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VIA ELECTRONIC MAIL AND OVERNIGHT DELIVERY

June 29, 2018

California Department of Business Oversight
1515 K Street, Suite 200
Sacramento, CA 95814

The Honorable Jan Lynn Owen, Commissioner
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Re: Request for Comment on Proposed Rulemaking (PRO 2/17) – Implementation of AB-1284 Licensure of PACE Program Administrators under the California Finance Law ("CFL")

Dear Commissioner Owen, et al.:

Thank you for the opportunity to comment on the Proposed Rulemaking (PRO 2/17) ("Draft Regulations") implementing Assembly Bill 1284 of 2017 ("AB-1284"). Renovate America appreciates that the Department of Business Oversight ("the Department") has solicited informal comments regarding its draft rules (the "Draft Regulations") and engaged in a constructive dialogue regarding the implementation of AB-1284.

To that end, Renovate America is submitting this comment letter that outlines both the background and current dynamics of the PACE market in California as well as our concerns with the Draft Regulations. Given the systemic nature and seriousness of Renovate America's concerns identified in the letter, we have additionally developed a comprehensive point-by-point response (the "Response") to each of the 28 sections of the Draft Regulations for your consideration. This additional analysis addresses the constitutional, legal, statutory, precedential, and operational concerns presented by the Draft Regulations and notes where Renovate America supports the Department's position and direction.

The Financial Code as amended in AB-1284 renamed the California Finance Lenders Law to the California Financing Law (the "CFL") and added PACE program administrators of Property Assessed Clean Energy ("PACE") programs as a class of licensees under the CFL, which had previously only applied to entities engaged in lending activities in California. *See* Cal. Fin. Code

§§ 22000, 22001(d). The authority conferred to the Department over CFL licensees, including program administrators, derives from Section 22150 of the California Financial Code, which provides that "[t]he commissioner [of the Department] may make general rules and regulations and specific rulings, demands, and findings for the enforcement of this division, in addition to, *and within the general purposes of*, this division" (emphasis added).

AB-1284 amended the "underlying purposes" of the CFL to include as one such purpose, "[t]o protect property owners from deceptive and misleading practices that threaten the *efficacy and viability* of property assessed clean energy financing programs" (emphasis added). Cal. Fin. Code § 22001(a)(7). The other underlying purposes enumerated in the CFL relate to lenders and lending activities. See Cal. Fin. Code § 22001(a)(1)-(6).

Renovate America is a strong supporter of AB-1284 and its companion bill, Senate Bill 242 of 2017 ("SB-242"). We unequivocally support consumer protections and a regulatory framework for PACE – we advocated for it – and we believe the Department's Draft Regulations have the opportunity to create a consistency of practice and outcomes across the PACE market in California. Whether or not the PACE market remains viable, however, is in large measure dependent on how the Department calibrates its Draft Regulations. The Draft Regulations have a direct impact on the ability of PACE programs to fulfill the public policy goals of broad access for all California homeowners, sustainability, efficiency, and conservation as established by the California Legislature (the "Legislature") and the communities all program administrators are selected to serve.

We also appreciate the significant task involved in developing these Draft Regulations for a nascent industry that is new to the Department, has never been regulated and has passionate stakeholders on all sides. PACE is a fundamentally different financial product than those the Department has historically regulated, and Renovate America is concerned that the current Draft Regulations reflect some fundamental misconceptions of PACE, its current status, and its position in the overall home improvement financing marketplace. Through this comment letter and line-by-line analysis, we have focused on clarifying those misconceptions and offering a roadmap for how the "efficacy and viability" of PACE programs can be maintained while also fulfilling the statutory mandates of the Legislature in a robust manner.

When promulgating the Draft Regulations, it is important for the Department to consider that PACE financing is in an active period of transition and maturation. Since the advent of AB-1284's underwriting requirements, the market in California has contracted by over 40 percent. Some of this was expected – the result of tighter rules that screen out more property owners on the basis of their ability to pay. Some of the contraction, however, is the result of home improvement contractors abandoning the PACE product altogether, determining that it is too cumbersome and burdensome as a point-of-sale offering for home improvement projects.

Home improvement contractors are not required to participate in PACE programs and can choose among a suite of other home improvement financing products to fit their needs. These financing products are necessary, as about half of the $300 billion in annual home improvement projects are financed.[1] The home improvement market overall is strong, projected to grow two

[1] http://www.jchs.harvard.edu/sites/default/files/harvard_jchs_2017_remodeling_report.pdf

percent on an annualized basis through 2025 and seven percent nationally through the first quarter of 2019 alone, making the contraction in the PACE marketplace in California even more striking.[2] In this environment of market growth and options, a regulatory framework that does not take into account the unique attributes of PACE financing, its position as a financing option among many home improvement financing products, and the actual role of the home improvement contractor could have the consequence of further disadvantaging PACE and possibly disabling PACE altogether as a viable home improvement financing option in California.

Renovate America is confident that it is possible to establish a robust and enforceable regulatory framework that is fitted to the features of PACE financing – there is a sweet spot for both strong consumer protections and a strong and viable PACE financing product. The Draft Regulations, however, do not achieve that desired balance. They impose new requirements which have no foundation in the CFL and are unnecessarily prescriptive. Instead of focusing on the desired outcome of a particular provision, the Draft Regulations propose step-by-step processes for both program administrators (licensees) and PACE solicitors (non-licensees) which do not reflect the actual market or accurate roles of either entity. In many cases, the Draft Regulations conflict with Chapters 29 and 29.1 of Division 7 of the Streets and Highways Code, and Chapter 3.5 of Division 9 of the Financial Code (collectively, the "PACE Statutes") and are internally contradictory with other provisions within the Draft Regulations. In other cases, the Draft Regulations create more uncertainty or impose requirements on program administrators that are impracticable or simply impossible to satisfy.

Many of the individual proposed provisions of the Draft Regulations could on their own disable PACE. Additionally, the cumulative impact of the Draft Regulations could disable PACE as well. Renovate America believes that it is imperative for the Department to consider and weigh the impact of each provision of the Draft Regulations – individually and in their totality – on PACE programs in order for a robust but balanced and functional regulatory framework to be achieved. Further, our comments are based on our actual practices today and going forward – not on how PACE *used to* function or operate – and are reflective of the actual and prospective condition of the market. To that end, Renovate America's Response has analyzed the interaction of all the proposed provisions and strived to demonstrate their cumulative impact on PACE programs and consumers through the use of market data and our experience and understanding of both the operations of PACE programs and the broader home improvement financing marketplace.

We are fully aware that this is not the first time an industry has responded to proposed regulatory frameworks with burden arguments and claims of overreach. PACE, however, is different. PACE is at its heart a public-private partnership that, in its very design attributes, delivery mechanisms and market position, cuts across multiple industry and jurisdictional frameworks to create an entirely new financial product. It is a highly technical and specialized product whose viability depends on the balancing of private interests and the public trust. In the negotiations around AB-1284, the Department recognized this and accordingly carved PACE out as its own section in the CFL, going through the detailed process of tailoring every statutory requirement to fit this unique

[2] http://162.242.237.67/harvard-jchs/blog/home-remodeling-expected-to-remain-strong-and-steady-into-2019/

and still nascent product and public policy. Renovate America urges that this recognition and sensitivity be applied consistently throughout the Draft Regulations.

Despite the level of substantive detail contained in both the comment letter and Renovate America's Response line-by-line analysis, neither provide an exhaustive review of our comments on each of the Draft Regulations. Renovate America will continue to work together with the Department in the spirit of advancing a robust and tailored regulatory policy for PACE that protects consumers and preserves the continued viability of PACE financing.

A. Background on PACE Programs and Market

This section contains overall background on PACE Programs, including: the public policy purpose behind PACE; how PACE fits into the broader home improvement financing market; the role of home improvement contractors in the offering of PACE financing as compared to other forms of home improvement financing; and data on the current condition of the PACE market, including the impact to-date of the statutory changes ushered into law via AB-1284 and SB-242.

Impacts of PACE To-Date

Since its introduction over a decade ago, PACE has empowered the owners of more than 200,000 U.S. homes to install products that save or capture energy or water or make homes more resilient to catastrophic weather. It is estimated that by spurring demand for contractor services, these improvements have created more than 55,000 local jobs. Over their expected lifetime, PACE-financed improvements to date are projected to save over 28 billion kilowatt-hours of electricity, equivalent to powering more than 2.6 million homes for a year; save over 19 billion gallons of water, enough to meet the hydration needs of everyone on the planet for five days; and reduce carbon dioxide emissions by over 7.6 million tons, equivalent to taking more than 1.6 million cars off the road for a year.

In California, PACE is an important component of the state's ambitious efforts to mitigate climate change. PACE has already been a significant driver of energy-efficiency and renewable-energy home improvements. A federally-funded study issued in April 2018 by researchers at Lawrence Berkeley National Laboratory concluded that thousands of California homeowners would not have installed rooftop solar systems between 2010 and 2015 had the PACE option not been available in their communities.[3]

The average PACE payment – based on a median assessment amount of $22,500 and median term of 15 years – translates to around $220 per month, less than what a family of four spends on gasoline.[4] PACE serves a wide range of credit profiles. Renovate America's HERO program – the largest PACE program in California with the broadest geographic coverage – features a weighted average FICO score of 684 (with 30% of the pool at 740+ and 46% at 700+).

[3] Jeff Deason and Sean Murphy, "Assessing the PACE of California residential solar deployment: Impacts of Property Assessed Clean Energy programs on residential solar photovoltaic deployment in California, 2010-2015," Electricity Markets & Policy Group, Lawrence Berkeley National Laboratory, March 2018.
URL: https://emp.lbl.gov/publications/assessing-pace-california-residential

[4] Citation: Consumer Expenditure Survey, U.S. Bureau of Labor Statistics, September 2017

Moreover, homeowners who turn to PACE financing are typically taking on non-discretionary single-infrastructure upgrades to their homes – not entire home renovation and improvement projects. The four most popular project categories in descending order are: HVAC, solar, windows and doors, and roofing.

In early 2018, credit-rating agency DBRS released an analysis showing that homes with PACE assessments pay their property taxes at rates that compare favorably to those of property owners in general – and that the delinquency rates on PACE homes at the end of the four most recent tax years were consistently below the aggregate delinquency rates of single-family residences over the same time period.[5] Kroll Bond Rating Agency released a report with similar findings in June of 2018.[6] These followed a 2017 report by credit-rating agency Morningstar that found that PACE assessments do not "materially increase the risk to the underlying mortgage."[7] Moreover, a study by national housing economist Laurie Goodman released in 2016 offered empirical evidence that PACE-financed improvements increase net home values, even after taking into account the costs of financing the improvements and remaining balance of the assessments upon sale.[8]

PACE in the Overall Home Improvement Finance Marketplace

PACE may be a discrete financing product, but it exists in a home improvement financing marketplace defined by many financing options. Of the roughly 50 percent of home improvement projects that are financed, the preponderance are paid for via a credit card, as the data shows in the graph below. Indeed, in California, PACE will account for roughly five percent of financed home improvement projects in 2018.[9]

Only "Financing" Sources *(excluding savings/investments)*	2016	2017	2018E
Credit Card	49%	49%	48%
HELOC or HEL	18%	15%	21%
Home Improvement Loan	12%	12%	15%
Other (includes PACE)	22%	24%	16%
Total	100%	100%	100%

[10]

Unlike almost any other financing product in home improvement, PACE underwriting is tied to an ability-to-pay analysis and not a credit score. The result of that underwriting framework and

[5] https://www.scotsmanguide.com/News/2018/02/Rating-agency--PACE-loans-rarely-default/
[6] https://www.krollbondratings.com/show_report/11071
[7] "Clearing the Air—Addressing Three Misconceptions of PACE," Morningstar Credit Ratings LLC, February 2017 URL: http://pacenation.us/wp-content/uploads/2017/03/morningstar-addressing-misconceptions-pace.pdf
[8] http://www.iinews.com/site/pdfs/JSF_Winter_2016_PACENation.pdf
[9] California comprises roughly 10% of the U.S. residential households. If 50% of the $300 billion in annual home improvement projects are financed, then the financed projects in California equate to roughly $15 billion. In 2017, the PACE marketplace in California was roughly $1.4 billion in size. We project that it will be roughly half that size in 2018 (roughly 5% of the overall marketplace).
[10] https://www.lightstream.com/annual-home-improvement

PACE's structure as a tax assessment means that property owners are not charged different interest rates based on their FICO score. For Renovate America's PACE program in California, stated interest rates range from 2.49% to 8.35%. Including origination and other fees, the average APR is approximately 8%.

In home improvement finance, this compares favorably to other options in the market, particularly for those with average or lower credit.

		APR Range		
		Low	Mid	High
Typical FICO	Higher	2.9%	8.6%	14.2%
	Avg.	8.4%	17.2%	26.0%
	Lower	24.0%	30.0%	36.0% [11]

Translated into monthly payments, PACE can provide advantageous payment terms over alternative home improvement finance products in the market. In addition to the non-credit dependent interest rates, PACE also allows homeowners to finance over longer periods depending on the useful life of the product(s) installed. The median financing term for PACE is 15 years, compared to 2 to 5 years for unsecured home improvement financing options. Comparing a median project financed through unsecured credit ($10,000) and accounting for the respective ranges of APRs for unsecured and PACE products, the below table demonstrates how PACE can result in lower translated monthly payments for the homeowner.

		Term (in years)						
		1	3	5	10	15	20	25
APR	5%	$856	$300	$189	$106	$79	$66	$58
	10%	$879	$323	$212	$132	$107	$97	$91
	15%	$903	$347	$238	$161	$140	$132	$128
	20%	$926	$372	$265	$193	$176	$170	$168
	25%	$950	$398	$294	$227	$214	$210	$209
	30%	$975	$425	$324	$264	$253	$251	$250
	35%	$1,000	$452	$355	$301	$293	$292	$292

[11] Based on data collected by Renovate America in June 2018 of APRs from over 40 lenders in the home improvement finance marketplace.

The below table further outlines the relative attributes of the most common financing options in home improvement finance:

Home Improvement Financing Comparison

	Residential PACE (CA)	Unsecured Loan	Credit Card	HELOC/HEL
Median Size	$20,000-$25,000	$10,000 Typically starts at $2,500	$3,000 Typically starts at $500	$100,000+ (a) Typically starts at $25,000
Term – Short **Median** **Long**	5, 10 years 15 years 20, 25, 30 years	Promotional: 6, 12, 18 months 2-5 years 7, 10, 15, 20 years	No term No term No term	5 years 10 years 15 years
Implied Median Monthly Payment	Assuming $22,500 assessment, 15 years and 8% APR = **$215**	Assuming $10,000 assessment, 3 years and 10% APR = **$323**	Every credit card company and lender uses a different formula to determine the minimum payment	HELOC - depends on lender, the monthly payment may be interest only or may include an amount to pay down the principal balance HEL - Assuming $100,000 HEL, 10 years and 6% APR = **$1,110**
Max Financing	Typically up to 15% of Home Value; 97% CLTV	Up to $100,000	Varies. Based on mix of stated income, DTI, credit score.	Based on percentage of equity in home (e.g., CLTV 70-90%; <45% DTI), up to $499,000
U/W Process	1) AVM to determine home value 2) Current property taxes, no involuntary lien +$1,000, current on mortgage (<= 1 30 day late in last 12 months), no BK in last 2 yrs/2-7 yr look back with <= 60 day late on secured/unsecured) 3) 97% CLTV cap 4) Ability to pay underwriting including residual income, housing expenses, existing debt obligations, annual PACE payment plus interest and fees 5) Income verification 6) Use of proceeds limited to PACE-eligible products	FICO, stated income, credit history, DTI, credit utilization rate	FICO, stated income, credit history, DTI, credit utilization rate	FICO, verification of income, mortgage balance, property appraisal, minimum DTI range of 43%-50%
APRs				
Excellent: 720 - 850	Average APR ~8% (RA); Components include 2.49% - 8.35% (interest may be deductible), plus 5-6% upfront origination fee and capitalized interest (up to 17 months)	Average U.S. Range 10.3% - 12.5%	Average 16.9%	Prime Rate (currently 4.75%) + spread HELOC Nat'l Avg 5.8% (740-850) HEL-10yr Nat'l Avg 6.0% (740-850)
Good: 680 - 719		Average U.S. Range 13.5% - 15.5%	Average 17.9%	HELOC Nat'l Avg: 7.4% (700-719) HEL-10yr Nat'l Avg 6.8% (700-719)
Average: 640 - 679		Average U.S. Range 17.8% - 19.9%	Average 21.5%	HELOC Nat'l Avg 10.3% (640-669) HEL-10yr Nat'l Avg 9.1% (640-669)
Bad: 300 - 639		Average U.S. Range 28.5% - 32.0%; lowest scores unlikely to qualify	Average 24.5%	HELOC Nat'l Avg 11.8% (620-639) HEL-10yr Nat'l Avg 10.3% (620-639)
		Source: ValuePenguin	Source: CardRates.com	Source: myFICO.com

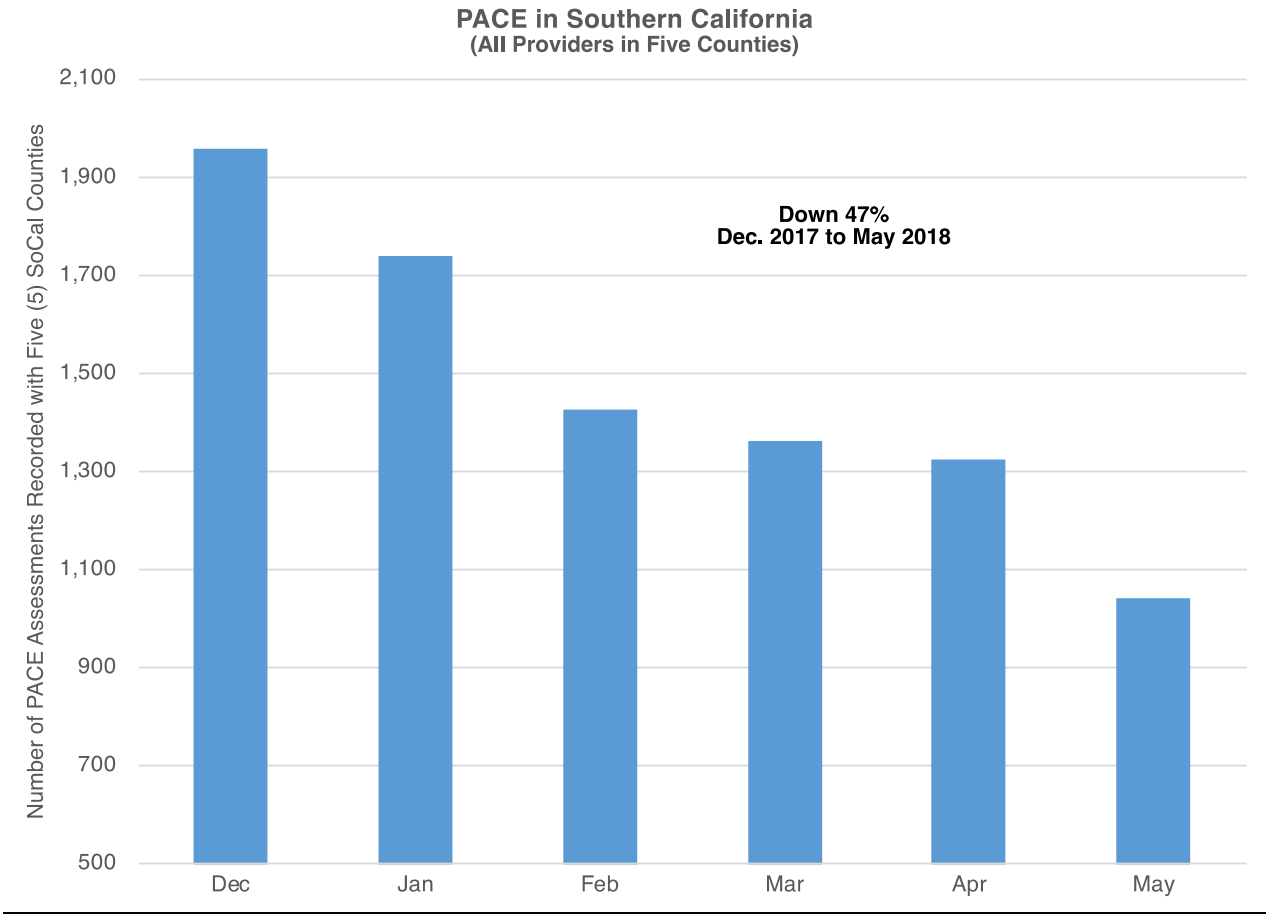
(a) Home Equity Lending Landscape, Whitepaper, February 2016, CoreLogic.

Operational and Market Impacts of AB-1284 and SB-242:

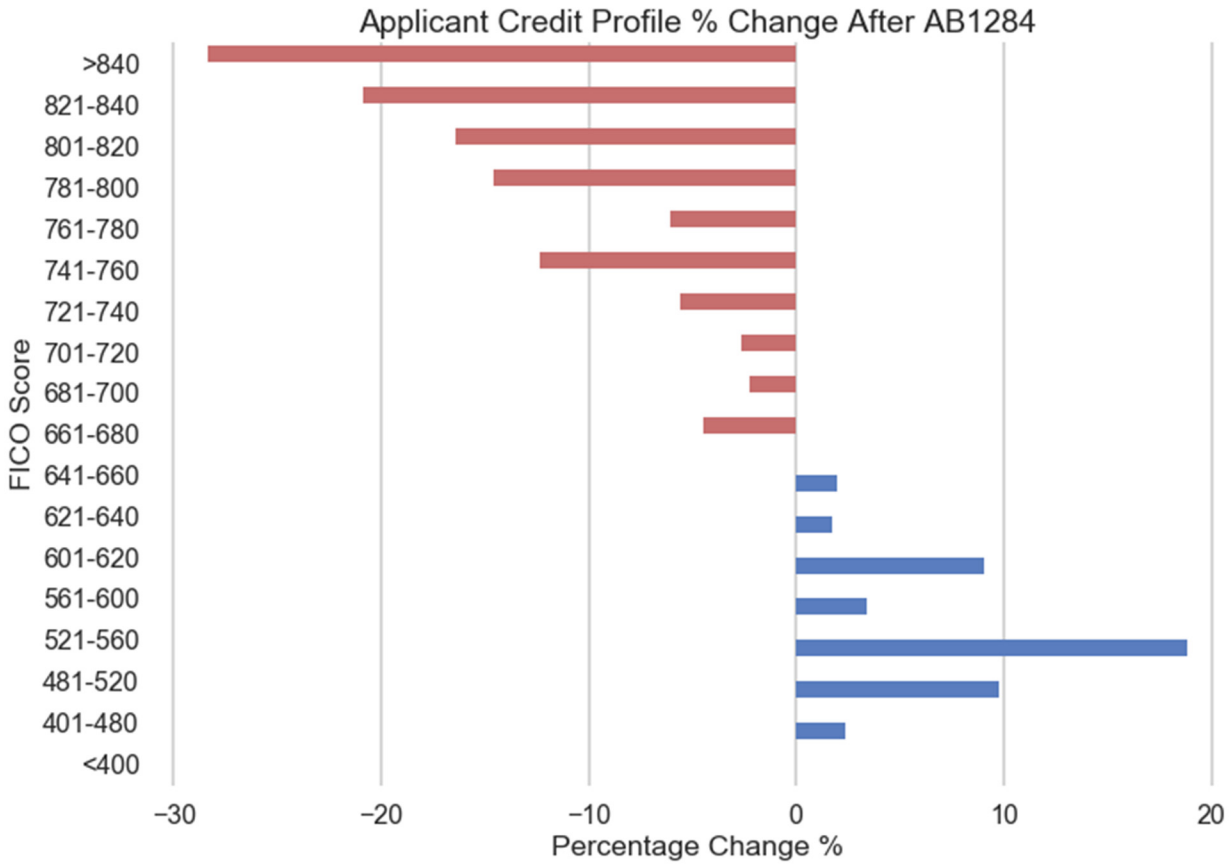
As a result of the additional statutory requirements, PACE is relatively disadvantaged as a point-of-sale product when compared to the other options in the marketplace. Credit cards are often already obtained by a homeowner, so no additional process is required; even where a credit card needs to be secured to complete the transaction, the process is functionally frictionless. Unsecured home improvement loans are decisioned immediately based on FICO score and stated income; it is only in a small percentage of cases where income documentation is required. As the table above demonstrates, home equity loans and home equity lines of credit are used for an entirely different use case – whole home renovations or additions where the cost of the improvements is high. Here, too, a homeowner likely already has these credit tools in place. From an ease of use perspective, the verification of income for PACE along with the prescriptive disclosure processes are singular and disadvantaging in this environment.

This is manifesting itself in an overall decline in the PACE market. Evaluating the number of recorded PACE assessments in five of the most active PACE counties in California representing

roughly 70% of state PACE volume (LA County, Riverside, San Bernardino, Orange, San Diego), there was a decline of 47% from December 2017 (1,959 assessments) to May 2018 (1,041 assessments). The decline in approval rates and the increased transactional friction of the process has resulted in a decline in contractor participation and applications submitted. In essence, contractors are turning away from PACE as an option because they have other financing options.



Further, since the implementation of AB-1284, Renovate America is beginning to see negative credit migration in terms of the profile of applications received. These data are still early because ability to pay has only been in effect since April 1, 2018, but they suggest the development of adverse selection in the product – effectively meaning that home improvement contractors are not leading with PACE in higher credit profile homes because they know the customer does not want to go through the required "hassle factor" when other options are available. Maintaining a balanced applicant pool is important not only as a general matter of public policy, but specifically with respect to ensuring that the product attracts and maintains the best and most diverse players in the home improvement industry.



These overall marketplace dynamics underscore how important it is to ensure that the regulatory framework enacted by the Department strikes the "sweet spot" that was intended in AB-1284, balancing the consumer protection needs in the marketplace that all parties support with the requirement that the marketplace not be designed in such a way that it causes critical market participants – home improvement contractors, PACE administrators and property owners – to opt out.

B. Thematic and Systemic Concerns with Proposed Regulations

The Draft Regulations fail to strike the right balance between consumer protection and support of PACE and, as such, threaten rather than of reinforce the "efficacy and viability" of PACE programs. Renovate America has several thematic concerns with the Draft Regulations, which are further detailed in Renovate America's Response. Those concerns include how the Draft Regulations depart from the statute in important ways; are unnecessarily prescriptive toward participants in PACE programs, especially home improvement contractors; are internally inconsistent, and in some cases provide confusing guidance; and misconstrue the relationships between program participants, including the Department and other governmental bodies.

Inconsistency with PACE Statutes

The Draft Regulations in many cases depart from the PACE Statutes that they are implementing. AB-1284 and SB-242 were tailored to fit the unique partnerships that implement PACE

programs, which include local governments that sponsor the program, the program administrators they hire, and home improvement contractors. The Draft Regulations in some places would impose requirements on participants that are inconsistent with the statute, in other places add requirements that the Legislature chose not to impose, and in still other places revise the regulatory scheme established by the Legislature. These apparent revisions of the statute unfortunately appear systemic and need to be corrected. Renovate America asks that in the Department's next draft, in addition to correcting these errors, that the Department identify the specific portions of the statute that each section would implement.

Inaccurate Revision of Underwriting Requirements

Among the provisions inconsistent with AB-1284, the Draft Regulations improperly revise underwriting requirements. The Draft Regulations make a series of revisions to the statutory scheme that would limit the information that program administrators could consider, add factors to the list of considerations set forth by the Legislature, and even change the nature of the underwriting exercise in some cases.

Overly Prescriptive Requirements

The Draft Regulations are overly broad and unnecessarily prescriptive. PACE financing is a small part of the overall California home improvement financing market, yet these proposed regulations subject PACE participants to extraordinary and disproportionate burdens. Instead of focusing on outcomes and giving participants flexibility to achieve them (which is how AB-1284 and SB-242 are written), the Draft Regulations would micromanage the details of participants' businesses and straightjacket their operations. Not only is this unnecessary, but the detailed requirements are inconsistent with how PACE programs actually work, resulting in procedural requirements that do not fit the realities and practicalities of the business. Given that the Department imposes no similar requirements on any other entity or industry that it regulates, the disproportionate burden on PACE programs seems especially unwarranted.

Extraordinary Burdens on Home Improvement Contractors

The Draft Regulations would impose extraordinary burdens on "PACE solicitors," who in practice are general home improvement contractors. The Draft Regulations would impose training and oversight requirements on these contractors that is found in no other type of home improvement financing. The Draft Regulations would go so far as to tell them what they can say, who they can associate with, and require them to turn over their agreements with homeowners to third parties. These contractors also would be subject to disciplinary procedures, through a detailed complaint process, that would give them less due process than they receive from their own governmental regulators. These types of small businesses generally lack the resources to comply with the imposing requirements within the Draft Regulations, and we fear that it will drive them away from PACE programs.

Oversight Responsibilities Shifted to Program Administrators

The Draft Regulations would make program administrators responsible for the acts of others, principally home improvement contractors, who are not subject to the administrators' control. Contractors are not program administrators' agents, and program administrators are not parties to home improvement contracts with property owners. California law places the general responsibility for oversight of contractors on the Contractors State License Board, and responsibility to enforce the CFL on the Department, and gives both agencies the powers necessary to exercise that authority. Yet, the Draft Regulations would shift the responsibility to oversee PACE contractors onto program administrators, by requiring administrators to have their own enforcement procedures and making them the guarantors of contractors' compliance with the Department's regulations. This is an improper realignment of responsibilities established in AB-1284 and imposes improper burdens on program administrators.

The Draft Regulations as drafted are overbroad, unduly onerous, and far exceed the scope of the regulatory framework intended by the Legislature in enacting AB-1284 and SB-242. Renovate America looks forward to working with the Department to craft regulations that meet the relevant statutes discussed above, and which truly "protect property owners from deceptive and misleading practices that threaten the efficacy and viability of property assessed clean energy financing programs." Cal. Fin. Code § 22001(a)(7). These Draft Regulations must be revised and reimagined so that Legislative intent is effectuated in earnest.

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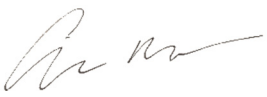
Thank you for the consideration of these comments. Renovate America appreciates the opportunity to share our perspective on the proposed regulations and we look forward to working with the Department throughout the rulemaking process. Should you have any questions or require additional information, please feel free to contact us.

Sincerely,



Ari A. Matusiak
Chief Strategy Officer
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Encl.

Renovate America

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I. Introduction

On April 19, 2018, the Department of Business Oversight (the "Department") issued proposed regulations related to the licensure and oversight of property assessed clean energy ("PACE") program administrators. Renovate America, Inc. ("Renovate America") submits its comments to the Draft Regulations by way of this response (the "Response"). While the Response is comprehensive, it is not exhaustive, and Renovate America reserves the right to comment further throughout the rulemaking process.

Assembly Bill 1284 of 2017 ("AB-1284") renamed the California Finance Lenders Law to the California Financing Law (the "CFL") and added PACE program administrators ("program administrators") as a class of licensees under the CFL, which had previously applied to persons engaged in lending activities in California. *See* Cal. Fin. Code §§ 22000, 22001(d). The authority conferred to the Department over CFL licensees, including program administrators, derives from Section 22150 of the California Financial Code, which provides that "[t]he commissioner [of the Department] may make general rules and regulations and specific rulings, demands, and findings for the enforcement of this division, in addition to, *and within the general purposes of*, this division" (emphasis added).

AB-1284 amended the "underlying purposes" of the CFL to include as one such purpose, "[t]o protect property owners from deceptive and misleading practices that threaten the efficacy and viability of property assessed clean energy financing programs." Cal. Fin. Code § 22001(a)(7). The other underlying purposes enumerated in the CFL relate to lenders and lending activities. *See* Cal. Fin. Code §§ 22001(a)(1)-(6).

To the extent that Section 22001 demonstrates a legislative intent to delegate rulemaking authority to the Department, this authority is inherently constrained to consumer protection. However, the general statement of purpose in Section 22001(a)(7) does not give the Department unlimited authority to create rules that relate to consumer protection. The Legislature cannot delegate overbroad legislative rule making powers without suitable safeguards to guide the confines of the delegated power. *Blumenthal v. Bd. of Med. Examiners*, 57 Cal. 2d 228, 236, 368 P.2d 101, 105 (1962); *see also Synar v. United States*, 626 F. Supp. 1374, 1383 (D.D.C. 1986), aff'd sub nom. *Bowsher v. Synar*, 478 U.S. 714, 106 S. Ct. 3181 (1986) (legislative bodies must "articulate a policy or set of standards which would serve to confine the discretion of the individuals exercising the delegated authority.").

Accordingly, to ensure that it did not confer overbroad rulemaking authority to the Department, the California State Legislature (the "Legislature") generally limited the Department's rulemaking authority over program administrators to matters of consumer protection. Any regulations promulgated under this authority cannot exceed the scope of authority established by the Legislature, and must be consistent with all applicable statutory provisions.

The statutory framework applicable to PACE is located primarily within Chapters 29 and 29.1 of Division 7 of the Streets and Highways Code, and Chapter 3.5 of Division 9 of the Financial Code (collectively, the "PACE Statutes"). Renovate America has significant concerns that numerous provisions within the Draft Regulations deviate from, exceed, and in many instances contradict, various provisions within the PACE Statutes, including the CFL's general purpose of "protect[ing] property owners from deceptive and misleading practices."

II. Rule 1620.02: Definitions

A. Overview of Response to Rule 1620.02

Rule 1620.02 of the Draft Regulations contains definitions for some of the terms used throughout the PACE Statutes. While some of the proposed definitions are consistent with their usage in the PACE Statutes, others depart from the statutory text or would indirectly change the substantive provisions of the PACE Statutes. Other definitions are vague and would be hard to implement in practice.

B. Response to Rule 1620.02

i. Rule 1620.02(a)

Rule 1620.02(a) states that "'[a]bility 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, without relying on the equity in a residential property owner's home."

This definition should be revised to more closely track the statute. Section 22687(a) of the Financial Code requires program administrators to determine whether a property owner has a "reasonable ability to pay the annual payment obligations for the PACE assessment." The statute makes clear that "ability to pay" is modified by the word "reasonable." It also specifically provides that program administrators must determine the ability to pay the "annual payment obligations of the PACE assessment," which is more precise than the phraseology used in Rule 1620.02(a), which refers to "every PACE assessment."

The proposed definition of "ability to pay" would indirectly change the underwriting requirements set forth in the CFL. Section 22687(a) states that "a program administrator shall determine . . . that the property owner has a reasonable ability to pay the annual payment obligations for the PACE assessment *based on the property owner income, assets and current debt obligations*" (emphasis added). In contrast, Rule 1620.02(a) indicates that property owners must be able to pay the assessment "from the property owner's income, without relying on the equity in the residential property owner's home." This formulation indicates that program administrators can consider only "the property owner's income," and not consider any "assets and current debt obligations" as required by the statute. The proposed definition therefore conflicts with the statute and must be revised.

ii. Rule 1620.02(b)

Rule 1620.02(b) states that "'[a]uthorized by a program administrator' means that the PACE Solicitor or PACE solicitor agent is enrolled with the program administrator. A PACE solicitor or PACE solicitor agent is also authorized by a program administrator if the program administrator funds a home improvement contract of the PACE solicitor."

This proposed definition is overbroad because it would include persons and entities that are *actually not authorized* by a program administrator to act as PACE solicitors or PACE solicitor

agents, as well as those *expressly prohibited* by a program administrator from acting as PACE solicitors or PACE solicitor agents. The Legislature used the term "authorized" deliberately when defining a PACE solicitor as a person "authorized by a program administrator to solicit a property owner to enter into an assessment contract." Cal. Fin. Code § 22017(a). This definition was designed to prevent program administrators from being held accountable by the Department for the activities of persons and entities that were acting as PACE solicitors and PACE solicitor agents without their knowledge or consent.

An example is instructive here. If a program administrator approves a financing application from a property owner who has not interacted with a PACE solicitor or PACE solicitor agent (e.g., the property owner submitted an online application in response to an advertisement from a program administrator), the program administrator may ultimately fund a home improvement contract of a home improvement contractor that is not authorized to "solicit a property owner to enter into an assessment contract." Home improvement contractors need not be engaged in solicitation activities in order to install improvements financed by PACE. If, in an unrelated circumstance, a sales representative for that home improvement contractor engages in an activity considered by the Department to be a solicitation (which, under the Draft Regulations, would include even mentioning PACE financing to a property owner), that unauthorized act should not transform the home improvement contractor into an "authorized" PACE solicitor simply because the program administrator has funded the home improvement contract.

The Department's proposed concept of authorization is defective because it would include instances that reflect the direct opposite of what authorization is understood to mean. In addition, it assumes that PACE solicitors are agents of program administrators (i.e., acting on their behalf and subject to their control) when they are not. PACE solicitors and PACE solicitor agents are wholly independent from program administrators. These persons and entities may enter into agreements with one or more program administrators, and engage in business with property owners outside of the context of PACE. Merely because a home improvement contractor is "enrolled" with a program administrator as a PACE solicitor, or installs improvements funded by a program administrator without enrolling as a PACE solicitor, that does not does not mean that all activities of the home improvement contractor can be ascribed to the program administrator.

To the extent that a home improvement contractor is acting pursuant to a contractual agreement with a program administrator, that home improvement contractor may properly be considered "authorized by a program administrator." However, that same home improvement contractor cannot be considered "authorized by a program administrator" when he or she commits *ultra vires* acts or engages in conduct not addressed in an agreement with a program administrator. This was the intent of the Legislature, as evidenced by Section 2 of AB-1284, which amended Section 10133.1 of the Business and Professions Code to exclude PACE participants from other requirements. This exemption applies only to "[a] PACE solicitor, *when enrolled by a person licensed as a program administrator and acting pursuant to an agreement with that program administrator licensee*" (emphasis added). Cal. Bus. & Prof. Code § 10133.1(13); *see also* Cal. Bus. & Prof. Code § 10133.1(14) (exempting "PACE solicitor agent" in a similar way). This formulation makes clear that PACE solicitors and PACE solicitor agents are acting pursuant to a PACE program only to the extent they are enrolled in a program and acting pursuant to an agreement with an administrator.

The definition of "authorized by a program administrator" should be revised to apply to PACE solicitors and PACE solicitor agents enrolled with a program administrator when acting pursuant to an agreement with that program administrator.

iii. Rule 1620.02(d)(1)

Rule 1620.02(d)(1) provides:

> "To solicit a property owner" includes, but is not limited to, any of the following:
> (A) Taking an application for financing through a PACE assessment.
> (B) Inviting a property owner to apply for a PACE assessment.
> (C) Asking a property owner whether the property owner is interested in a PACE assessment.
> (D) Discussing the terms of a PACE assessment with a property owner.
> (E) Describing the characteristics of a PACE assessment to a property owner.

This proposed definition is unacceptably vague. The proposed definition does not actually define what it means "to solicit a property owner," but instead provides an apparently non-exhaustive list of examples. A person or entity potentially subject to this provision is therefore left to guess as to what exactly it means to solicit a property owner, and what additional actions not included on this list are covered. This "I know it when I see it" form of regulation would have a chilling effect on communications with property owners and raises significant First Amendment concerns.

The examples provided in Rule 1620.02(d)(1) also capture conduct that is not independently sufficient to qualify as solicitation. For example, "[t]aking an application for financing," is an inherently administrative or clerical task, not an act of solicitation, and "[a] person who performs purely administrative or clerical tasks" is expressly exempt – *by statute* – from the definition of "PACE solicitor" and "PACE solicitor agent." Cal. Fin. Code § 22017(c)(3). In addition, acts like "[i]nviting a property owner to apply" and "[a]sking a property owner whether the property owner is interested in a PACE assessment" could capture completely *de minimis* conduct (like a passing reference or a single-sentence response to an inquiry) by persons with little to no involvement in the PACE financing process generally, let alone solicitation activities.

Similarly, "[d]iscussing the terms" and "[d]escribing the characteristics of a PACE assessment," are not on their own activities that rise to the level of solicitation. Absent an ability to effectuate a PACE transaction, statements about PACE are just free speech. Solicitation should be tied to the ability of the soliciting party to effectuate the transaction for a PACE assessment. For example, "[d]iscussing the terms" or "[d]escribing the characteristics of a PACE assessment" are activities that, if more specifically defined, could conceivably become solicitation activities, when paired with the ability to "tak[e] an application for financing." For this reason, two requirements should be satisfied to constitute solicitation: (i) making statements of a sufficient specificity regarding PACE financing, combined with (ii) the ability to submit applications for PACE financing.

iv. Rule 1620.02(d)(2)

Rule 1620.02(d)(2) provides:

> An individual who includes a PACE assessment in a list of two or more financing options available to a property owner, without providing any information on the program and without recommending the benefits of one financing option over another, does not solicit a property owner, provided that the individual does not engage in any other activity that constitutes soliciting a property owner under this subsection (d). The referral of a property owner to an enrolled PACE solicitor agent for information on the PACE program, after two or more financing options are identified, does not constitute solicitation of a property owner.

Renovate America supports the effort to create a safe harbor related to scenarios where multiple financing options are discussed as part of the home improvement financing process. However, this provision would not be workable to implement as drafted. It is simply not possible to include information about PACE assessments in a package of options "without providing any information" and "without recommending the benefits of one financing option over another." Presenting options to a property owner inherently means presenting information about different choices. Even if a person does not expressly recommend any one option, a listener could conclude based on the information received that one or another option is recommended. If the Department wants to establish an effective safe harbor, it should revise this provision to provide more clear and workable guidance.

v. Rule 1620.02(d)(3)

Rule 1620.02(d)(3) provides that "[a]n 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 would capture too much conduct in the concept of "solicitation." As discussed above with respect to Rule 1620.02(d)(1), the concept of solicitation should require two elements: (i) making statements of a sufficient specificity regarding PACE financing, combined with (ii) the ability to submit applications for PACE financing. Rule 1620.02(d)(3) would regulate speech alone, divorced from its relevance to PACE programs. In addition, this provision, and the one immediately preceding it, also would regulate speech differently based on very fine distinctions (i.e., whether a speaker says enough or too much about PACE financing). The unintended consequence of Rule 1620.02(d)(3) would be to instantaneously transform all individuals who happen to acknowledge the existence of PACE into PACE solicitor agents. This is not a tailored solution, and would have a chilling effect on all speech related to PACE programs.

vi. Rule 1620.02(d)(4)

Rule 1620.02(d)(4) states:

> An employee or subcontractor of a contractor who is performing labor on a job site for an efficiency improvement contract is not required to enroll as a PACE solicitor agent, provided that the employee or subcontractor does not engage in any of the activities in this subsection that constitute soliciting a property owner for a PACE assessment.

This provision would treat a subcontractor who has no relationship with a program administrator as a PACE solicitor agent, by virtue of activities as *de minimis* as engaging in small talk with a property owner. As discussed above with respect to Rule 1620.02(d)(1), the concept of solicitation should require two elements: (i) making statements of a sufficient specificity regarding PACE financing, combined with (ii) the ability to submit applications for PACE financing. In addition, as discussed with respect to Rule 1620.02(b), a person should not be treated as a PACE solicitor agent unless he or she has an agreement with a program administrator, and is acting pursuant to that agreement.

vii. Rule 1620.02(d)(5)

Rule 1620.02(d)(5) provides that "[a] publisher of a bona fide newspaper, news magazine, or industry publication of general, regular, and paid circulation, and the employees thereof, are not soliciting a property owner to enter into an assessment contract."

This provision raises serious First Amendment concerns. It would discriminate against speech based on the person speaking, and whether the Department considers the published speech of that person to be "bona fide." Individuals and entities have the right to free speech regardless of whether the government believes they are acceptable speakers.

The terms in this section also are unacceptably vague. What is a "bona fide" publication? Is a newspaper not "bona fide" if it runs a paid advertisement? Is a free periodical exempt? Are periodicals aimed at specific market segments, such as those issued by realtors that discuss properties as well as options relating to property ownership, subject to this exemption? Rule 1620.02(d)(5) is so unclear that many persons would have to guess as to whether they were covered or not.

viii. Rule 1620.02(d)(6)

Rule 1620.02(d)(6) provides:

> A general Internet search engine, and the employees thereof, are not soliciting a property owner to enter into an assessment contract when providing general search results to the public, whether or not based on paid advertising, provided that the Internet search engine does not engage in any solicitation activities beyond providing search results which may include paid advertising.

Rule 1620.02(d)(6) raises significant issues related to free speech, as it would regulate speakers based on whether a government agency believes they go too far in providing information. Whether an Internet search engine merely provides search results, or provides information in response to a search query, is not necessarily clear. With the increasing reliance on algorithmic search engine optimization and artificial intelligence, the line drawn by this provision would be increasingly difficult to apply. This could result in the Department defining as "PACE solicitors" companies like Google, Twitter, Facebook, and other Internet-based companies that derive revenue from advertising. This is absolutely not what the PACE Statutes had contemplated in defining PACE solicitor.

ix. Rule 1620.02(e)

Rule 1620.02(e) provides:

> "A person who performs purely administrative or clerical tasks" includes
> (1) individuals who are not directly interacting with property owners, and
> (2) individuals whose interaction includes functions like communicating with property owners to gather documents and facilitate the processing of paperwork, provided that the individual does not otherwise solicit a property owner as defined in this section.

The CFL exempts from the definitions of "PACE solicitor" and "PACE solicitor agent" a "person who performs purely administrative or clerical tasks." Cal. Fin. Code § 22017(c)(3). This proposed regulation, instead of defining the nature of those "administrative and clerical tasks," defines regulated parties based on whether and how they interact with property owners. This is inconsistent with the CFL, and any clarification of this term should focus on the tasks that are exempt, rather than the people with whom a person interacts.

x. Rule 1620.02(f)

Rule 1620.02(f) provides that "[i]nformation is not 'obtained in connection with advertising or soliciting a PACE program' if a PACE program is not mentioned or described during the marketing of a home improvement contract."

Rule 1620.02(f) is unclear and confusing. It does not define what the phrase "obtained in connection with advertising or soliciting a PACE program" means, but rather defines what the phrase does not mean. It also would implicitly include information obtained in an interaction where a PACE program is mentioned and described, while other provisions in Rule 1620.02 would exempt from the definition of "solicitation" certain communications where PACE is mentioned. This provision therefore creates confusion rather than increasing clarity.

xi. Rule 1620.02(g)

Rule 1620.02(g) provides:

> Administering a PACE program on behalf of a public agency" means managing a PACE program, or parts thereof, on behalf of a public agency.
>
> (1) A building contractor is not administering a PACE program on behalf of a public agency if the building contractor solicits a property owner to enter into an assessment contract for the purpose of financing a home improvement contract with the building contractor.

This provision should make clear that a program administrator is an entity that has an agreement with a public agency to administer a PACE program. Rule 1620.02(g)(1) is unclear to the extent that it appears to suggest that a "building contractor" that qualifies as a PACE solicitor could otherwise be considered a program administrator in the absence of this provision.

xii. Rule 1620.02(h)

Rule 1620.02(h) states that "'[p]roperty owner' means any owner of record of real property."

The proposed definition of "property owner" is inconsistent with the definition adopted by the PACE Statutes. The definition used by the Department is far broader than that used by the Legislature, which *twice* defined "property owner" as "all property owners of record *on the property subject to the PACE assessment*" (emphasis added). Cal. Sts. & High. Code § 5902(g); Cal. Fin. Code § 22018.5.

xiii. Rule 1620.02(j)

Rule 1620.02(j) states that "'[m]aintain a license in good standing' means that a license or registration is active and not expired, suspended, revoked, surrendered, conditioned, or otherwise in a status that in any manner restricts the activity of a licensee or registrant under the authority of the license."

This definition should reflect the doctrine of substantial compliance recognized in Section 7031(e) of the Business and Professions Code. There are instances where a home improvement contractor's license status may not be reflected as "active," but where the home improvement contractor is substantially compliant with the requirements necessary for the license to be considered "in good standing." One common example occurs in cases where a home improvement contractor submits a license renewal application to the Contractors State License Board (the "CSLB") prior to the expiration date of the license, as required, but processing of the renewal extends beyond the expiration date, so the CSLB no longer designates the license as "active." This often occurs as a result of the CSLB's long renewal application processing times.

Incorporating the doctrine of substantial compliance recognized in Section 7031(e) of the Business and Professions Code would allow PACE solicitors and PACE solicitor agents to be considered in "good standing" where they have (i) acted reasonably and in good faith to maintain

proper licensure or registration and (ii) acted promptly and in good faith to remedy any failure to comply with licensure or registration requirements upon learning of the failure.

xiv. Rule 1620.02(m)

Rule 1620.02(m) states that "'[t]hing of material value' does not include items of de minimis and nominal value such as pens, coffee mugs, tee shirts, light refreshments, a greeting card, a cup of coffee, a cookie, or the like."

The definition of "thing of material value" should be revised to affirmatively define the term based on the concept of materiality. The term "material" has a well-established legal meaning as something significant to the matter or issue at hand. In the context of PACE programs, "material value" is something of sufficient value to be significant in the context of a PACE assessment. The examples provided in Rule 1620.02(m) are appropriately described as *de minimis* and nominal. However, although things that are of *de minimis* and nominal value are clearly immaterial, it is not true that *only* things of *de minimis* and nominal value are immaterial. Stated differently, "immaterial" does not mean "*de minimis* and nominal." There are things with values well above "*de minimis* and nominal" that still fall short of "material." This should be reflected in the definition.

If the Department believes it is necessary to identify an absolute value that represents materiality, a simple approach would be to define a "thing of material value" as a direct benefit that exceeds one hundred dollars ($100) per recipient per year, indexed for inflation. This should exclude incidental benefits, such as training and other educational materials, web-based or software-based tools, listings on websites and other directories, and information regarding current and prospective customers (including customer referrals), which are necessary components of PACE programs.

III. Rule 1620.03: Obligations of Program Administrator

A. Overview of Response to Rule 1620.03

Each requirement within Rule 1620.03 of the Draft Regulations addresses a distinct purported obligation of program administrators. These purported obligations are not substantively related, but they are grouped together in Rule 1620.03 as a miscellaneous list of obligations not present in any underlying statute. All such obligations lack any statutory authority, and they are related in this way.

B. Response to Rule 1620.03

i. Rule 1620.03(a)

Rule 1620.03(a) states that "[e]very program administrator shall maintain procedures established to ensure sufficient sources of capital to finance the efficiency improvements that it has obligated to finance."

The Department lacks the statutory authority to promulgate Rule 1620.03(a), which addresses the sufficiency of capital sources available to a program administrator. As discussed in Section I, the general purpose of the CFL with respect to program administrators is consumer protection. Consistent with this general purpose, the substantive provisions of Chapter 3.5 of the CFL relate to matters concerning consumer protection. No substantive provisions within Chapter 3.5, or any other applicable law, relate to the sources of capital available to program administrators. In fact, no provisions anywhere within the CFL relate to the sources of capital available to any other class of licensee, and the Department has issued no regulations with respect to any other class of licensee regarding the sufficiency of capital sources.

The omission of requirements relating to available sources of capital in the CFL was an intentional decision by the Legislature. Not only would any such requirements deviate from the stated purpose of the CFL with respect to program administrators, but program administrators are inherently incapable of being "obligated to finance" efficiency improvements, given the nature of their role in the PACE financing process. Program administrators do not and cannot enter into assessment contracts with property owners, because program administrators, as private entities, do not have the authority to levy PACE assessments. That authority lies with the public agencies that maintain PACE programs and, in the ordinary course of maintaining such programs, enter into PACE assessment contracts with property owners.

ii. Rule 1620.03(b)

Rule 1620.03(b) states:

> 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.

Renovate America supports having a well-educated workforce, and has invested substantial resources in various training activities for their employees. However, Renovate America views this as a matter best left to the program administrators to manage.

The Department lacks the statutory authority to promulgate Rule 1620.03(b), which purports to require most or all employees of a program administrator to be familiar with the laws, rules, and regulations governing the administration of a PACE program. While the intended scope of this provision is unclear, it is wholly without statutory foundation. Neither the PACE Statutes nor any other applicable law sets forth an obligation for program administrators to educate their employees with respect to the laws, rules, and regulations governing the administration of a PACE program.

Moreover, the subject of education was addressed extensively and in great detail in the CFL, and it was expressly confined to the program administrator's provision of training to PACE solicitor agents. Given the degree of legislative attention paid to the training provisions of the CFL, had the Legislature intended to extend education requirements to the employees of program administrators, it would have done so expressly. To the contrary, the Legislature expressly exempted the employees of program administrators from the definition of "PACE solicitor agent," confirming an intent to confine education requirements to PACE solicitor agents.

Rule 1620.03(b) is also incurably vague and overbroad, both in scope and substantively. It is unclear whether the Department intended to apply the provision to all employees of program administrators, or a large class of employees that is somehow limited in size by virtue of "perform[ing] a function . . . under division 7 of the Streets and Highways Code or division 9 of the Financial Code." Because the statutory divisions cited by the Department do not apply to distinct functions performed by employees of program administrators, Rule 1620.03(b) does not provide sufficient clarity to inform program administrators as to which employees would require education. This defect cannot be remedied, because there is no statutory basis to establish which employees should be subject to the education requirements of Rule 1620.03(b). Whether the Department intended the provision to apply to all employees of program administrators, or to a very large class of employees who are engaged in performing a function that relates to program administration generally, Rule 1620.03(b) is inherently overbroad in its application.

Substantively, Rule 1620.03(b) requires employees of program administrators to be educated on laws, rules, and regulations governing the administration of a PACE program. It is unclear whether this provision is intended to refer to *all* such laws, rules, and regulations, or whether there is an implicit limitation, such as, for example, the specific function performed by an employee. This defect cannot be remedied, however, because there is no statutory basis to establish which employees should be subject to an education requirement. Whether the Department intended the provision to be substantively limited by an undefined criterion, or to apply to all laws, rules, and regulations governing the administration of a PACE program, Rule 1620.03(b) is inherently overbroad in substance.

Rule 1620.03(b) would effectively require most or all employees of program administrators to be licensed attorneys. While Renovate America recognizes the critical importance of having a well-

trained workforce that receives relevant education, an open-ended regulation such as this would only insert uncertainty into the marketplace.

iii. Rule 1620.03(c)

Rule 1620.03(c) states that "[a] program administrator shall implement a procedure intended to ensure that a property owner has a physical 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."

Rule 1620.03(c) relates back to Section 5913 of the Streets and Highways Code. Section 5913(e)(1) provides, in relevant part, that "if the oral confirmation was conducted primarily in a language other than English that is specified in Section 1632 of the Civil Code, the program administrator shall *deliver in writing* the disclosures and contract or agreement required by law" (emphasis added). Section 5913(e)(2) provides, in relevant part, that "[b]efore the execution of any contract or agreement described in paragraph (1), the program administrator shall *deliver* a translation of the disclosures, contract, or agreement in the language in which the oral confirmation was conducted, that includes a translation of every term and condition in that contract or agreement."

The requirement to *deliver in writing* a copy of the assessment contract in one of the languages specified in Section 1632 of the Civil Code before contract execution is, by operation of existing federal and state law, subject to the federal Electronic Signatures in Global and National Commerce Act (the "ESIGN Act") and the California Uniform Electronic Transactions Act (the "UETA"). In relevant part, the ESIGN Act provides:

> If a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing . . . .

15 U.S.C. § 7001(c)(1). In relevant part, the UETA provides:

> If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, that requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt.

Cal. Civ. Code § 1633.8(a).

Because Rule 1620.03(c) requires the program administrator to implement a procedure to facilitate *physical* delivery of an assessment contract, it is facially inconsistent with the ESIGN Act and the UETA, which deem electronic delivery to satisfy statutory requirements to "deliver" information "in writing." To the extent Section 5913 requires delivery in writing, it cannot be

interpreted in a manner that would render it violative of state and federal law. Rule 1620.03(c) is therefore inconsistent with Section 5913.

iv. Rule 1620.03(d)

Rule 1620.03(d) states 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."

Rule 1620.03(d) has no statutory foundation. Based on the lack of substantive statutory support for Rule 1620.03(d), the Department may have concluded that this provision promotes the CFL's statutory purpose of consumer protection. Such a conclusion has troubling implications, because it necessarily assumes that the mere presence of a PACE solicitor or PACE solicitor agent during the terms confirmation call poses a risk to consumers so significant that it should be altogether prohibited.

Renovate America is unaware of the Department's evidentiary basis to support such a conclusion. PACE solicitors are typically small home improvement businesses that provide positive social and economic benefits to their communities. PACE solicitor agents inform property owners about the goods and services offered by these businesses, and often assist property owners in navigating the sometimes daunting process of improving their homes, often with improvements that provide economic, energy, or water savings. These businesses and individuals are subject to licensure or registration by the CSLB, and should not be subjected to a blanket assumption that they pose an inherent risk to consumers. California law has long permitted such businesses and individuals to engage directly with property owners in their homes, and to assist property owners in obtaining financing for home improvement projects. *See, e.g.*, Cal. Bus. & Prof. Code § 7163. The CFL expressly authorizes such businesses and individuals to "solicit a property owner to enter into an assessment contract." *See* Cal. Fin. Code § 22017.

The CFL contains numerous provisions that acknowledge the role of home improvement contractors and home improvement salespersons in introducing PACE financing to property owners, as do the Draft Regulations. The CFL requires program administrators to maintain robust processes to screen all businesses and individuals prior to authorizing them as PACE solicitors or PACE solicitor agents, to monitor and test their compliance, to administer training to every PACE solicitor agent, and to periodically review the PACE-related activities of every PACE solicitor, among other things. The Draft Regulations purport to dramatically expand these requirements, yet Rule 1620.03(d) impairs the ability of home improvement salespersons to function as PACE solicitor agents, evidencing an inherent distrust of their participation in the process of PACE financing.

Rule 1620.03(d) directly conflicts with Rule 1620.11(b)(3)(E) of the Draft Regulations, which would require program administrators to contractually require every PACE solicitor to "ensure a property owner receives a confirmation of key terms call prior to proceeding with work under a home improvement contract." As a result, the Draft Regulations would require program administrators to simultaneously *prohibit* PACE solicitors from being present during the terms

confirmation call and *require* PACE solicitors to *ensure* that such call occurs. This contradiction effectively requires program administrators to induce PACE solicitors into a breach of their contractual obligations to program administrators, creating contractual liability for PACE solicitors and program administrators alike.

v. Rule 1620.03(e)

Rule 1620.03(e) states that "[e]very assessment contract shall contain contact information, including the name, telephone number, mailing address, and website address, for the PACE solicitor, the program administrator, the sponsoring public agency, and the Department of Business Oversight."

Rule 1620.03(e) has no statutory foundation. Based on the lack of substantive statutory support for Rule 1620.03(e), the Department may have concluded that this provision promotes the CFL's statutory purpose of consumer protection. However, this conclusion misconceives the role of the program administrator and the PACE solicitor in the PACE financing process.

Assessment contracts are executed by property owners and the public agencies that maintain PACE programs. Such public agencies – not program administrators – dictate the language in assessment contracts, which set forth the rights and obligations of property owners and such public agencies. Program administrators therefore cannot be compelled to modify assessment contracts. Moreover, the CFL expressly exempts such public agencies from all requirements under the CFL. *See* Cal. Fin. Code § 22018.

Rule 1620.03(e) also fails to account for instances where a property owner obtains PACE financing without first selecting a home improvement contractor, or replaces one home improvement contractor with another. In such circumstances, any information regarding the PACE solicitor would be unavailable or inaccurate. Property owners have other readily available means to ascertain the identity of their selected home improvement contractor, including but not limited to their home improvement contract and other disclosures required by California law, which must contain the name, address, and licensing information of the home improvement contractor. *See* Cal. Bus. & Prof. Code §§ 7159(c)(3)(B)(ii), (d)(1)-(2), (e)(1)-(2).

Rule 1620.03(e) effectively requires PACE solicitors to maintain a website in order to introduce property owners to PACE financing. Most home improvement contractors are small businesses, and many may not have the sophistication or resources to maintain a website. This class of home improvement contractors will effectively be shut out of the PACE marketplace, which will have an adverse economic impact on the home improvement industry, local economies, and on the public policy underpinning PACE.

vi. Rule 1620.03(f)

Rule 1620.03(f) states:

> 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 Rule 1620.07 of these rules.

Rule 1620.03(f) lacks statutory foundation, and it is effectively impossible for program administrators to comply with the standards set forth thereunder. In order to achieve compliance with this requirement, it appears that program administrators would need to be present for every representation made by every PACE solicitor or PACE solicitor agent to every property owner with whom they interact, whether or not the PACE solicitor or PACE solicitor agent introduces such property owner to PACE financing. If any representation involved a statement regarding the achievement of energy savings from an efficiency improvement, the program administrator would need to collect evidence in support of the representation and retain such evidence for a period of up to 33 years (three years after the extinguishment of an assessment, which would effectively reach up to 33 years). The PACE Statutes do not require program administrators to be present for – and gather evidence in support of – every statement made by PACE solicitors and PACE solicitor agents regarding energy savings, nor do they require program administrators to document actual energy savings achieved for each home improvement project financed by PACE.

Rule 1620.03(f) is so burdensome as to render compliance impossible. The only avenue to attempt to comply would be for program administrators to employ PACE solicitor agents outright, in order to exercise the necessary level of oversight compelled by Rule 1620.03(f). Because employees of program administrators are exempted from the designations of PACE solicitor and PACE solicitor agent, the requirement would therefore be rendered moot, as would the designations of PACE solicitor and PACE solicitor agent. Therefore, compliance with this singular provision would have the effect of eliminating PACE solicitors and PACE solicitor agents altogether. This outcome is squarely at odds with the intent of the Legislature, which acknowledged the permissibility of the activities of PACE solicitors and PACE solicitor agents in the CFL.

By imposing upon program administrators a continuous monitoring function that is effectively impossible for program administrators to achieve, Rule 1620.03(f) would threaten the viability of PACE as a public policy, which conflicts with the CFL's stated purpose of preserving the "efficacy and viability of property assessed clean energy financing programs." Cal. Fin. Code § 22001(a)(7). Existing program administrators would likely be forced to withdraw from the PACE market or cease operations, and the barriers to entry for new program administrators would be insurmountable. The positive economic benefits of PACE would be lost, and home improvement contractors, property owners, and the communities that have benefitted from PACE would be disadvantaged as a result.

IV. Rule 1620.04: PACE Pricing

A. Response to Rule 1620.04

Rule 1620.04 states:

> Within 6 months of licensure, a program administrator shall implement a process to track price data for common PACE eligible efficiency improvements and products, including installation costs, labor time, and profit, based on the square foot of residential property obtaining the efficiency improvement, by zip code. The data shall be provided to the Commissioner upon request.

Rule 1620.04 has no statutory foundation. Based on the lack of substantive statutory support for Rule 1620.04, the Department may have concluded that this provision promotes the CFL's statutory purpose of consumer protection. However, it is unclear how this goal would be achieved as a result of the collection of detailed pricing breakdowns for home improvement projects financed by program administrators, unless the Department intends to require program administrators to take systemic actions with respect to PACE solicitors or PACE solicitor agents on the basis of pricing information, or intends to take action itself on such basis. Any such actions taken by a program administrator would raise significant antitrust concerns, as discussed below.

Rule 1620.04 assumes that the pricing attributes of goods and services that *happen to be financed by PACE* are an inseverable feature of PACE financing itself. This is wrong. No matter what form of payment is received by a home improvement contractor, whether cash, credit, or PACE, the amounts charged by the home improvement contractor are charged pursuant to a separate home improvement contract, which is subject to requirements under the Business and Professions Code and the oversight of the CSLB. The pricing of home improvement projects is a matter for consideration by that body, if any, and details of "cost, labor time, and profit" for each home improvement project is well beyond the control of program administrators.

Tellingly, nowhere in the Business and Professions Code is there a requirement for home improvement contractors to provide the CSLB or any other party with pricing information that discloses their installation costs, labor time, and profit as a matter of course. *See* Cal. Bus. & Prof. Code § 7150 *et seq.* Nor has the CSLB promulgated any regulations to that effect. *See* 16 Cal. Code Regs. § 810 *et seq.* While it may be an open question as to whether the CSLB would compel contractors to provide proprietary pricing information on a continuous basis, there is no question that such an endeavor would fall within the ambit of that agency, and would need to be applied consistently to all home improvement contractors, not only to home improvement contractors who happen to introduce consumers to PACE financing.

The prospect of the Department collecting, or compelling program administrators to collect, cost and profit information obtained from home improvement contractors, raises serious concerns regarding price fixing, price discrimination, and other restraints of trade prohibited by the federal Sherman Antitrust Act, 15 U.S.C. §§ 1-7, and the federal Clayton Antitrust Act, 15 U.S.C. §§ 12-27. Moreover, the burden that will be imposed upon program administrators in obtaining

itemized pricing information would be substantial, not least because many home improvement contractors view such pricing information as proprietary competitive information, and would simply refuse to participate in the PACE market if providing such information were a condition of participation, which is not the case with any other form of home improvement financing.

Further, many home improvement contractors may not be able to ascertain cost and profit on a project-by-project basis, because their overhead costs are not reflected on that basis. This may be particularly true for smaller home improvement contractors, who lack sophisticated accounting capabilities. The differing sizes, structures, and levels of complexity of home improvement contractors would also need to be taken into consideration in making any conclusions regarding such information, and would indeed render the insights from such an effort inconclusive to downright misleading.

For example, some home improvement contractors may incur significant costs on acquiring new customers through marketing and advertising, which feeds into their overhead costs, whereas others may spend an outsized amount on employing laborers directly, rather than subcontracting. Moreover, pricing is affected by seasonal changes in labor supply and material costs, as well as microeconomic and macroeconomic changes in the home improvement market. Taken together, this requirement is unworkable, burdensome, and imposes a “PACE penalty” on any contractor which wishes to work with PACE financing.

V. Rule 1620.05: Advertising Standards

A. Overview of Response to Rule 1620.05

Most provisions within Rule 1620.05 of the Draft Regulations are constitutionally invalid under the United States Constitution and the California Constitution, because they prohibit truthful commercial speech. Rule 1620.05 also exceeds the scope of the Department's regulatory authority, because many of its prohibitions are not contemplated by the PACE Statutes, and because it would compel program administrators to act on behalf of the Department to regulate the activities of PACE solicitors and PACE solicitor agents, including limiting their speech in constitutionally impermissible ways. Program administrators simply have no authority to engage in such activities, and have no practical means to limit protected speech.

Moreover, Rule 1620.05 appears to discount the changes adopted in AB-1284, Senate Bill 242 of 2017 ("SB-242"), and Assembly Bill 2693 of 2016 ("AB-2693"), the consumer protection pillars of the PACE Statutes, which fundamentally transformed PACE by creating the following robust consumer protections: (i) a financing estimate and disclosure form that must be signed by all property owners, and that contains certain heightened disclosures that must be initialed by the property owner; (ii) a requirement for program administrators to perform a live, recorded telephone call in which various key terms are confirmed directly with a property owner (the "terms confirmation call"); (iii) an enhanced right to cancel a PACE financing transaction; (iv) an income-based underwriting regime with documented income verification and a determination of the property owner's ability to pay the annual assessment obligation; and (v) enrollment, training, and review requirements with respect to home improvement contractors and home improvement salespersons. The provisions within Rule 1620.05 are therefore unnecessary, as the problems they aim to solve have already been conclusively addressed by the Legislature.

When evaluating the economic burden imposed on program administrators by the Draft Regulations, it is important to consider the Draft Regulations in the broader context of the home improvement market, and the public policy purpose of PACE, as well as the expected outcome of the Draft Regulations. It is also important to recognize how the Draft Regulations interact with each other. While individual provisions in isolation may appear insignificant, the cumulative weight of the Draft Regulations would be extraordinarily detrimental to PACE.

B. Response to Rule 1620.05

i. Rule 1620.05(a)(1)

Rule 1620.05(a)(1) states:

> 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.

Rule 1620.05(a)(1) is unconstitutional, because it is true that a property owner may qualify for a tax benefit by obtaining PACE financing. The federal Internal Revenue Service (the "IRS") has itself stated that the interest portion of a PACE payment may be treated as a deduction to personal income taxes, in the same way that home mortgage interest may also be tax-deductible. *See* IRS Topic No. 503 – Deductible Taxes, https://www.irs.gov/taxtopics/tc503.

This provision would prevent program administrators, PACE solicitors, and PACE solicitor agents from sharing basic facts about PACE programs, which constitutes a prior restraint of protected commercial speech. Commercial speech is entitled to constitutional protections, and the state has no legitimate interest in prior restraint of truthful, non-deceptive speech about PACE financing. *See, e.g.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

By acting as a blanket prohibition on true statements regarding potential tax benefits, Rule 1620.05(a)(1) directly conflicts with the PACE Statutes. Section 5924 of the Streets and Highways Code states 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" (emphasis added). The statutory language is clear and purposeful. It permits the representation of tax benefits so long as those representations are consistent with opinions of the IRS or applicable state tax agency on the tax treatment of PACE assessments.

Sections 5913(a)(1)(L) and 5898.17 of the Streets and Highways Code provide additional support that the Legislature did not intend to prohibit representations with respect to tax benefits. Section 5913(a)(1)(L) requires program administrators to inform property owners during the terms confirmation call that "[t]he program administrator and contractor do not provide tax advice, and that the property owner should seek professional tax advice if he or she has questions regarding tax credits, tax deductibility, or of other tax impacts on the PACE assessment or assessment contract." Similarly, Section 5898.17 requires program administrators to provide to property owners a financing estimate and disclosure form that informs property owners to "[c]onsult your tax advisor regarding tax credits, credits and deductions, tax deductibility, and other tax benefits available. Making an appropriate application for the benefit is your responsibility." Property owners must provide their initials to acknowledge this disclosure.

As evidenced by these statutory provisions, the Legislature clearly recognized that potential tax benefits were associated with PACE financing, and that representations would likely be made regarding such benefits. Rather than engage in a prior restraint of protected commercial speech, the Legislature created disclosure requirements to better inform property owners of their responsibility to determine whether they would qualify for a tax benefit. Renovate America believes that, taken together, these statutory provisions provide a powerful and reasonable standard for representations of tax benefits.

ii. Rules 1620.05(a)(2)-(4), (9)-(10)

Rules 1620.05(a)(2)-(4) and (9)-(10) state:

> 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:
>
> . . .
>
> (2) Make statements, representations or omissions likely to lead a property owner to believe that the program is a free or subsidized government program, including but not limited to a statement that the state is financing the efficiency improvement.
>
> (3) Make statements, representations or omissions likely to lead a property owner to believe that the program is a means-based government program.
>
> (4) Make statements, representations or omissions likely to lead a property owner to believe that the property owner will not be obligated to repay the amount borrowed plus interest and fees.
>
> . . .
>
> (9) Use advertising that suggests or implies, or would lead a property owner to believe, that the advertising is from the government.
>
> (10) Fail to identify the program administrator or the PACE solicitor responsible for the advertisement.

The above provisions are sufficiently vague and overbroad as to render compliance impossible. As a result they are likely to also infringe on First Amendment rights by restraining truthful commercial speech.

For example, Rules 1620.05(a)(2)-(4) and (9) are based on a standard of prohibiting speech that would be "likely to lead a property owner to believe" or that would "lead a property owner to believe" a given concept. The attendant vagueness and overbreadth of this standard would cast an impermissibly broad net, restraining a range of constitutionally protected speech. This standard also fails to take into account any considerations with respect to the reasonableness or intent of the speech it purports to prohibit.

Rules 1620.05(a)(2)-(4) and (9) also appear to disregard the disclosure framework codified in the PACE Statutes. For example, the program administrator is required to directly discuss the terms of the PACE financing with the property owner on a live and recorded phone call *prior* to the property owner signing any of their financing documents. These disclosures are further buttressed by a new income-based underwriting regime which includes documentation of a property owner's income and a determination of the ability to pay the annual assessment obligation. Given the number of consumer protections built into the PACE Statutes, it appears unlikely that a property owner would develop a belief that PACE financing is free, subsidized or means-based program.

Moreover, a program administrator does not have the ability to directly control all advertisements and other forms of speech independently created by PACE solicitors and PACE solicitor agents. In Rule 1620.11(b)(3)(J), the Department would also require program administrators, through their written agreements with PACE solicitors, to either prepare or approve all advertising created by PACE solicitors. As discussed in Section XI.B.xii, that is an unduly burdensome requirement that exceeds the scope of the authority conferred by the Legislature to the Department.

Finally, Rule 1620.05(a)(2) is inconsistent with the PACE Statutes to the extent that it would prohibit program administrators from making a statement or representation that "the state is financing the efficiency improvement." PACE is, of course, not a free or subsidized government program, but political subdivisions of the state *are actually* financing the efficiency improvement. The public agencies that maintain PACE programs are political subdivisions of the state, and they are parties to the assessment contract, not program administrators. This concept is built into the definition of an "assessment contract," which is defined as "[a]n agreement entered into between all *property owners* of record on real property and a *public agency* in which, for voluntary contractual assessments imposed on the real property, *the public agency provides a PACE assessment for the installation of one or more efficiency improvements* on the real property in accordance *with a PACE program*" (emphasis added). Cal. Fin. Code § 22003.5. As a result, the language in Rule 1620.05(a)(2) prohibits statements that are true – the state is financing the efficiency improvement through the assessment contract.

iii. Rule 1620.05(a)(5)

Rule 1620.05(a)(5) states:

> When advertising a PACE program, a program administrator shall not . . . and a program administrator shall develop and implement policies and procedures intended to ensure that a PACE solicitor and PACE solicitor agent do not . . . [a]dvertise property improvements that are not efficiency improvements in the same advertisement.

This proposed regulation is an unconstitutional prior restraint of protected commercial speech. If the advertising is true, and there is no implication that would confuse a consumer between the efficiency and non-efficiency improvements, the state has no basis by which to regulate such speech. Moreover, Rule 1620.05 is overbroad and would impose an extreme burden on program administrators.

First, the term "PACE solicitor" is something of a misnomer. PACE solicitors are home improvement contractors whose primary function is to perform home improvement work. PACE solicitors offer a suite of financial products and PACE is but one of multiple financing options. These home improvement contractors also offer a variety of improvements that range in their level of efficiency, like windows and doors, and heating and cooling systems. This provision would essentially force home improvement contractors to run two separate lines of advertising for the improvements they offer – one for efficiency improvements financed with PACE, and another for non-efficiency improvements.

Rule 1620.05(a)(5) would impose a substantial economic burden on PACE solicitors, requiring them to upend their advertising systems and processes in order to participate in PACE. For example, this provision would prohibit a PACE solicitor from advertising in a single advertisement a series of new window products – some PACE-eligible and some not. It would also prohibit a landscaper who happens to offer PACE from publishing an advertisement featuring turf (PACE-eligible) and drought-tolerant vegetation (not PACE-eligible).

Home improvement contractors would respond to this prohibition by simply refusing to participate in PACE, instead offering alternative financing options for which there are no such restrictions. Rule 1620.05(a)(5) alone would create a significant incentive for home improvement contractors to opt out of PACE financing, directly undermining the public policy purpose and benefits of PACE.

There is nothing inherently deceptive about advertising a range of products or services, so long as the advertisement is true. Renovate America is unaware of any evidence to suggest that advertisements including a variety of products are more likely to include misrepresentations. In any event, the disclosure and training regimes within the PACE Statutes are well positioned to address these issues.

Additionally, the Draft Regulations also contain onerous record retention requirements for PACE solicitors that would exacerbate the burden imposed by this provision. Rule 1620.11(a)(3)(K) states that "[a] PACE solicitor shall maintain all advertising for at least 24 months." This means that to offer PACE, a PACE solicitor would need to retain records for *all* advertisements for a period of two years – evidently to include PACE advertisements and non-efficiency advertisements unrelated to PACE – to demonstrate that efficiency improvements were not advertised alongside non-efficiency improvements.

Home improvement contractors that do not participate in PACE are not subject to any such record retention requirements. This, again, magnifies the economic burden of participating in PACE. The cumulative burden associated with these provisions will particularly disadvantage small home improvement contractors, which comprise the majority of the PACE solicitor network.

Rule 1620.05(a)(5) provides no unique or necessary consumer protection benefit, serving only to penalize PACE financing relative to other home improvement financing products.

iv. Rule 1620.05(a)(7)

Rule 1620.05(a)(7) states:

> When advertising a PACE program, a program administrator shall not . . . and a program administrator shall develop and implement policies and procedures intended to ensure that a PACE solicitor and PACE solicitor agent do not . . . [s]uggest 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.

For many of the same reasons articulated above, this provision is constitutionally invalid. It also directly conflicts with the PACE Statutes, and undermines the public policy purpose of PACE.

First, Rule 1620.05(a)(7) prohibits program administrators from making statements that are true, which constitutes a prior restraint on commercial speech. Energy efficient systems have inherent and calculable economic savings based on superior energy performance and manufacturing attributes. Many government entities, manufacturers, and third parties publish and advertise ratings and projected economic savings. To that end, Section 5954(a)(8) of the Streets and Highways Code requires program administrators to report to public agencies on a semi-annual basis the "estimated total amount of energy saved, and the estimated total dollar amount of those savings by property owners and by the efficiency improvements installed . . . . [T]he report shall state the total number of energy savings improvements, and number of improvements installed that are qualified for the Energy Star program . . . ." Public agencies are also required to make that data publicly available.

Rule 1620.05(a)(7) is in direct tension with Section 5954(a)(8), and there is no basis to require program administrators to publicly report information to public agencies about economic savings, yet prohibit program administrators from using that same information in their own advertising. Furthermore, the State of California has recognized that it is possible to make representations of economic savings and itself makes such representations. For example, California Energy Commissioner David Hochschild has described PACE as a way for "homeowners to voluntarily make improvements to their homes that reduce their gas, electric and water bills." *PACE: Protect homeowners and the environment*, SAN DIEGO TRIBUNE (Jun. 13, 2016), http://www.sandiegouniontribune.com/opinion/commentary/sdut-pace-environment-homeowners-2016jun23-story.html.

Further, Rule 1620.05(a)(7) prohibits program administrators from sharing basic facts about their PACE programs. PACE financing is single-scope financing that can *only* be used to finance efficiency improvements. For example, PACE finances ENERGY STAR certified products that have been independently certified as energy efficient. The ENERGY STAR program, which is managed by the United States Environmental Protection Agency and the United States Department of Energy, consistently promotes the value and savings created through its energy efficient-certified products. For example, the homepage of the ENERGY STAR website states that the ENERGY STAR program "helps businesses and individuals save money and protect our climate through superior energy efficiency." ENERGY STAR, https://www.energystar.gov/ (last visited Jun. 29, 2018). The federally-sponsored program also states that, "since 1992, ENERGY STAR and its partners have helped save American families and businesses more than $450 billion and over 3.5 trillion kilowatt-hours of electricity . . . ." ENERGY STAR, https://www.energystar.gov/about (last visited Jun. 29, 2018). These statements are based on estimated energy and utility bill savings calculations and suggest that the use of ENERGY STAR products *will* result in economic savings. However, under Rule 1620.05(a)(7), program administrators would not be permitted to advertise or share information with respect to the economic savings of ENERGY STAR products.

Second, prohibiting program administrators from making similar advertisements with respect to the economic savings of improvements financed by PACE would undercut the very foundation

of PACE, the primary purpose of which is to increase efficiency. The prohibition would unequivocally undermine the attractiveness of PACE as a financing option and disadvantage PACE against other forms of non-energy efficient home improvements (which are less costly upfront yet have higher overall lifecycle costs) and non-energy efficient financing options (which have less of a "hassle factor"). It would also go so far as to disadvantage PACE with respect to other forms of energy efficiency financing products. PACE would be the only form of energy efficiency financing for which representations of estimated economic savings–a key economic feature of any energy efficiency-related program – are prohibited.

Third, Rule 1620.05(a)(7) fails to account for requirements in the PACE Statutes. For example, Section 5913(a)(1)(K) requires a program administrator to inform a property, during the terms confirmation call, that "[a]ny potential utility savings are not guaranteed, and will not reduce the assessment payments or total assessment amount." The PACE Statutes therefore permit the representations that provide estimated cost savings, just not representations that *guarantee* cost savings.

Finally, PACE solicitors and PACE solicitor agents are free to represent issues regarding energy savings for other forms of financing, including other state government programs, that are not subject to the same restrictions. For example, the REEL (Residential Energy Efficiency Loan) program sponsored by the California Alternative Energy and Advanced Transportation Authority (CAEATFA) has no such restrictions. This is yet another example of a "PACE penalty" for contractors. 4 Cal. Code Regs. § 10091 *et seq.*

Rule 1620.05(a)(7) provides no unique or necessary consumer protection benefit, serving only to harm PACE financing relative to other home improvement financing products.

v. Rule 1620.05(a)(8)

Rule 1620.05(a)(8) states:

> When advertising a PACE program, a program administrator shall not . . . and a program administrator shall develop and implement policies and procedures intended to ensure that a PACE solicitor and PACE solicitor agent do not . . . [v]iolate, directly or indirectly, any state or federal "do not call" law, or anti-spam law.

This provision is inappropriate, because it purports to incorporate other state and federal laws into the Draft Regulations without any statutory authority. Program administrators, and all other entities, are already bound by do not call laws irrespective of this proposed regulation. Moreover, there is no statutory foundation for requiring program administrators to be responsible for the calls of PACE solicitors or PACE solicitor agents, let alone their calls that are not even relevant to PACE. This far exceeds the Department's regulatory authority. Finally, the proposed regulation is vague because it is unclear how program administrators comply with the requirements related to regulating PACE solicitors.

i. Rule 1620.05(b)

Rule 1620.05(b) states that "[a] program administrator shall develop and implement policies and procedures intended to ensure that a PACE solicitor or PACE solicitor agent does not lead a property owner to believe that the PACE solicitor or PACE solicitor agent has been certified to provide efficiency improvements under any PACE program."

Rule 1620.05(b) lacks any statutory support, and directly conflicts with Rule 1620.17(d)(2), which requires program administrators to provide PACE solicitor agents with a "certificate" upon the successful completion of the training administered by program administrators. This contradiction undermines the purpose and usefulness of the required training programs. Moreover, it prohibits PACE solicitors and PACE solicitor agents from making true statements in circumstances where a PACE solicitor agent has been certified under a particular PACE program. The fact that a PACE solicitor agent has undergone training and received a certificate necessarily confers upon them a right to represent that they are certified under a particular PACE program.

i. Rule 1620.05(c)

Rule 1620.05(c) states:

> Every written advertisement must include the following disclosure in 12-point font: "[Program administrator] is a for-profit business and not a division of the government. The fees, interest rates, and terms of the PACE financing are determined by [Program Administrator]. The installation or construction of property improvements are provided by a for-profit business and not a division of the government. All pricing for work is at the sole discretion of the party performing the work."

Rule 1620.05(c) has no statutory foundation, and it is unclear what consumer protection purpose is served by stating that program administrators are for-profit entities, given that program administrators are serving at the behest of public agencies that maintain the PACE programs. This provision would also require advertisements to contain language that is factually incorrect with respect to PACE programs, because "fees, interest rates, and terms of the PACE financing" are all ultimately determined by public agencies, not program administrators.

To the extent that Rule 1620.05(c) is intended to apply to *all* advertising related to PACE financing, including advertising created by public agencies, PACE solicitors, and PACE solicitor agents, it would impose an enormous burden on program administrators to police all PACE advertisements that appear in the marketplace, regardless of whether a given program administrator had any reason to know of such advertisements. Compliance with this requirement would be impossible to achieve.

ii. Rule 1620.05(d)

Rule 1620.05(d) states that "[a] program administrator may not advertise, on its website or otherwise, businesses or individuals approved by the program administrator to provide efficiency

improvements to the public, unless the business or individual is enrolled by the program administrator as a PACE solicitor or PACE solicitor agent."

Rule 1620.05(d) is unconstitutional both in its prohibition of free association, and its prior restraint of commercial speech. Moreover, it effectively prevents program administrators from advertising the services of home improvement contractors who do not solicit property owners to enter into assessment contracts, and instead confine their roles to the installation of improvements financed by PACE. It also effectively eliminates the ability of program administrators to advertise any businesses or individuals – such as manufacturers or distributors of PACE-eligible materials and equipment – that are wholly unrelated to the sale or installation of home improvements. Not only is this unconstitutional, but it is well beyond any possible reading of the statutory scheme underpinning the PACE Statutes. Nowhere does the Legislature evidence an intent to regulate the advertising activities of program administrators in this way.

VI. Rule 1620.06: Mandatory Brochure

A. Overview of Response to Rule 1620.06

Rule 1620.06 of the Draft Regulations would require program administrators to provide to property owners a mandatory brochure containing disclosures prescribed by the Department. The mandatory brochure would be required to be approved by the Department prior to its use, signed by the property owner, and maintained in the program administrator's books and records. The Commissioner also reserved the right to develop a "standard brochure" beyond the mandatory brochure that program administrators must use.

Renovate America supports strong consumer disclosures for PACE financing, and believes that it is critical for consumers to be well-informed about the financial obligations they choose to take on – whether it is PACE financing or any other form of financing. For this reason, Renovate America supported and advocated for the adoption of AB-2693, SB-242, and AB-1284, which together have created extensive disclosure requirements for PACE financing.

For example, AB-2693 resulted in the statutory creation of the financing estimate and disclosure form, which program administrators must deliver to property owners, and which must be signed by all property owners. This form also includes a requirement for all property owners to "initial" next to several particularly important disclosures, the exact language of which is statutorily prescribed. SB-242 adopted a requirement for program administrators to directly confirm the terms of the assessment contract with a property owner on a live, recorded terms confirmation call. During this call, the program administrator is required to provide to the property owner at least fourteen specific disclosures. *See* Cal. Sts. & High. Code §§ 5913(a)(2)(A)-(N). A property owner must also complete the terms confirmation call prior to signing and initialing the financing estimate and disclosure form, and complete both prior to signing their financing documents.

Given the highly prescriptive nature of the required PACE financing disclosures, it is unclear what purpose would be advanced by the mandatory brochure, or what problem it would solve. It appears to be aimed at addressing an issue that the Legislature has already resolved. That is not to suggest that PACE disclosures should be frozen in time by statute, but these major disclosures were recently codified and substantially complete the goal of establishing a robust disclosure regime for PACE. This mandatory brochure is therefore duplicative, adding a layer of unnecessary complexity and possibly causing confusion without providing a corresponding benefit.

A comparison of the disclosures required in the mandatory brochure to the disclosures required in the PACE Statutes demonstrates significant overlap and underscores the point that the PACE Statutes obviate the need for the mandatory brochure. Most of the mandatory brochure's disclosure requirements are wholly duplicative with the disclosure requirements in the PACE Statutes or are substantially similar to the existing statutory requirements. These similarities may lead some to conclude that the mandatory brochure is not problematic. However, that is not the case.

First, redundant disclosures are unnecessary, particularly for documents all property owners must sign, and where the substance of the disclosures have been highly and recently prescribed by statute. Also, the mandatory brochure must be considered and weighed in the broader context of the totality the Draft Regulations, which would create new and extensive processes, procedures, and requirements for program administrators. To that end, requiring a program administrator to produce and operationalize a new mandatory brochure that is largely duplicative, and that must receive the Department's prior approval, is unduly burdensome.

More importantly, many statements contained within the mandatory brochure are materially inconsistent with the PACE Statutes or other provisions within the Draft Regulations. These inconsistencies would create confusion among consumers and undermine the Department's objectives. The mandatory brochure also omits critical disclosures contained within the PACE Statutes. This creates further inconsistencies with the PACE Statutes and undercuts the disclosures prescribed therein, as the omissions could easily cause a property owner to misinterpret the requirements, or to believe that any disclosures not contained within the mandatory brochure are erroneous, contradictory, or not relevant.

This result is reason alone to eliminate the requirement to provide a mandatory brochure. However, if the Department instead revised the brochure to account for its omissions, the brochure would become wholly duplicative with existing disclosures and therefore unnecessary.

For these reasons, Renovate America opposes the requirement to provide the mandatory brochure requirement. While Renovate America has identified some of the problems with specific language and particular provisions, it does not support the inclusion of a mandatory brochure, even if amended.

B. Response to Rule 1620.06

i. Rules 1620.06(a)-(b)

Rules 1620.06(a)-(b) state:

> (a) Each program administrator shall provide every property owner a PACE brochure prior to entering into an assessment contract.
>
> (1) The program administrator shall obtain the signed acknowledgement of receipt of the brochure from a property owner, and maintain evidence of the signed acknowledgement in the program administrator's books and records.
>
> (2) The program administrator shall obtain approval of the brochure from the Commissioner prior to use.
>
> (3) The Commissioner may develop a standard brochure for every program administrator to use, and may require that a program administrator use that brochure.
>
> (b) The written acknowledgement from the property owner shall include a representation from the property owner that the brochure was received.

These provisions are unduly burdensome. In particular, the requirement to obtain prior approval from the Department is problematic because it would impair the ability of program administrators to adapt to market conditions and respond to consumer needs. The approval process could add weeks, if not months, to the process of implementing updated disclosures, and it would needlessly impact the ability of program administrators to efficiently and effectively meet the needs of property owners.

ii. Rules 1620.06(c)(1)-(7), (c)(9), (c)(10)(A), (c)(10)(D), and (c)(10)(I)

Rules 1620.06(c)(1)-(7), (c)(9), (c)(10)(A), and (c)(10)(I) reflect disclosures that are substantially similar to, and in some cases wholly duplicative of, the disclosures already required by the PACE Statutes. To illustrate the similarities between the two sets of required disclosures, Renovate America has prepared the chart below (Figure 1).

Figure 1 demonstrates how various of the disclosures required under Rule 1620.06 are already provided to property owners through other means required by the PACE Statutes, including the financing estimate and disclosure form and the terms confirmation call. *See* Cal. Sts. & High. Code §§ 5898.17(b), 5913. Note: Figure 1 does not address all mandatory brochure requirements; it includes only those that are substantially similar to, or duplicative of, requirements within the PACE Statutes. The remaining provisions are addressed elsewhere in this Section.

Figure 1	
Mandatory Brochure	**Comparison to the PACE Statutes**
"The impact an assessment contract will have on a property owner's property taxes, including the addition of a new amount and a description of how the amount will be determined." Draft Regulations § 1620.06(c)(1).	Rule 1620.06(c)(1) requires a disclosure that address three subjects: (i) the impact an assessment contract will have on a property owner's property taxes; (ii) the addition of a new amount; and (iii) how the amount will be determined. The first two disclosures are directly addressed by the PACE Statutes and the third is substantially similar. **Statutory Language and Analysis:** Section 5898.17(b) of the Streets and Highways Code requires a program administrator to provide the property owner with a notification in the financing estimate and disclosure form with respect to the impact of the assessment contact on property taxes that states "[t]he financing arrangement described below will result in an assessment against your property which will be collected along with your property taxes and will result in a lien on your property." Sections 5913(a)(2)(D) and 5913(a)(2)(E) require a program administrator disclose to the property owner the estimated "annual costs" the property owner will have to pay "under the assessment contract, including applicable fees" and the "estimated average

Figure 1	
Mandatory Brochure	**Comparison to the PACE Statutes**
	monthly amount of funds the property owner will have to save in order to pay the annual costs under the PACE assessment, including applicable fees." The PACE Statutes do not require the program administrator to provide a "description of how the amount will be determined," but the financing estimate and disclosure form does exactly that, by summarizing and itemizing all relevant financing amounts in granular detail. Moreover, "how the amount will be determined" is unclear without any context, and could vary based on the specific property owner's circumstance. As a result, if this were a standard disclosure it would likely sow confusion, not more clarity. Alternatively, if it were a tailored disclosure it would pose an undue burden on program administrators. In addition to populating all of the fields in the financing estimate and disclosure form, which itself acts as a description of how amounts are determined, the program administrator would have to draft a disclosure in prose form that described how an amount was determined. Not only is this duplicative, but it will likely lead to confusion.
"A description of the process for paying the assessment through property taxes." Draft Regulations § 1620.06(c)(2).	Rule 1620.06(c)(2) requires a disclosure describing the process for paying the assessment through property taxes. This disclosure is directly addressed in the PACE Statutes. **Statutory Language and Analysis:** Sections 5913(a)(2)(H) and 5913(a)(2)(F) of the Streets and Highways Code require a program administrator to disclose the process for paying the assessment through property taxes, during the required terms confirmation call. Section 5913(a)(2)(H) requires a program administrator to inform a property owner, during the terms confirmation call, of the following: That payments on the assessment contract will be made through an additional annual assessment on the property and paid either directly to the county tax collector's office as part of the total annual secured property tax bill, or through the property owner's mortgage impound account, and that if the property owner pays his or her taxes through an impound account he or she should notify their mortgage lender to discuss adjusting his or her monthly mortgage

Figure 1	
Mandatory Brochure	**Comparison to the PACE Statutes**
	payment by the estimated monthly cost of the PACE assessment. Section 5913(a)(2)(F) requires a program administrator to inform a property owner, during the terms confirmation call, of the following: That the county annual secured property tax bill, which will include the installment of the PACE lien, will be mailed by the county tax collector no later than November 1 each year, and that if the lien is recorded after the fiscal year closes but before the bill is mailed, the first installment may not appear on the county tax bill until the following year. Section 5898.17(b) also requires that a property owner receive a financing estimate and disclosure form that includes a description of the process for paying the assessment contract through property taxes. This disclosure also requires the property owner to initial next to the specific provision, which states: Your payments will be added to your property tax bill. Whether you pay your property taxes through your mortgage payment, using an impound account, or if you pay them directly to the tax collector, you will need to save an estimated $_____ for your first tax installment. If you pay your taxes through an impound account you should notify your mortgage lender, so that your monthly mortgage payment can be adjusted by your mortgage lender to cover your increased property tax bill. [Borrower initials].
"The statutory penalty for failing to pay property taxes on time." Draft Regulations § 1620.06(c)(3). "The statutory rate of interest for failing to pay property taxes on time." Draft Regulations § 1620.06(c)(4).	Rules 1620.06(c)(3) and (c)(4) require a disclosure describing (i) the statutory penalty for failing to pay property taxes on time and (ii) the statutory penalty of interest for failing to pay property taxes on time. Both issues are disclosures that are directly addressed by the PACE Statutes. **Statutory Language and Analysis:** Section 5913(a)(2)(M) of the Streets and Highways Code requires a program administrator to inform a property owner, during the terms confirmation call, of the statutory penalty and rate of interest for failing to pay property taxes on time. Section 5913(a)(2)(M) states:

Figure 1	
Mandatory Brochure	**Comparison to the PACE Statutes**
	That if that property tax payment is delinquent within the fiscal year, the county tax collector will assess a 10-percent penalty and may assess related costs, as required by state law. A delinquent payment also subjects the property to foreclosure. If the delinquent payment continues past June 30 of a given year and defaults, the county tax collector will assess penalties at the rate of 1 ½ percent per month (18 percent per year), and the property will continue to be subject to foreclosure and may become subject to the county tax collector's right to sell the property at auction. Section 5898.17(b) also requires that a property owner receive a financing estimate and disclosure form that includes a description of the statutory penalties and interest, and that requires the property owner to initial next to the specific provision, which states: "Statutory Penalties: If your property tax payment is late, the amount due will be subject to a 10% penalty, late fees, and 1.5% per month interest penalty as established by state law, and your property may be subject to foreclosure. [Borrower initials]."
"The potential that a lender or home buyer may require the property owner to pay off the PACE assessment if selling or refinancing the subject property." Draft Regulations § 1620.06(c)(5).	Rule 1620.06(c)(5) requires a disclosure that a potential lender or home buyer may require the property owner to *pay off* the PACE assessment if selling or refinancing the property. This is directly addressed in the PACE Statutes. **Statutory Language and Analysis:** Section 5913(a)(2)(I) of the Streets and Highways Code requires a program administrator to disclose, during the required terms confirmation call, that a property owner may need to pay off the assessment in full in the event of a sale or refinancing. Section 5913(a)(2)(I) states that "[t]the property will be subject to a lien during the term of the assessment contract and that the obligations under the assessment contract may be required to be paid in full before the property owner sells or refinances the property." Section 5898.17(b) also requires that a property owner receive a financing estimate and disclosure form that includes the same disclosure, which the property owner must initial. Section 5898.17(b) states: "I understand that I may be required to pay off the remaining balance of this obligation by the mortgage

Figure 1	
Mandatory Brochure	**Comparison to the PACE Statutes**
	lender refinancing my home. If I sell my home, the buyer or their mortgage lender may require me to pay off the balance of this obligation as a condition of sale. [Borrower initials]."
"The risk of a tax sale for failing to pay the assessment contract, including the timing of the sale and the minimum amount for which the property may be sold." Draft Regulations § 1620.06(c)(6).	Rule 1620.06(c)(6) requires a disclosure that addresses two subjects: (i) the risk of a tax sale for failing to pay the assessment contract and (ii) the timing of the sale and the minimum amount for which the property may be sold. The first disclosure is directly addressed by the PACE Statutes. The second, however, is problematic. **Statutory Language and Analysis:** Section 5913(a)(2)(M) of the Streets and Highways Code requires the program administrator to disclose, during the required terms confirmation call, the risk of a tax sale for failing to pay the assessment contract. Section 5913(a)(2)(M) states that "[i]f the delinquent payment continues past June 30 of a given year and defaults, the county tax collector will assess penalties at the rate of 1 ½ percent per month (18 percent per year), and the property will continue to be subject to foreclosure and may become subject to the county tax collector's right to sell the property at auction." The language in the Draft Regulations requiring an additional disclosure of the "timing of the sale and the minimum amount for which the property may be sold" does not have an analog in the PACE Statutes and is highly problematic because it is impossible for a program administrator to know this information. These amounts will always vary, and it is not possible to predict the timing of the sale or the minimum amount.
"A recommendation that a property owner consult a tax advisor to determine whether the energy-related improvement provides any tax benefits." Draft Regulations § 1620.06(c)(7).	Rule 1620.06(c)(7) requires a disclosure that recommends that a property owner consult a tax advisor to determine whether the energy-related improvements provide any tax benefits. This disclosure is directly addressed in the PACE Statutes. **Statutory Language and Analysis:** Section 5913(a)(2)(L) of the Streets and Highways Code requires the program administrator to disclose, during the required terms confirmation call, that the program administrator does not provide

Figure 1	
Mandatory Brochure	**Comparison to the PACE Statutes**
	tax advice and that the property owner should seek professional advice with respect to potential tax benefits. Section 5913(a)(2)(L) states "[t]hat the program administrator and contractor do not provide tax advice, and that the property owner should seek professional tax advice if he or she has questions regarding tax credits, tax deductibility, or of other tax impacts on the PACE assessment or assessment contract." Section 5898.17(b) also requires that a property owner receive a financing estimate and disclosure form that includes the same disclosure, and that requires the property owner to initial next to the specific provision, which states: "Tax Benefits: Consult your tax adviser regarding tax credits, credits and deductions, tax deductibility, and other tax benefits available. Making an appropriate application for the benefit is your responsibility. [Borrower initials]."
"The program administrator's website and telephone number for additional information. The website address must direct the consumer to a page that explains how PACE operates." Draft Regulations § 1620.06(c)(9).	Rule 1620.06(c)(9) requires (i) that the mandatory brochure provide information on the program administrator's website and telephone number for additional information and (ii) that the website address direct consumers to a page that explains how PACE operates. Current statutory disclosure requirements for PACE mandate the program administrator provide the property owner with contact information, including a toll-free number and email address. Current law does not require a program administrator provide website information, or direct the consumer to a specific website address. This is unnecessary and is inconsistent with the PACE Statutes. **<u>Statutory Language and Analysis:</u>** Section 5898.17(b) of the Streets and Highways Code requires program administrators to provide property owners with "contact information" on the financing estimate and disclosure form. Specifically, the statute requires the form to include a customer service toll-free telephone number and email address. The PACE Statutes have determined what information should be provided to the consumer: a telephone number and email address. Requiring additional information, such as a specifically tailored webpage, is not consistent with the PACE Statutes. Further, this only serves to create an additional administrative burden for

Figure 1	
Mandatory Brochure	**Comparison to the PACE Statutes**
	program administrators without a corresponding benefit to consumers due to the duplicative nature of the disclosures.
"The PACE assessment is not a government benefit and must be repaid." Draft Regulations § 1620.06(c)(10)(A).	Rule 1620.06(c)(10)(A) requires a disclosure that the PACE assessment is not a government benefit and must be repaid. These disclosures are substantially addressed by the PACE Statutes. **Statutory Language and Analysis:** The PACE Statutes require program administrators to disclose substantially similar requirements that obviate the need for this disclosure. For example, the financing estimate and disclosure form includes entries for the following "costs" and "amounts" to be paid: "Products and Costs," "Financing Costs," "Total Amount you will have paid over the life of the financing," "other costs," "Total Financing Costs and Closing Costs," "Additional Information about These Financing Comparisons," "Principal you will have paid off," and "Amount of interest you have paid." Cal. Sts. & High. Code § 5898.17(b). These "costs" and "amounts" are described as an obligation of the property owner, not a "government benefit." Moreover, Section 5913(a)(2)(I) of the Streets and Highways Code requires the program administrator to disclose, during the required terms confirmation call, "[t]hat the property will be subject to a lien during the term of the assessment contract and that the obligations under the assessment contract may be required to be paid in full before the property owner sells or refinances the property." A "lien" is not a "government benefit" and the reference to payment "in full" unequivocally indicates that the assessment contract "must be repaid."
"The cost of property improvements offered by a contractor or retailer are set by the contractor or retailer, and not subsidized by the government." Draft Regulations § 1620.06(c)(10)(D).	Rule 1620.06(c)(10)(D) requires that the mandatory brochure include a disclosure explaining that the cost of the improvements are offered by a contractor or retailer and not subsidized by the government. **Statutory Language and Analysis:** There is no direct analog to this disclosure in the PACE Statutes. However, as discussed above, there are a variety of disclosures in the PACE Statutes that directly speak to the payments a property owner must make on an assessment contract. These payments and costs, which are clearly described as obligations of the property

Figure 1	
Mandatory Brochure	**Comparison to the PACE Statutes**
	owner, cannot be construed as a subsidy from the government. Moreover, disclosures in the PACE Statutes describe PACE as a "lien" on the property, which is understood to mean a security interest granted from a consumer to a different entity to secure payment, until that payment is made in full. No consumer will confuse this with a subsidy. Thus, the disclosure regime under the PACE Statutes fully protects against consumer confusion on this subject.
"An explanation of the potential impact on a mortgage impound account." Draft Regulations § 1620.06(c)(10)(I).	Rule 1620.06(c)(10)(I) requires that the mandatory brochure include a disclosure that explains the potential impact on a mortgage impound account. This disclosure is directly addressed in the PACE Statutes. **Statutory Language and Analysis:** Section 5913(a)(2)(H) of the Streets and Highways Code requires a program administrator to inform a property owner, during the terms confirmation call, of the potential impact of the PACE assessment on a mortgage impound account. Section 5913(a)(2)(H) states: > That payments on the assessment contract will be made through an additional annual assessment on the property and paid either directly to the county tax collector's office as part of the total annual secured property tax bill, or through the property owner's mortgage impound account, and that if the property owner pays his or her taxes through an impound account he or she should notify their mortgage lender to discuss adjusting his or her monthly mortgage payment by the estimated monthly cost of the PACE assessment. Section 5898.17(b) also requires that a property owner receive a financing estimate and disclosure form that includes the same disclosure. This disclosure is located in two places on the form. In the first instance, the form notifies the consumer that "[i]f your property taxes are paid through an impound account, your mortgage lender may apportion the amount and add it to your monthly payment." In the second instance, the form states:

Figure 1	
Mandatory Brochure	**Comparison to the PACE Statutes**
	Your payments will be added to your property tax bill. Whether you pay your property taxes through your mortgage payment, using an impound account, or if you pay them directly to the tax collector, you will need to save an estimated $_____ for your first tax installment. If you pay your taxes through an impound account you should notify your mortgage lender, so that your monthly mortgage payment can be adjusted by your mortgage lender to cover your increased property tax bill. [Borrower initials].

iii. Rule 1620.06(c)(8)

Rule 1620.06(c)(8) states that the mandatory brochure shall include "[t]he minimum eligibility standards required to qualify for a PACE assessment."
The disclosure required in Rule 1620.06(c)(8) is potentially misleading, because a property owner's eligibility for PACE is determined in large part by the ability to pay the annual assessment obligation, which depends on an individualized analysis of that property owner's income, assets, debt obligations, and basic household living expenses. It is infeasible to describe minimum eligibility standards when they vary widely from consumer to consumer.

iv. Rule 1620.06(c)(10)(C)

Rule 1620.06(c)(10)(C) states that the mandatory brochure shall explain that "[a] homeowner may choose any licensed contractor or retailer to provide the property improvement and products."

Rule 1620.06(c)(10)(C) does not accurately reflect how PACE programs operate. PACE programs only permit enrolled home improvement contractors to install home improvement projects financed by those programs. This requirement is consistently enforced by the public agencies that maintain PACE programs. Similarly, PACE financing is single-scope financing and, as such, may only be used for efficiency improvements, which many home improvement contractors are not qualified to install. However, this disclosure refers to "property improvements" generally, which could mislead a property owner into believing that non-efficient products could be financed with PACE financing.

v. Rule 1620.06(c)(10)(H)

Rule 1620.06(c)(10)(H) states that the brochure shall explain "[t]hat most tax collectors will not accept partial payments of an assessment."

Rule 1620.06(c)(10)(H) is overbroad, inaccurate, and potentially misleading. First, some tax collectors – such as Los Angeles County (which serves 25% of the state's population) – do accept partial payments and, as such, this disclosure could mislead property owners who live in

jurisdictions where partial payments are accepted. Second, all property owners are able to prepay their PACE assessments in part or in full. This disclosure language would likely be read to imply that partial prepayments were not permitted. Third, many property owners with PACE assessments have mortgage impound accounts, in which a portion of their monthly mortgage payments are set aside, and eventually applied to their property tax payments. This language could confuse property owners who pay their property taxes through mortgage impound accounts.

VII. Rule 1620.07: Books and Records

A. Overview of Response to Rule 1620.07

Rule 1620.07 of the Draft Regulations would impose records retention requirements upon program administrators that would dwarf any requirements ever promulgated by the Department with respect to any other type of entity. The requirements are excessive in scope and in duration, and they would result in massive resource expenditures that would not further the CFL's stated purpose of consumer protection.

Rule 1620.07 would apply the statutory books and records retention period (three years after the extinguishment of an assessment, which would effectively reach up to thirty-three years) to a variety of records that would otherwise not be considered part of a program administrator's books and records. For records related to PACE solicitors and PACE solicitor agents, Rule 1620.07 would apply an open-ended, indefinite retention period.

In some cases, Rule 1620.07 would also require program administrators to create or obtain records that are without any statutory foundation. Once created or obtained, these records would then be subject to retention. Some of these records are effectively impossible to create or obtain.

B. Response to Rule 1620.07

i. Rules 1620.07(b)(2)-(10), (d)

Rule 1620.07(d) states that "[a] program administrator must maintain the records in paragraphs (2), (3), (4), (5), (6), (7), (8), (9), and (10) for three years after the final assessment under the assessment contract is satisfied and extinguished." Rules 1620.07(b)(2)-(10) refer to the following records:

(2) Complaints and related correspondence.
(3) Property owner correspondence.
(4) Assessment contracts.
(5) Documentation of ability to pay for each assessment contract.
(6) Documentation of home improvement agreements, contractor payments, any other invoices related to an individual assessment agreement.
(7) Oral confirmation of key terms records.
(8) Evidence supporting any energy savings representations to a property owner.
(9) Evidence of actual energy savings attributable to a PACE improvement, if any.
(10) Documentation regarding the useful life of efficiency improvements.

The retention period of up to 33 years set forth by Rule 1620.07(d) is overbroad in its application, and Rule 1620.07(d) purports to apply to records that program administrators are not required to create or obtain, let alone to retain. Moreover, the descriptions of various records subject to the retention period of Rule 1620.07(d) are themselves vague and overbroad. As a result, Rule 1620.07(d) imposes a substantial burden upon program administrators that renders compliance impracticable, or even impossible.

Rules 1620.07(b)(2) and (b)(3) collectively refer to complaints, correspondence related to complaints, and correspondence with property owners. The requirement to retain such extensive documentation as part of an entity's books and records lacks any statutory foundation and is without precedent for other entities supervised by the Department.

Historically, the Department has promulgated only two regulations that specifically address consumer complaints, and only one of those regulations expressly requires complaints to be retained as part of an entity's books and records. *See* 10 Cal. Code Regs. §§ 260.218.4(c)(5), 1436(b)-(c). That regulation applies narrowly to mortgage lenders and brokers that make or arrange nontraditional mortgage loans or adjustable rate mortgage loans, and its application is limited to requiring the retention of a copy of each complaint specific to nontraditional mortgage loans or adjustable rate mortgage loans, and either a written response or a written explanation of how each complaint was resolved. *See* 10 Cal. Code Regs. §§ 1436(b)-(c).

These requirements are dwarfed by the requirements within Rules 1620.07(b)(2) and (b)(3), which require program administrators to retain not only copies of complaints, but related correspondence, and all other correspondence with property owners. This requirement is amplified by Rule 1620.08 of the Draft Regulations, which requires program administrators to *generate* a substantial volume of complaint-related documentation and correspondence. Rule 1620.08 requires program administrators to (i) provide a notice regarding complaints to each property owner, (ii) create a form for the submission of complaints that must transmit an email to the complainant for each complaint submitted, (iii) send an acknowledgement to each complainant for each complaint submitted, (iv) send a detailed written response to each complainant for each complaint submitted, (v) send a closing letter to each complainant for each complaint submitted, and (vi) create an extremely detailed log that captures every step of the complaint response process. *See* §§ 1620.08(b); (d)(1); (d)(1)(a)(1); (f); (j); (e), (h).

The unprecedented and extraordinary burden placed on program administrators by Rules 1620.07(b)(2) and (b)(3) is evident, particularly given the retention period of up to 33 years imposed by Rule 1620.07(d). However, this retention period appears to contradict (or partially contradict) Rule 1620.08(g), which requires a program administrator to "keep in its files all copies of complaints and responses for a period of five years after resolution."

Rule 1620.07(b)(5) is an example of a retention requirement that is vague and overbroad. Rule 1620.07(b)(5) requires program administrators to retain "[d]ocumentation of ability to pay for each assessment contract," but does not provide information sufficient to inform program administrators what specific documentation is required to be obtained.

Rule 1620.07 also requires program administrators to retain documentation that they are not statutorily required to obtain. For example, Rule 1620.07(b)(6) requires program administrators to retain as part of their books and records copies of home improvement contracts between property owners and home improvement contractors, copies of all related invoices, and records of payments to contractors. These records are subject to a retention period of up to 33 years under Rule 1620.07(d). There is no statutory basis to require program administrators to obtain home improvement contracts or invoices from contractors. Moreover, there is no basis to require transaction data related to payments to third parties to be retained for up to 33 years. These

requirements are unduly burdensome, and this burden is not outweighed by any perceived consumer protection rationale.

Rule 1620.07(b)(7) relates back to Section 5913(b)(3) of the Streets and Highways Code, which provides that the "[r]ecording of an oral confirmation shall be retained by the program administrator for a period of at least *five years* from the time of the recording" (emphasis added). However, Rule 1620.07(b)(7) subjects "oral confirmation of key terms records" to the retention period of up to 33 years under Rule 1620.07(d). While Section 5913(b)(3) does provide for a retention period of *at least* five years, the gulf between five years and thirty-three years is so substantial that it demonstrates a lack of fidelity from the Draft Regulations to the underlying statute, which was clearly intended to provide a meaningful benchmark for what the Legislature deemed to be an appropriate retention period.

Rules 1620.07(b)(8) and (b)(9) provide examples of records that are not required by statute to be created or obtained by program administrators but are nonetheless subject to the retention requirements in the Draft Regulations. Rule 1620.07(b)(8) requires the retention of "[e]vidence supporting any savings representations to a property owner" and Rule 1620.07(b)(9) requires the retention of "[e]vidence of actual energy savings attributable to a PACE improvement, if any." In addition to lacking a statutory basis, these requirements are vague, overbroad, and without precedent, and they would impose an insurmountable burden on program administrators.

As discussed in Section III.B.vi, it is effectively impossible for program administrators to be aware of all representations made to property owners in order to identify which representations relate to energy savings and, if such a representation is identified, to gather evidence in support of such representation. It is also effectively impossible to monitor energy consumption, let alone for the duration of an assessment contract plus an additional three years, in order to obtain evidence of actual energy savings.

Rule 1620.07(b)(10) imposes a retention requirement for "[d]ocumentation regarding the useful life of efficiency improvements." While this requirement is vague, if it is intended to apply to the *actual* useful life of each improvement installed, achieving compliance would be effectively impossible, as it would require continuous monitoring of the performance of efficiency improvements throughout the duration of an assessment contract plus an additional three years.

ii. Rules 1620.07(b)(11), (e)

Rule 1620.07(e) states that "[a] program administrator must maintain agreements with local agencies in paragraph (11) during the term of the agreement plus three years." Rule (b)(11) refers to "[a]greements with local agencies."

This requirement is vague and overbroad. It is unclear whether "agreements with local agencies" is confined to "public agencies" as defined in Section 22020 of the Financial Code, or whether it is intended to apply to any local agency, no matter how unrelated to the program administrator's administration of a PACE program.

iii. Rules 1620.07(b)(12)-(17), (f)

Rule 1620.07(f) states that "[a] program administrator must maintain records regarding solicitors and solicitor agents in paragraphs (12), (13), (14), (15), (16) and (17) for four years after the PACE solicitor or PACE solicitor agent is no longer enrolled." Rules 1620.07(b)(12)-(17) refer to the following records:

> (12) Agreements with PACE solicitors and PACE solicitor agents.
> (13) Enrollment records for PACE solicitors and PACE solicitor agents.
> (14) Documentation of the background check of PACE solicitors and PACE solicitor agents.
> (15) Documentation of monitoring PACE solicitor and PACE solicitor agent compliance, as required by Rule 1620.14(a)(1)(C) of these rules.
> (16) Reports summarizing results of periodic reviews.
> (17) Records of PACE solicitor agent training.

The retention period set forth in Rule 1620.07(f) is overbroad, both substantively and in scope. Substantively, Rule 1620.07(f) would impose an indefinite retention period that would only conclude four years after a PACE solicitor or PACE solicitor agent was disenrolled from a given PACE program, which could feasibly amount to decades, or longer. In scope, the requirement would effectively sweep in all information related to the enrollment, training, monitoring, and periodic review of all PACE solicitors and PACE solicitor agents. It would also reach beyond information contemplated by statute. For example, Rule 1620.07(b)(12) would apply to all agreements with PACE solicitors and PACE solicitor agents, not only to the agreements required by Section 22680(a)(1) of the Financial Code, while Rule 1620.07(f) would require all agreements to be retained indefinitely – as long as the PACE solicitor or PACE solicitor agent remained enrolled – even agreements that terminate or expire well before the disenrollment of a PACE solicitor or PACE solicitor agent.

As with most other retention requirements within Rule 1620.07, these requirements are enormously burdensome and unprecedented. The Department has never promulgated a regulation that requires all third-party oversight activities to be retained as part of an entity's books and records, and the imposition of an indefinite retention period to such a large volume of information will significantly impact the ability of program administrators to achieve compliance.

To the extent that Rule 1620.08(h) would require program administrators to retain records created by or at the direction of counsel, which could include the results of background investigations, compliance monitoring activities, and reports regarding periodic reviews, such records would be attorney work product or otherwise subject to the attorney-client privilege, which would be asserted accordingly. Cal. Evid. Code § 954, Cal. Civ. P. Code § 2018.030.

iv. Rules 1620.07(b)(18), (g)

Rule 1620.07(g) states that "[a] program administrator must keep advertising in paragraph (18) for two years." Rule 1620.07(b)(18) refers to "[a]dvertising."
Rules 1620.07(b)(18) and (g) are vague and overbroad. It is unclear what is meant by the broad term "advertising," and to the extent such term applies to any advertising of PACE solicitors or PACE solicitor agents, Rule 1620.07(g) would impose an unacceptably large burden on program administrators.

v. Rules 1620.07(b)(19)-(21), (h)

Rule 1620.07(h) states that "[a] program administrator must keep all current procedures and must keep obsolete procedures for three years after revisions (paragraphs (19), (20), and (21)." Rules 1620.07(b)(19)-(21) refer to the following records:

> (19) Procedures for handling complaints.
> (20) Procedures for enrolling and terminating agents and solicitors.
> (21) Procedures for determining a property owner's ability to pay.

Rules 1620.07(b)(19)-(21) and (h) are vague, overbroad, and unduly burdensome. It appears that Rule 1620.07(h) would require program administrators to distinguish every iterative change of every procedure referred to in Rules 1620.07(b)(19)-(21), no matter how minor, and to track and retain every such iteration for a period of three years after every such iterative change. This requirement would apply to a potentially voluminous population of procedures, which are by nature far more dynamic and more detailed than policies, and would require an unworkable system of version identification that would impose an extreme burden on program administrators.

The unintended consequence of such an extreme requirement would be to incentivize program administrators to make as few changes to their procedures as possible, in order to minimize the administrative burden associated with gratuitous version retention. This would result in fewer process improvements and hinder compliance efforts generally.

The extent to which these retention requirements are unprecedented is extraordinary. Historically, the Department has promulgated only one regulation requiring the development of policies or procedures, and that requirement applies narrowly to mortgage lenders and brokers that make or arrange nontraditional mortgage loans or adjustable rate mortgage loans. *See* 10 Cal. Code Regs. §§ 1436(b)-(c). The Department has promulgated no regulation requiring policies or procedures to be retained in an entity's books and records, let alone every iteration of every procedure relating to a large swath of that entity's compliance activities.

VIII. Rule 1620.08: Complaint Processes and Procedures

A. Overview of Response to Rule 1620.08

Rule 1620.08 of the Draft Regulations contains an extensive, highly prescriptive set of regulations that dictates every substantive aspect of the processes implemented by program administrators with respect to handling complaints. Rule 1620.08 extends well beyond its statutory foundation, imposing a crippling burden on program administrators PACE solicitors while forcing them to shift resources away from effective complaint management practices and toward administrative activities and ineffective processes. The Department has taken extraordinary steps to subject program administrators to unattainable standards for addressing complaints, despite having never promulgated any regulations prescribing any specific complaint handling processes for any other type of entity over which it has oversight authority, including mortgage lenders, mortgage loan originators, loan brokers, finance companies, and even payday lenders.

Rule 1620.08 relates back to Section 22683 of the Financial Code, which provides that "[a] program administrator shall develop and implement policies and procedures for responding to questions and addressing complaints as soon as reasonably practicable." On the basis of this statutory requirement, Rule 1620.08 requires program administrators to develop numerous distinct processes, to adhere to rigid timelines, to engage in extensive logging and recordkeeping activities, to generate a multitude of forms and correspondence, and to provide a suite of translation services wholly without precedent. Moreover, Rule 1620.08 appears to expect perfection, requiring the "resolution" of all complaints received by program administrators – whether those are received directly or through a PACE solicitor.

It appears the Department has promulgated only two regulations that specifically address consumer complaints. One regulation applies to broker-dealers, and consists of a single statement requiring "[t]he prompt review and written approval of the handling of all customer complaints." 10 Cal. Code Regs § 260.218.4(c)(5). The other regulation applies to mortgage lenders and brokers that make or arrange nontraditional mortgage loans or adjustable rate mortgage loans, and it requires such lenders and brokers to "implement[] a consumer complaint process to resolve consumer complaints" involving such loans, to periodically report "the number of resolved complaints and unresolved complaints" and to "maintain for each complaint a copy of the complaint and the . . . written response or explanation of how the company resolved the complaint." 10 Cal. Code Regs. § 1436(b)-(c).

It is unclear why the Department seeks to impose a far greater burden on program administrators than on any other type of entity that it supervises, on the basis of a single statutory provision. This is especially troubling given the small size of the PACE industry and the average program administrator relative to the massive industries and entities that are permitted to determine how best to manage complaints from consumers.

B. Response to Rule 1620.08

i. Rule 1620.08(a)

Rule 1620.08(a) states:

> Every program administrator shall establish and maintain a complaint process approved by the Commissioner under which a property owner may submit a complaint to the program administrator.
>
> (1) The complaint process shall provide for adequate consideration, and appropriate resolution, of property owner complaints and resolution when appropriate.
>
> (2) "Resolution" means the complaint has reached a final conclusion.

Rule 1620.08(a) relates back to Section 22683 of the Financial Code, which provides that "[a] program administrator shall develop and implement policies and procedures for *responding* to questions and *addressing* complaints as soon as reasonably practicable" (emphasis added). Section 22683 does not require that complaints reach a resolution, and the definition of "resolution" supplied by Rule 1620.08(a) is vague. As is the case for all entities engaged in providing consumer services, a program administrator may encounter scenarios where, after dedicating appropriate resources toward addressing a given complaint, the program administrator is still unable to reach a resolution or final conclusion with the consumer. If Rule 1620.08(a) is intended to impose upon program administrators a standard of conclusively resolving all consumer complaints, it will impose a standard that is impossible to satisfy, is not applied to any other product or industry the Department administers and will place an extreme economic burden on program administrators.

Section 22683 does not expressly require any complaint policies or procedures to be approved by the Department. However, Rule 1620.08(a) requires program administrators to "establish and maintain a complaint process approved by the commissioner." It is unclear how program administrators would comply with this requirement. If the requirement is intended to compel program administrators to seek approval from the Department prior to establishing complaint procedures, and to obtain approval from the Department every time an existing process is modified or a new process is established, the requirement would significantly and unnecessarily impair the ability of program administrators to operate and manage their own processes.

The only provision within the CFL that subjects the processes of program administrators to input from the Department is contained within Section 22681, which addresses the requirement to provide training to PACE solicitors. Section 22681 states that "[a] program administrator shall establish and maintain a training program for PACE solicitor agents, which is acceptable to the commissioner." This provision evidences the Legislature's intent to require some form of regulatory review over training, one of the central features of the CFL. However, the absence of any other provision requiring acceptance or approval of processes by the Department confirms that the Legislature neither expected nor intended to require program administrators to seek regulatory approval every time new processes unrelated to training were adopted or modified.

Complaint processes are no exception.

It bears repeating that no other CFL licensee is subject to any Department regulation prescribing complaint handling processes, let alone processes that would require approval by the Department.

ii. Rules 1620.08(b)-(d)

Rules 1620.08(b)-(d) state:

> (b) Prior to the execution of the assessment contract, the program administrator shall notify the property owner of the availability of a process for complaints related to the PACE assessment.
>
> (1) The notice shall include information on how a complaint may be submitted, including through an Internet website and by mail.
>
> (2) The program administrator may accept complaints received by telephone.
>
> (3) If a program administrator does not accept complaints by telephone, the program administrator shall implement a procedure intended to ensure that its complaint process provides access to persons unable to submit a complaint in writing or through the Internet.
>
> (4) A program administrator shall maintain a toll-free telephone number to answer property owner questions and inform property owners on how to submit a written complaint.
>
> (5) The toll-free telephone number shall provide a property owner with the option of speaking with a live representative.
>
> (c) The program administrator shall develop a form for property owners to submit complaints.
>
> (d) The program administrator shall have a link to filing a complaint on the main page of its Internet website.
>
> (1) The submission of an online complaint shall result in a copy of the complaint being transmitted back to an e-mail address provided by the property owner.
>
> (a) (1) A program administrator shall provide a written acknowledgment within five calendar days of the receipt of a complaint.
>
> (2) The acknowledgment shall advise the complainant of the following:
>
> (A) That the complaint has been received.
>
> (B) The date of receipt.
>
> (C) The name and contact information of a single point of contact for the property owner who may be contacted about the complaint.

In Rules 1620.08(b)–(d), the Department prescribes a discrete complaint intake subprocess within the prescribed complaint process imposed upon program administrators. This intake subprocess intrudes upon a program administrator's ability to make its own determinations as to the most effective methods of receiving and acknowledging complaints, and even dictates how a web-based complaints system should be structured, including the placement of a link for filing complaints on the homepage of a program administrator's website, and designating an email address as a required field in an online complaint form. *See* §§ 1620.08(d), (d)(1). Moreover, as

part of the complaint acknowledgment requirements within Rule 1620.08(d), program administrators are required to supply property owners with the name and contact information of a "single point of contact . . . who may be contacted about the complaint." § 1620.08(d)(2)(C).

This level of specificity infinitely exceeds any requirements to which other CFL licensees are subject with respect to the handling of complaints, or any other activity. It also imposes on a program administrator's ability to manage its own operations. For example, Rule 1620.08(d)(2)(C) effectively requires a program administrator to assign a single individual as a contact person for a complaint, which prevents program administrators from establishing processes that involve various specialists handling various stages of a complaint, which is often a more efficient approach to complaint disposition.

While the complaint intake subprocess is highly prescriptive, it is also vague in places. For example, Rule 1620.08(b) requires program administrators to "notify" property owners of "the availability of a process for complaints." It is unclear to what extent the notification must elaborate on the program administrator's "process for complaints." Moreover, if a program administrator does not accept complaints by telephone, it is unclear what alternative process a program administrator could establish to "ensure that its complaint process provides access to persons unable to submit a complaint in writing or through the Internet." *See* § 1620.08(b)(3).

iii. Rule 1620.08(e)

Rule 1620.08(e) states:

> The program administrator shall maintain a log of all complaints that includes the following information for each complaint:
> (1) The date of receipt of the complaint.
> (2) The name of the complainant.
> (3) The complainant's address.
> (4) The nature of the complaint.
> (5) The nature of the resolution.
> (6) The date of resolution.
> (7) The name of the representative assigned to the complaint.

The complaint log required by Rule 1620.08(e) presents multiple concerns. As currently described, the complaint log would include nonpublic personal information protected under the California Financial Information Privacy Act ("FIPA"), which became expressly applicable to program administrators by the codification of the CFL. To the extent that the log would contain the names and addresses of property owners, any public release of such list – whether by a program administrator or the Department, and whether as a result of any annual reporting requirement imposed by the Department or as a result of any public records request – would violate FIPA. Moreover, to the extent that names of employees of program administrators would be subject to publication of any kind, such publication could violate privacy protections afforded to individuals under the California constitution.

The complaint log would require program administrators to record the nature and date of complaint resolutions. As discussed above, what constitutes a "resolution" under Rule 1620 is unclear. Further, by requiring program administrators to record the names of persons assigned to complaints, Rule 1620.08(e) does not recognize that a program administrator may maintain a process wherein it does not assign a specific person or persons to a complaint.

iv. Rule 1620.08(f)

Rule 1620.08(f) states that "[a] program administrator shall provide a complainant with a written response to a complaint that explains the reasons for the program administrator's resolution."

The requirement that a program administrator provide a written response to every complaint received, no matter how minor, and to detail the reasons in support of the "resolution" of every complaint is overly prescriptive and unduly burdensome. By forcing program administrators to shift limited resources from addressing inquiries and complaints to performing the administrative task of preparing written correspondence for every complaint, Rule 1620.08(f) would conflict with the CFL's purpose of promoting consumer protection. Moreover, Rule 1620.08(f) presupposes that a resolution will be achieved for every complaint received by a program administrator. As discussed above, what constitutes a "resolution" under Rule 1620 is unclear.

Moreover, it bears noting that the "written response" in Rule 1620.08(f) is only one part of at least *five* separate processes that could be triggered as a result of a complaint under Rule 1620.08: a process to transmit a copy of an online complaint back to the consumer via email (§1620.08(d)(1)); a process to provide a written acknowledgement within five days of receipt (§1620.08. (d)(1)(a)(1)); a process to provide a status update every 20 days (§1620.08(h)(2)); a process to provide a closing letter upon resolution of complaint (§1620.08(j)); a process to provide records provided within 15 days of request (§1620.08(n)).

v. Rule 1620.08(g)

Rule 1620.08(f) states that "[a] program administrator shall keep in its files all copies of complaints and responses for a period of five years after resolution."

The five-year retention period set forth in Rule 1620.08(f) directly conflicts with the books and records requirement set forth in Rule 1620.07(d), which requires "[c]omplaints and related correspondence" and "[p]roperty owner correspondence" to be retained for three years after a PACE assessment is extinguished. While a five-year retention period is vastly more reasonable than up to 33 years, Rule 1620.08 would compel a substantial increase in the number of complaint-related communications, and a five-year retention period would result in a significant retention burden to program administrators.

vi. Rule 1620.08(h)

Rule 1620.08(h) states:

> (h) The complaint process shall require the program administrator to attempt to resolve complaints regarding PACE financing within 60 days.
>
> (1) The program administrator shall maintain a record of the status of the complaint and, if applicable, the reason the complaint is outstanding more than 60 days.
>
> (2) Each outstanding complaint shall have a status update no later than 30 days after the last status update, that identifies the specific action taken in the last 30 days to actively move the complaint to resolution.

The administrative and timing requirements set forth in Rule 1620.08(h) are overly prescriptive and unduly burdensome. By requiring additional logging activities beyond those required in Rule 1620.08(e), including the logging of regular status updates, actions taken, and reasons why complaints are outstanding, Rule 1620.08(h) would layer on additional administrative steps to a program administrator's existing complaint processes, which would substantially impact the resources available to addressing complaints. Moreover, Rule 1620.08(f) presupposes that a resolution will be achieved for every complaint regarding PACE financing received by a program administrator. As discussed above, what constitutes a "resolution" under Rule 1620 is unclear.

To the extent that Rule 1620.08(h) would require program administrators to create business records that could be construed or misconstrued as statements against interest, program administrators would be unable to comply without creating the unacceptable risk of inviting litigation. In addition, to the extent that Rule 1620.08(h) would require program administrators to log information that may relate to potential or pending legal claims against them, much of the information may be attorney work product or may otherwise be subject to the attorney-client privilege, which would be asserted accordingly. Cal. Evid. Code § 954, Cal. Civ. P. Code § 2018.030.

vii. Rule 1620.08(i)

Rule 1620.08(i) states "[t]he complaint process shall include a requirement for expedited review for complaints involving delinquent assessments, foreclosures, and other imminent harm."

Rule 1620.08(i) assumes that tax delinquencies and foreclosures are events that inherently result in "imminent" consequences, and that such consequences inherently qualify as a "harm." This is not accurate. If a property owner fails to make a property tax payment on time, the property taxes become delinquent. While the property owner may incur considerable penalties as a result, these penalties are charged to taxpayers in the ordinary course of the property tax collection process in California, and a mere delinquency does not imminently result in a foreclosure sale. If property taxes remain unpaid and a tax default occurs, the public agency responsible for recording the assessment may initiate judicial foreclosure proceedings, but the judicial foreclosure process is slow, and usually takes years. While nonjudicial foreclosure proceedings initiated by other

parties are faster, these proceedings may be completely unrelated to PACE financing. For example, a property owner may obtain a second mortgage 10 years after obtaining PACE financing that results in foreclosure five additional years later, even though the property owner's property taxes remain current.

Moreover, property tax records for all property owners, regardless of whether they have obtained a PACE assessment, show that there is a substantial "cure" rate for delinquencies. To assume that a delinquency is an emergency event does not comport with the data.

It is inappropriate to assume that a failure to make an assessment payment is inherently attributable to an act or omission related to the PACE financing that would render a tax delinquency or foreclosure a "harm." The failure to make a payment may be a straightforward failure to make a payment. Moreover, because PACE assessments are merely one component of a property owner's property taxes, it cannot be assumed that a property owner's failure to pay property taxes is even related to the PACE financing. For example, a property owner may acquire a property with five years of remaining assessment payments, which account for twenty percent of the property owner's overall property tax liability. If, three years later, that property owner fails to make a property tax payment, such failure would be deemed an "imminent harm" under the construct set forth in Rule 1620.08.

As demonstrated by both examples provided above, Rule 1620.08 effectively prioritizes complaints unrelated to PACE financing over those related to PACE financing. In addition, it unduly burdens program administrators with a heightened responsibility to address issues involving delinquencies and foreclosures on properties subject to a PACE assessment, regardless of whether such delinquencies and foreclosures are related to PACE financing.

viii. Rule 1620.08(j)

Rule 1620.08(j) states:

> Upon resolution of the complaint, the program administrator shall send a closing letter to the complainant that provides the following:
> (1) PACE solicitor contact information.
> (2) Sponsoring public agency contact information.
> (3) Department of Business Oversight contact information for complaints.
> (4) Contractors State License Board contact information for consumer complaints related to performance of the home improvement contract.

As discussed previously, the definition of "resolution" is vague, ambiguous, and creates uncertainty for the program administrator as to whether they have complied with the Department's expectations. Further, the closing letter required under Rule 1620.08(j) is an unnecessary duplication of the written response required under Rule 1620.08(f). As with Rule 1620.08(j), Rule 1620.08(f) would compel program administrators to dedicate resources that could otherwise be used to address complaints to administrative tasks. In addition, nearly all of information required by the closing letter would already be available to property owners. The property owner's home improvement contract would already contain the information regarding

the property owner's home improvement contractor, as well as information regarding how to submit complaints to the CSLB. *See* Cal. Bus. & Prof. Code §§ 7159(c)(3)(B)(ii), (d)(1)-(2), (e)(1)-(2), (e)(5). Information regarding the sponsoring public agency would already be available in the public agency's assessment contract and in the cancellation notice required under Section 5898.16 of the Streets and Highways Code.

Rule 1620.08(j) appears to assume that all complainants will have contracted with a home improvement contractor that qualifies as a PACE solicitor. This will not be true in all cases. Because PACE solicitor information is required to be included in the closing letter, it is unclear how program administrators would be able to comply with Rule 1620.08(j) in such cases.

ix. Rule 1620.08(k)

Rule 1620.08(k) states:

> The complaint process shall 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 telephone relay systems and other devices that help disabled individuals communicate.

Rule 1620.08(k) conflicts with and substantially exceeds the scope of the provisions applicable to program administrators with respect to foreign languages. These provisions were established through the adoption of SB-242, and are located within Sections 5913(d)-(e) of the Streets and Highways Code. In short, program administrators are *expressly not required by law* to support any foreign language. To the contrary, a program administrator is required to stop a PACE transaction from proceeding if, during the terms confirmation call, a property owner informs the program administrator that he or she would prefer to communicate in one of five specified foreign languages (Spanish, Chinese, Tagalog, Vietnamese, or Korean), and the "preferred language is not supported" by the program administrator. Cal. Sts. & High. Code § 5913(d).

Such support is expressly defined as the program administrator's ability to (i) perform the remainder of the terms confirmation call in whichever one of the five specified languages identified by the property owner as his or her preferred language, and (ii) provide the property owner with a translated assessment contract, financing estimate and disclosure form, and cancellation notice in that language. *Id.* § 5913(e). If a program administrator is able to perform the terms confirmation call and provide those documents in one of the five specified languages, it gains the right to permit the transaction to proceed. *Id.* § 5913(d).

The PACE Statutes do not require foreign language support in any language beyond the five specified languages under any circumstance. To the extent a program administrator opts to support one of those specified languages, the support need only extend to terms confirmation

calls, assessment contracts, financing estimate and disclosure forms, and cancellation notices. A program may also opt not to support those or any other language if it chooses.

Rule 1620.08(k) purports to require program administrators to provide translations of complaint-related forms and correspondence in every language that may be deemed to satisfy the linguistic needs of property owners, and to provide interpreters of every such language. A program administrator can fully comply with Section 5913 by preventing transactions from continuing when a property owner indicates a preference to speak in one of the five designated languages. However, if a property owner initially indicates a preference to speak in a supported language and later indicates a need to speak in any language that is not supported, Rule 1620.08(k) would require that program administrator to provide support in that language, including by providing translated correspondence and interpreters (if one is not chosen by the property owner).

For example, a property owner may initially indicate a preference to speak in Spanish, a language supported by a given program administrator. Later, that same property owner (or a separate owner of the same property) may indicate a need to speak in French. Rule 1620.08(k) would compel that program administrator to provide support to that property owner in French. This requirement directly contradicts Section 5913, and imposes an impossible standard on all program administrators, a standard that is entirely without precedent under any state or federal law, including for large entities such as banks, mortgage lenders, and other finance companies. Not only does Rule 1620.08(k) contradict Section 5913, it also introduces a vastly greater scope than intended by the Legislature. The framework of Section 5913 is clearly limited in scope to five designated languages, whereas Rule 1620.08(k) would require program administrators to support any foreign language so long as it is deemed to meet the linguistic needs of property owners.

Rule 1620.08(k)'s requirement that program administrators meet the "cultural needs" of property owners is vague and overbroad, and it provides no indication of how program administrators could achieve compliance with this requirement. Moreover, this requirement also contradicts and far exceeds the provisions contained within Section 5913.

x. Rule 1620.08(l)

Rule 1620.08(l) states:

> If the complaint involves an issue of contractor workmanship and the contractor was (or should have been) a PACE solicitor enrolled by the program administrator, the program administrator shall verify all of the following:
>
> (1) The efficiency improvements financed by the assessment contract were performed.
>
> (2) The PACE solicitor installed the same products for which the PACE solicitor was paid.
>
> (3) The efficiency improvements were completed.
>
> (4) Any building permits were finalized.

Rule 1620.08(l) would impose an extreme burden on program administrators by requiring them to engage in disproportionately extensive investigative activities in response to complaints involving workmanship issues. To the extent that Rule 1620.08(l) is intended to require program administrators to respond to every workmanship-related complaint by performing an on-site inspection to verify that a home improvement project is completed and that all financed improvements are installed, this requirement is prohibitively expensive and altogether impossible physical requirement to satisfy.

Many types of workmanship-related complaints do not involve allegations of a failure to complete work or a failure to install all of the financed improvements. However, all such complaints would trigger the verification requirements of Rule 1620.08(l). For example, if a program administrator receives a complaint that a home improvement contractor caused minor damage to a property owner's roof while installing solar panels, that program administrator would have to engage in an extensive verification process that is wholly unnecessary and unrelated to the complaint at issue. As this example illustrates, Rule 1620.08(l) pushes well beyond the statutory requirement that a program administrator "develop and implement policies and procedures for responding to questions and addressing complaints as soon as reasonably practicable."

xi. Rule 1620.08(m)

Rule 1620.08(m) states that "[t]he complaint process must include a procedure for investigating complaints of fraud or forgery."

Rule 1620.08(m) unnecessarily requires the institution of a separate procedure for complaints alleging fraud or forgery. This requirement interferes with the ability of program administrators to "develop and implement policies and procedures for responding to questions and addressing complaints." Cal. Fin. Code § 22683. For example, a program administrator may determine that the most effective way to address allegations of fraud or forgery is through the application of a more comprehensive procedure that equally applies to other types of allegations, rather than a procedure narrowly targeted to fraud and forgery. This discretion is eliminated by Rule 1620.08(m).

In addition, by requiring program administrators to perform investigations for an entire class of complaints, irrespective of the legitimacy of a given complaint, Rule 1620.08(m) extends beyond the outer bounds of Section 22683, the purpose of which is "responding to questions and addressing complaints." In some cases, addressing a complaint alleging fraud or forgery may not require any investigation beyond that applied to all other complaints.

xii. Rule 1620.08(n)

Rule 1620.08(n) states:

> A program administrator shall provide a property owner with records related to the property owner's assessment contract, and any related complaint records, within 15 days of a request.

(1) Nothing in this section shall restrict the ability of a property owner to obtain records through other lawful means.

Rule 1620.08(n) lacks statutory foundation with respect to its requirement that program administrators provide property owners with complaint records upon request. As with all other legal and natural persons, including all other licensees under the CFL, program administrators are not compelled to provide internal records to private parties absent a legal requirement or valid legal process, like a subpoena or a court order. In addition, to the extent that Rule 1620.08(n) would require program administrators to provide information that may relate to potential or pending legal claims against them, much of the information may be attorney work product or may otherwise be subject to the attorney-client privilege, which would be asserted accordingly. Cal. Evid. Code § 954, Cal. Civ. P. Code § 2018.030.

IX. Rule 1620.09: Completion of Work

A. Overview of Response to Rule 1620.09

Rule 1620.09 of the Draft Regulations would compel program administrators to (i) obtain all copies of home improvement contracts from PACE solicitors, (ii) obtain evidence of approval of all building permits prior to making final payments to PACE solicitors, and (iii) for solar improvements, obtain confirmation that a property owner obtains permission to operate from the utility company.

These requirements lack any statutory foundation, and run counter to the role of program administrators contemplated by the PACE Statutes. Program administrators are defined by their roles in acting on behalf of public agencies to administer a form of public financing. *See* Cal. Fin. Code § 22018 (defining a program administrator as "a person administering a PACE program on behalf of, and with the written consent of, a public agency"). Consistent with this role, the obligations imposed upon program administrators by the PACE Statutes relate to the financial aspects of PACE financing, including enrolling, training, and disenrolling PACE solicitors and PACE solicitor agents who participate in PACE, and establishing and maintaining processes designed to optimize the conduct of PACE solicitors and PACE solicitor agents with respect to the PACE programs they administer. *See* Cal. Fin. Code §§ 22680, 22681, 22689.

Nowhere do the PACE Statutes purport to require program administrators to oversee the various aspects of construction practices and the logistics of installing improvements, including permitting and issues related to utility companies. The CSLB performs many of the functions with respect to PACE solicitors and PACE solicitor agents, not program administrators or the Department. Moreover, home improvement contractors are not performing the duties of PACE solicitors or PACE solicitor agents when they are executing building permits and permissions to operate. These are basic functions of home improvement contractors more broadly. Therefore, the provisions of Rule 1620.09 are beyond the scope and at odds with the language and the design of the PACE Statutes.

Moreover, Rule 1620.09 is not reasonably necessary to effectuate the statutory purpose of protecting consumers, because the PACE Statutes impose other controls on consumer disclosures and on the responsibilities of program administrators with respect to PACE solicitors and PACE solicitor agents. As a result, these provisions only serve to burden program administrators without providing a corresponding benefit or protection to the consumer.

B. Response to Rule 1620.09

i. Rule 1620.09(a)

Rule 1620.09(a) states that "[a] program administrator shall obtain a copy of each home improvement contract from a PACE solicitor."

The Department lacks the statutory authority to promulgate this rule. Rule 1620.09 identifies various responsibilities of program administrators with respect to the PACE solicitors, all of

which relate to *financing*, not *home improvement contracting*. Given the comprehensiveness and specificity of these requirements, it is notable that the PACE Statutes never veer into the realm of home improvement contracting by requiring program administrators to obtain home improvement contracts.

Further, where the PACE Statutes do speak to consumer disclosures and documentation, they do not refer to home improvement contracts. For example, Section 5913(a)(1)(A) of the Streets and Highways Code requires a program administrator to confirm, during a terms confirmation call, that a property owner has "a copy of the contract assessment documents . . . the financing estimate and disclosure form . . . and the right to cancel form . . . ." This provision does not require the program administrator to confirm receipt of a home improvement contract, nor does any other, precisely because the home improvement contract relates to home improvement contracting, not financing. It is clear that the Legislature did not intend for program administrators to be responsible for obtaining home improvement contracts. Rule 1620.09(a) is therefore inconsistent with the PACE Statutes.

The collection of the home improvement contract by a program administrator also does not provide any benefit or protection to the consumer. Program administrators are not parties to home improvement contracts, and cannot enforce any rights or obligations contained therein, nor should they. Program administrators are not regulators of home improvement contractors, they are private entities that manage public financing programs on behalf of public agencies. As a result, Rule 1620.09(a) is not reasonably necessary to effectuate the purpose of the PACE Statutes.

Moreover, program administrators already undertake reasonable efforts to obtain information contained within home improvement contracts that is relevant to PACE financing, like the improvements installed and the project amount. This information is required in the ordinary course of administering a PACE program, and enables program administrators to comply with the actual requirements of the PACE Statutes.

Rule 1620.09(a) assumes a correlation that does not exist between the collection of the home improvement contract, the eligibility of products financed through PACE, and the protection of consumers. There is no data-driven analysis or evidentiary basis to suggest otherwise. In fact, Renovate America recently conducted a year-long analysis of a random sample of home improvement contracts, and results suggested there is no such correlation. In this analysis, the Administrator requested nearly 300 home improvement contracts and only two contracts were flagged as a potential concern (0.69%), one of which was a false positive (0.34%) and one of which was not (0.34%). The results demonstrated the lack of a predictive or useful compliance nexus between the collection of the home improvement contract and the identification of a violation or abuse of PACE financing.

Finally, requiring a program administrator to collect home improvement contracts places a significant economic burden and operational constraint on program administrators. The collection of home improvement contracts inevitably results in extended periods of "chasing" documents that is resource-prohibitive and unbeneficial. It is also not required for any other form of home improvement financing. This provision also imposes additional burdens on PACE

solicitors that are not required for other forms of home improvement financing. The economic burden imposed by the provision is simply not justified by any perceived consumer protection benefit.

ii. Rule 1620.09(b)-(c)

Rules 1620.09(b)-(c) state:

> (b) Before providing the final payment on a home improvement contract for property secured by a PACE assessment, a program administrator shall obtain evidence from the PACE solicitor that every building permit required for the efficiency improvements under the home improvement contract has received final approval and been signed by a building inspector, as required by the local jurisdiction.
> (c) If the financing is for a solar project that requires permission to operate from a utility company, the program administrator shall confirm that the property owner is able to obtain the necessary permission before providing final payment on the home improvement contract to the PACE solicitor.

Rule 1620.09(b) exceeds the scope of the PACE Statutes. As discussed above, the PACE Statutes delineate the responsibilities of program administrators with respect to property owners, PACE solicitors, and PACE solicitor agents. None of these responsibilities relate to obtaining final permits.

Under California law, obtaining and ultimately receiving final approval of construction permits is ultimately the responsibility of property owners. This responsibility is enforced by the local government within whose boundaries the subject property is located. By requiring program administrators to obtain evidence of all final permits, Rule 1620.09(b) would therefore force program administrators to take on the responsibilities of property owners and local governments. This directly conflicts with California's established construction-permitting framework, which is independently maintained by hundreds of city, county, and town building departments.

For example, the city of Sacramento County Building Permits and Inspectors requires one or more inspections by its County Building Permits and Inspectors to verify that permitted work has been done correctly and that the public have safe use of any building. The County specifically states permitting is the responsibility of property owners. County guidance states that "[T]he current property owner (and future owner) is ultimately the responsible party (in dealing with Sacramento County Building Permits and Inspections) to ensure that the permitting and inspections were completed on his/her property." Responsibility for Inspection of your Permitted Work: General Information for the Contractor and Property Owner, http://www.building.saccounty.net/Public%20Documents/AP-15%20Responsibility%20for%20Inspection%20of%20your%20Permitted%20Work.pdf.

The same is true with respect to Rule 1620.09(c), which requires a program administrator to confirm that a property owner is able to obtain the necessary permission to operate ("PTO") from a utility company, if required as part of their solar home improvement project. This is also the responsibility of the property owner or their home improvement contractor.

Rules 1620.09(b)-(c) condition final payment to the PACE solicitor on the receipt of final permits and confirmation of the property owner's ability to receive PTO, respectively. This condition exceeds the CFL's stated purpose of consumer protection.

Moreover, these provisions place an extraordinary economic burden and operational constraint on program administrators, not only requiring them to become experts on building permits and processes related to utility companies, but also forcing them to track down every single building permit and every PTO confirmation prior to completing the PACE financing process. This is an impracticable task required of no other form of home improvement financing, and would likely lead to the withdrawal of home improvement contractors from PACE altogether.

X. Rule 1620.10: Unfair Business Practices

A. Overview of Response to Rule 1620.10

Rule 1620.10(a) purports to deem certain activities to be "unfair business practice[s]" by program administrators under Section 22161 of the Financial Code. However, Section 22161 does not actually recognize the concept of an "unfair business practice." Rather, it incorporates by reference Section 17200 of the Business and Professions Code, which broadly prohibits unfair business practices without specifically defining them. *See* Cal. Fin. Code § 22161(d). The Legislature left to the judiciary the task of determining what constitutes an unfair business practice, and courts have applied varying standards over time by which to give meaning to this term.

While not acknowledging it directly, the Department is in fact attempting to deem certain activities unfair business practices under Section 17200, a statute over which the Department has no rulemaking authority. This would eliminate the due process rights that would otherwise be afforded to program administrators for alleged violations of Section 17200. In effect, the Department proposes to permit itself to skip the step of having to allege a violation, and instead create a class of activities that it can deem violations without challenge. Through Rule 1620.10(a), the Department would adjudicate by regulation what activities violate Section 17200, and would need only ever prove that a program administrator engaged in one of those defined activities.

Establishing what constitutes a violation of Section 17200 is an exercise unquestionably within the province of the Legislature and the courts, not the Department. The Legislature sought fit to leave unfair business practices undefined, and the judiciary has taken to defining them. The Legislature was not silent, however, in defining how a violation of Section 17200 could be established: through prosecution "exclusively in a court of competent jurisdiction." Cal. Bus. & Prof. Code § 17204. The Legislature was also clear in defining which state actors may allege such violations: the Attorney General, district attorneys, county counsels, city attorneys, and city prosecutors. Cal. Bus. & Prof. Code § 17204. By attempting to bootstrap its way into Section 17200, the Department is usurping the authority of the Legislature, the judiciary, and the Attorney General.

Separately, Rule 1620.10(b) highlights the Department's efforts to engage in a different bootstrapping exercise, wherein the Department intends to regulate home improvement contractors and home improvement salespersons without any statutory authority, using program administrators as its means of enforcement. This concept alone is troubling, but it is compounded by the numerous provisions within Rule 1620.10(b) (and elsewhere throughout the Draft Regulations) that would result in the prior restraint of constitutionally protected commercial speech. Effectively, the Department would enlist the program administrators to act on behalf of the state to infringe upon the constitutional rights of home improvement contractors throughout California.

Renovate America supports the sentiment behind Rule 1620.10(b), which appears primarily concerned with intentional misrepresentations regarding PACE financing. However, the

approach taken by the Department is problematic, because it does not provide adequate consideration of the constitutional protections that apply to commercial speech. Restrictions of speech by state actors must be sufficiently tailored to ensure that true speech is not being unconstitutionally suppressed. Whether intentional or not, the provisions within Rule 1620.10(b) are not sufficiently tailored, and would prohibit constitutionally protected commercial expression in many circumstances.

To be constitutionally valid, a regulation that restricts commercial speech concerning lawful activity must: (i) seek to implement a substantial governmental interest; (ii) directly advance that interest; and (iii) reach no further than necessary to accomplish the given objective. *See Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 610 (9th Cir. 1993) (citing *Cent. Hudson*., 447 U.S. at 563–66); *see also Gerawan Farming, Inc. v. Kawamura*, 33 Cal. 4th 1, 23 (2004). As the party seeking to regulate commercial speech, the government has the burden of affirmatively establishing that the regulation meets each of these three elements. *See Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n. 20 (1983).

Many of the provisions within Rule 1620.10(b) fail to satisfy all three of the elements enumerated above, particularly the third element. Even if some of the provisions would have the effect of prohibiting intentional misrepresentations, they would also sweep in a significant amount of true commercial speech. The provisions reach much further than necessary to achieve the purpose of prohibiting misrepresentations about PACE, as discussed in detail below.

Moreover, Rule 1620.10(b) imposes no fewer than twenty separate requirements attempting to compel program administrators to implement policies and procedures to govern the behavior of PACE solicitors and PACE solicitor agents. The sheer volume of requirements creates a crushing burden for program administrators, and extends far beyond what is reasonably necessary to effectuate the purpose of the PACE Statutes.

B. Response to Rule 1620.10

i. Rule 1620.10(a)(1)

Rule 1620.10(a)(1) states that "[d]isclosing to a PACE solicitor or PACE solicitor agent the amount of PACE financing available to a property owner" constitutes an unfair business practice by a program administrator under Section 22161 of the Financial Code.

As discussed, Rule 1620.01(a) is facially invalid because the Department does not have the authority to unilaterally deem any activity an unfair business practice under Section 17200. Rule 1620.10(a)(1) is also vague and overbroad, and could be construed to prohibit otherwise permissible activity.

Rule 1620.10(a)(1) relates back to Section 5925 of the Streets and Highways Code, which states that "[a] program administrator shall not provide to a contractor or third party engaged in soliciting assessment contracts on its behalf any information that discloses the amount of funds for which a property owner *is eligible* under a PACE assessment" (emphasis added). Rule

1620.10(a)(1) could be read to extend beyond the prohibition of communications regarding amounts for which property owners are *eligible*, and apply more broadly to communications regarding (i) financing amounts that have already been *accepted*, (ii) amounts that are to be paid to PACE solicitors upon completion of home improvement projects, and (iii) whether the amount of available financing accepted by the property owner is sufficient to cover the amount of the home improvement contract. If this provision is interpreted broadly to cover these types of communications, PACE solicitors and PACE solicitor agents would be expected to complete home improvement projects with no indication of how much they would be paid through the proceeds of PACE financing, or whether they would be paid at all. The possibility of such an interpretation renders Rule 1620.10(a)(1) an unconstitutional prior restraint of protected commercial speech.

ii. Rules 1620.10(a)(2)-(5)

Rules 1620.10(a)(2)-(5) state:

> The following activities constitute an unfair business practice by a program administrator, under Financial Code section 22061 *[sic]*.
>
> . . .
>
> (2) Paying a PACE solicitor for unperformed work.
> (3) Paying a PACE solicitor for an uninstalled product. For purposes of this paragraph, a warranty shall not constitute an uninstalled product.
> (4) 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.
> (5) Paying a PACE solicitor for work for which the solicitor has already received payment from another source.

Rules 1620.10(a)(2)-(5) purport to deem the mere act of making a payment to a PACE solicitor an unfair business practice in certain circumstances. No court would uphold this determination. California courts have applied various tests to determine whether alleged conduct is "unfair" under Section 17200, but those tests do not simply assume that such conduct is unfair because one party says so. Moreover, such tests require an allegation of harm, unlike Rules 1620.10(a)(2)-(5). *See, e.g., In re Firearm Cases*, 126 Cal. App. 4th 959, 981 (2005) ("[W]e do not believe a UCL violation may be established without a link between a defendant's business practice and the alleged harm."); *Camacho v. Automobile Club of Southern California*, 142 Cal. App. 4th 1394, 1403 (2006) (adopting from Section 5 of the Federal Trade Commission Act the following analytical factors: "(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided"). Regardless of whether the test applied focuses on the causation of the injury, or the character of the injury, there has to be an injury. Rules 1620.10(a)(2)-(5) do not articulate any injury.

The tests adopted by *In re Firearm Cases* (the "*Firearm Cases*") and *Camacho* are predominant in California courts. In the *Firearm Cases*, the court interpreted causation of harm as the basis in determining whether a business practice was "unfair." 126 Cal. App. 4th at 981. Here, the Department would deem the making of payments to PACE solicitors "unfair" if such payments

were made "for unperformed work," "for an uninstalled product," "for a product that materially differs in price from the product installed on the property, where the installed product costs less," and "for work for which the solicitor has already received payment from another source." §§ 1620.10(a)(2)-(5). The act of making a payment to a home improvement contractor causes no harm to any person, and bears no reasonable relation to the CFL's statutory purpose of consumer protection. If, however, an independent home improvement contractor has received a payment for providing goods and services without having done so, any harm that may occur is harm *caused* by the home improvement contractor, not the program administrator's payment. Therefore, Rules 1620.10(a)(2)-(5) would fail under the *Firearm Cases* test.

Similarly, the consequence of paying a home improvement contractor cannot be characterized as an injury, let alone a substantial injury that is not outweighed by countervailing benefits, and that a consumer could not reasonably have avoided. If an independent home improvement contractor has received a payment for providing goods and services without having done so, any injury that may occur depends on what that injury actually is. For example, if a PACE solicitor and property owner each misrepresent to a program administrator that the PACE solicitor completed a home improvement project at the property owner's residence, causing the program administrator to make a payment to the PACE solicitor, and the PACE solicitor remits the proceeds to a property owner, what is the consumer injury? If the PACE solicitor keeps one percent of the proceeds instead of providing the entire amount to the property owner, is that an injury that the property owner could not reasonably have avoided? While examples of PACE solicitors obtaining payments for unperformed or incomplete work are exceedingly rare, it cannot be said that such payments are themselves an injury, and that the program administrator is the cause. Therefore, Rules 1620.10(a)(2)-(5) would fail under the *Camacho* test.

The burden that Rules 1620.10(a)(2)-(5) would place on program administrators would be insurmountable. To achieve compliance with Rules 1620.10(a)(2)-(4), program administrators would have to perform on-site inspections at the residence of every property owner who obtained PACE financing to confirm that all work was performed and all products were installed. It is unclear whether compliance with Rule 1620.10(a)(5) would even be possible, because it would appear to require program administrators to have continuous visibility into every PACE solicitor's books, records, and accounts, in order to determine whether PACE solicitors are receiving payments from other sources for the same work. These requirements would eliminate PACE as a viable home improvement financing option in California.

iii. Rule 1620.10(a)(6)

Rule 1620.10(a)(6) states that "[d]elaying the consummation of an assessment contract to postpone the property owner's obligation to pay the PACE assessments" constitutes an unfair business practice by a program administrator under Section 22161 of the Financial Code.

Rule 1620.10(a)(6) relates back to Section 5914 of the Streets and Highways Code, which states, in relevant part, that "[a] program administrator may not waive or defer the first payment on an assessment contract." While Renovate America fully supports this requirement, there is no basis to conclude that delaying a property owner's first payment date would result in any consumer harm. For this and all other reasons discussed, this provision would not withstand challenge.

iv. Rule 1620.10(b)(1)

Rule 1620.10(b)(1) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor a PACE solicitor agent "[r]epresents to a property owner that a PACE assessment may be repaid in any manner other than through the payment of property taxes."

Rule 1620.10(b)(1) would compel program administrators to act on behalf of the state to engage in the unlawful prior restraint of constitutionally protected commercial speech. In many cases, PACE assessments *can* and *are* repaid through a manner other than through the payment of property taxes. For example, many property owners pay their property taxes through mortgage escrow accounts (also referred to as "impound accounts"). In addition, property owners who desire to make partial or full prepayments cannot make such payments through the ordinary property tax collection process. Instead, they are usually required to make payments to a third party generally referred to as an assessment engineer. By compelling program administrators to prohibit PACE solicitors from making true statements to property owners, Rule 1620.10(b)(1) would violate PACE solicitors' rights to free speech under the United States Constitution and the California Constitution.

v. Rule 1620.10(b)(2)

Rule 1620.10(b)(2) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor a PACE solicitor agent "[r]epresents to a property owner that the PACE program is a free or subsidized government program."

While Renovate America appreciates the sentiment behind Rule 1620.10(b)(2), it is not sufficiently tailored to avoid infringing upon constitutionally protected commercial speech, and it would likely compel program administrators to act on behalf of the state to engage in the unlawful prior restraint of such speech. This provision is unduly vague and could be construed as prohibiting any statements regarding the reality that PACE programs are *inherently* government programs. It could also be construed as prohibiting any statements regarding the potential tax benefits associated with PACE financing, to the extent those could be viewed as subsidizing PACE. It could also be construed as prohibiting any statements related to the PACE Loss Reserve Program administered by the California Alternative Energy and Advanced Transportation Financing Authority ("CAEATFA"), a division of the State Treasurer's Office. The PACE Loss Reserve Program maintains a fund against which claims can be made by first mortgage lenders for any direct losses incurred due to the existence of a PACE lien on a property during a foreclosure or forced sale. Rule 1620.10(b)(2) could also prohibit additional speech in the event of future legislative action. For example, this would occur if the Legislature authorized a direct subsidy from the state to certain property owners who obtained PACE financing.

By compelling program administrators to prohibit PACE solicitors from making true statements to property owners, Rule 1620.10(b)(2) would violate PACE solicitors' rights to free speech under the United States Constitution and the California Constitution.

vi. Rule 1620.10(b)(3)

Rule 1620.10(b)(3) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor a PACE solicitor agent "[r]epresents to a property owner that the PACE program is available to the property owner based on the property owner's age, race, ethnicity, or income status."

While Renovate America appreciates the sentiment behind Rule 1620.10(b)(3), it is not sufficiently tailored to avoid infringing upon constitutionally protected commercial speech, and it would compel program administrators to act on behalf of the state to engage in the unlawful prior restraint of such speech. PACE financing is in fact only available to property owners of a certain age and income status. In California, an individual under the age of eighteen is entitled to own real property. *Estate of Yano*, 188 Cal. 645, 649 (1922). However, an individual under the age of eighteen cannot "[m]ake a contract relating to real property or an interest therein." Cal. Fam. Code § 6701(b). Therefore, a property owner cannot enter into an assessment contract if such property owner is under the age of eighteen. Moreover, the CFL requires program administrators to engage in an extensive ability-to-pay analysis to determine the amount of PACE financing available to a property owner based on the property owner's ability to pay. Some property owners will not qualify for any PACE financing on this basis. Therefore, it is entirely true that PACE financing is available to property owners based on their income status.

By compelling program administrators to prohibit PACE solicitors from making true statements to property owners, Rule 1620.10(b)(3) would violate PACE solicitors' rights to free speech under the United States Constitution and the California Constitution.

vii. Rule 1620.10(b)(4)

Rule 1620.10(b)(4) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor a PACE solicitor agent "[r]epresents to a property owner that the property owner prequalifies for eligibility prior to the program administrator determining the property owner's ability to pay, as provided in Financial Code section 22687."

Rule 1620.10(b)(4) would compel program administrators to act on behalf of the state to engage in the unlawful prior restraint of constitutionally protected commercial speech. In financial services, the term "prequalification" generally refers to a process in which a consumer requests to see whether they may qualify for a given financial product. The consumer is thereafter presented with an indication of whether the consumer may qualify for the product. This is not treated as a financing approval, and additional conditions must be satisfied in order for an approval to be made.

Nothing prohibits program administrators from establishing prequalification processes. If a program administrator maintains a prequalification process, and a PACE solicitor makes a true statement regarding the outcome of that process with respect to a given property owner, the prohibition of such statement is an unconstitutional prior restraint of speech. By compelling program administrators to prohibit PACE solicitors from making true statements to property

owners, Rule 1620.10(b)(4) would violate PACE solicitors' rights to free speech under the United States Constitution and the California Constitution.

viii. Rule 1620.10(b)(5)

Rule 1620.10(b)(5) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor a PACE solicitor agent "[r]epresents 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."

While Renovate America appreciates the sentiment behind Rule 1620.10(b)(5), it is not sufficiently tailored to avoid infringing upon constitutionally protected commercial speech, and it would compel program administrators to act on behalf of the state to engage in the unlawful prior restraint of such speech. This provision is vague and overbroad, and would require program administrators to create standards by which PACE solicitors could reasonably determine what qualifies as "scientific," what qualifies as "evidence," what qualifies as "generally accepted," what qualifies as the "scientific community," and what would sufficiently "establish" that an improvement is energy efficient in order to determine what speech the Department sought to silence. Moreover, the program administrator would have to continuously evaluate whether its assumptions related to those terms would agree with the interpretation of the Department, and would be forced into a role of policing this interpretation.

By compelling program administrators to prohibit PACE solicitors from making true statements to property owners, Rule 1620.10(b)(5) would violate PACE solicitors' rights to free speech under the United States Constitution and the California Constitution.

ix. Rule 1620.10(b)(6)

Rule 1620.10(b)(6) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor a PACE solicitor agent "[r]epresents to a property owner that a PACE assessment will result in a tax credit or tax benefit."

Rule 1620.10(b)(6) would compel program administrators to act on behalf of the state to engage in the unlawful prior restraint of constitutionally protected commercial speech. This provision is vague, and to the extent it could be read to prohibit all representations regarding the *potential* tax benefits of PACE, it is also overbroad. For example, if a property owner tells a PACE solicitor that he or she always deducts the interest portion of the mortgage payments on the property from his or her income taxes, and the PACE solicitor responds that the interest portion of the PACE assessment may be tax deductible in accordance with IRS Topic 503, would the PACE solicitor be viewed as having represented that the PACE assessment *will* result in a tax benefit to the property owner? It is unclear. Although the PACE solicitor's statement would clearly comply with Section 5924 of the Streets and Highways Code, which permits representations that are "consistent with representations, statements, or opinions of the Internal Revenue Service," it could run afoul of the speech restrictions within Rule 1620.10(b)(6).

Similarly, it is unclear if a property owner obtains PACE to finance a solar photovoltaic system, and the system qualifies for a federal investment tax credit, whether a PACE solicitor or PACE solicitor agent be barred from representing the potential availability of the credit.

By compelling program administrators to prohibit PACE solicitors from making true statements to property owners, Rule 1620.10(b)(6) would violate PACE solicitors' rights to free speech under the United States Constitution and the California Constitution.

x. Rule 1620.10(b)(7)

Rule 1620.10(b)(7) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor a PACE solicitor agent "[f]ails to complete the home improvement contract that is financed by the assessment contract."

Rule 1620.10(b)(7) is vague and overbroad. It is unclear whether this provision refers to filling in all blank spaces within a home improvement contract so that it is "complete" or whether it refers to completing the work contemplated by the home improvement contract. If the former, this provision would create a very specific obligation of program administrators, one which would require them to perform an administrative function on behalf of home improvement contractors, and which would also lack statutory foundation. Nowhere in the PACE Statutes is there a requirement for program administrators to obtain copies of home improvement contracts, let alone review them for completeness. To do so would impose an undue burden on program administrators, without a commensurate consumer protection benefit.

If Rule 1620.10(b)(7) instead refers to completion of the home improvement project, it appears to require program administrators to attempt to ensure that all obligations set forth in all home improvement contracts have been satisfied, rather than rely upon representations from property owners and contractors to that effect. This would also require program administrators to engage in detailed reviews of every home improvement contract, and would further require them to perform on-site inspections to validate whether every obligation had been satisfied. Nowhere in the PACE Statutes are such on-site reviews required or even contemplated. The burden that such a requirement would impose upon program administrators would effectively eliminate the PACE industry in California.

xi. Rule 1620.10(b)(8)

Rule 1620.10(b)(8) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor a PACE solicitor agent "[r]epresents to a property owner that a home improvement that is not an efficiency improvement may be financed through a PACE assessment, or otherwise provided to a property owner who enters into an assessment contract."

Rule 1620.10(b)(8) would compel program administrators to act on behalf of the state to engage in the unlawful prior restraint of constitutionally protected commercial speech. This provision is vague and overbroad, and could be interpreted to prohibit statements indicating that non-efficiency improvements may be installed as part of a home improvement project that also

includes efficiency improvements financed through an assessment contract. Although the Department may not have intended for Rule 1620.10(b)(8) to be applied in this manner, the plain language of the provision prohibits representations "that a home improvement that is not an efficiency improvement may be . . . otherwise provided to a property owner who enters into an assessment contract."

PACE solicitors are not prohibited from providing non-efficiency improvements to property owners simply because they also happen to install efficiency improvements financed through a PACE assessment. For example, a PACE solicitor may install solar panels on the roof of a property owner's residence, which the property owner finances through a PACE assessment, and also install a room addition, which the property owner pays for in cash, or through another form of financing. Informing a property owner of this possibility would be a true statement that Rule 1620.10(b)(8) would prohibit.

By compelling program administrators to prohibit PACE solicitors from making true statements to property owners, Rule 1620.10(b)(8) would violate PACE solicitors' rights to free speech under the United States Constitution and the California Constitution.

xii. Rule 1620.10(b)(9)

Rule 1620.10(b)(9) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor PACE solicitor agent "[r]epresents to a property owner that the property owner will not be liable for the payment of the PACE assessments."

While Renovate America appreciates the sentiment behind Rule 1620.10(b)(9), it is not sufficiently tailored to avoid infringing upon constitutionally protected commercial speech, and it would compel program administrators to act on behalf of the state to engage in the unlawful prior restraint of such speech. In cases where a property owner sells a property subject to a PACE assessment, and the PACE assessment is not paid off, that property owner will no longer be liable for the payment of that PACE assessment. If a PACE solicitor were to explain this concept to a property owner, it would be making a true statement that Rule 1620.10(b)(9) would prohibit. Although the Department may not have intended for Rule 1620.10(b)(9) to be applied in this manner, the provision is sufficiently broad to prohibit constitutionally protected commercial speech.

By compelling program administrators to prohibit PACE solicitors from making true statements to property owners, Rule 1620.10(b)(9) would violate PACE solicitors' rights to free speech under the United States Constitution and the California Constitution.

xiii. Rule 1620.10(b)(10)

Rule 1620.10(b)(10) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor a PACE solicitor agent "[r]epresents to the property owner that the assessment contract will transfer to the buyer upon the sale of the property."

Rule 1620.10(b)(10) would compel program administrators to act on behalf of the state to engage in the unlawful prior restraint of constitutionally protected commercial speech. This provision is vague, and to the extent it could be read to prohibit all representations regarding the *possibility* that an assessment could remain on a subject property when sold, and that a buyer would therefore be responsible for making the remaining payments, it is also overbroad. For example, if a property owner asks a PACE solicitor whether the responsibility to make the remaining assessment payments would "transfer" to the buyer of a property in the even the assessment remained on the property after a sale, and the PACE solicitor accurately responds in the affirmative, this response may be prohibited by Rule 1620.10(b)(10). Although the Department may not have intended for Rule 1620.10(b)(10) to prohibit such a representation, the provision is sufficiently broad to prohibit constitutionally protected commercial speech.

Interpreted in this way, Rule 1620.10(b)(10) would also conflict with the plain language of Sections 5898.17(b) and 5913(a)(2)(I) of the Streets and Highways Code, which require that program administrators disclose that a PACE assessment *may* be required to be paid in full. The obvious corollary is that a PACE assessment also *may not* be required to be paid in full, as noted above.

By compelling program administrators to prohibit PACE solicitors from making true statements to property owners, Rule 162010(b)(10) would violate PACE solicitors' rights to free speech under the United States Constitution and the California Constitution.

xiv. Rule 1620.10(b)(11)

Rule 1620.10(b)(11) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor PACE solicitor agent "[m]isrepresents an increase in a property's market value as a result of the efficiency improvements."

While Renovate America appreciates the sentiment behind Rule 1620.10(b)(11), it is not sufficiently tailored to avoid infringing upon constitutionally protected commercial speech, and it would compel program administrators to act on behalf of the state to engage in the unlawful prior restraint of such speech. Notably, of the fourteen provisions within Rule 1620.10(b) that prohibit PACE solicitor speech, Rule 1620.10(b)(11) is one of only two provisions that actually expressly prohibits statements that that are untrue or misleading. However, this provision is still constitutionally defective due to its overbreadth, because it does not take into consideration the numerous attributes that contribute to property value, or the reasonableness of a representation that ultimately turns out to be inaccurate.

By compelling program administrators to prohibit PACE solicitors from making true statements to property owners, Rule 1620.10(b)(11) would violate PACE solicitors' rights to free speech under the United States Constitution and the California Constitution.

xv. Rule 1620.10(b)(12)

Rule 1620.10(b)(12) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor a PACE solicitor agent "[p]articipates in the evaluation of a property owner's ability to pay an assessment contract."

Rule 1620.10(b)(12) has no statutory foundation, and it bears no relation to the CFL's stated purpose of consumer protection. Moreover, it is vague and overbroad, and could be interpreted to prohibit PACE solicitors from engaging in conduct beneficial to property owners, like assisting property owners in identifying or submitting documentation for the purpose of enabling a program administrator to perform an ability to pay evaluation. Because Rule 1620.10(b)(12)'s prohibition has no basis in the PACE Statutes, including the CFL's stated purpose of consumer protection, its promulgation would exceed the scope of the Department's authority.

xvi. Rule 1620.10(b)(13)

Rule 1620.10(b)(13) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor a PACE solicitor agent "[n]egotiates the terms of an assessment contract."

Rule 1620.10(b)(13) would compel program administrators to act on behalf of the state to engage in the unlawful prior restraint of constitutionally protected commercial speech. This provision generally prohibits the act of negotiating, which renders it inherently constitutionally overbroad. Moreover, the term "negotiate" is vague, and is often interpreted to mean "discuss," "describe," or "explain." As a result, Rule 1620.10(b)(13) could prohibit PACE solicitors from engaging in such benign speech as describing the term lengths available under an assessment contract, or even generally explaining how PACE assessments are repaid.

Rule 1620.10(b)(13) is a prime example of a structural contradiction that permeates the Draft Regulations. Program administrators are subjected to hundreds of requirements never before applied to CFL licensees, including numerous requirements to "intend[] to ensure" every aspect of every action of PACE solicitors, yet PACE solicitors are effectively prohibited from discussing any aspect of an assessment contract, let alone "solicit[ing] a property owner to enter into an assessment contract," which is the very definition of what it means to be a PACE solicitor. Cal. Fin. Code § 22017(a).

The provisions of Rule 1620.10(b) interfere with the intent of the Legislature. Why would the Legislature require program administrators to provide training to PACE solicitors on subjects like "PACE programs and assessment contracts" and "PACE disclosures" if it intended for the Department to prohibit PACE solicitors in numerous ways from making statements about PACE financing? *See* Cal. Fin. Code §§ 22681(b)(1)-(2). Why has the Department elaborated on these requirements, proposing to require PACE solicitors to be educated on "[t]he public benefits behind PACE programs," "[f]inancial disclosures," "[r]epayment terms," "[t]he assessment process," "[i]nterest on assessment contracts," "[f]ees on assessment contracts," "[t]ax benefits," and "[r]epayment obligation[s]," among a number of other things, if the Department intends to

compel the program administrators to prohibit them from saying almost anything? Draft Regulations §§ 1620.17(g)(1)(C); (g)(2)(B); (g)(2)(C); (g)(2)(D); (g)(2)(E); (g)(4)(B); (g)(4)(E).

By compelling program administrators to prohibit PACE solicitors from making any true statements about PACE financing to property owners, Rule 1620.10(b)(13) would violate PACE solicitors' rights to free speech under the United States Constitution and the California Constitution.

xvii. Rule 1620.10(b)(14)

Rule 1620.10(b)(14) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor PACE solicitor agent "[c]ounsels a property owner on answers for the oral confirmation of key terms call, or the ability to pay determination."

Rule 1620.10(b)(14) would compel program administrators to act on behalf of the state to engage in the unlawful prior restraint of constitutionally protected commercial speech. This provision generally prohibits the act of counseling, which renders it inherently constitutionally overbroad. Moreover, the term "counsel" is vague, and could mean "discuss," "describe," or "explain." As a result, Rule 1620.10(b)(14) could prohibit PACE solicitors from engaging in such benign speech as describing the term lengths available under an assessment contract, or even generally explaining how PACE assessments are repaid.

By compelling program administrators to prohibit PACE solicitors from making any true statements about PACE financing to property owners, Rule 1620.10(b)(14) would violate PACE solicitors' rights to free speech under the United States Constitution and the California Constitution.

xviii. Rule 1620.10(b)(15)

Rule 1620.10(b)(15) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor a PACE solicitor agent "[m]isleads the property owner about the overall cost of the assessments."

While Renovate America appreciates the sentiment behind Rule 1620.10(b)(15), it is not sufficiently tailored to avoid infringing upon constitutionally protected commercial speech, and it would compel program administrators to act on behalf of the state to engage in the unlawful prior restraint of such speech. Notably, of the fourteen provisions within Rule 1620.10(b) that prohibit PACE solicitor speech, Rule 1620.10(b)(11) is one of only two provisions that actually expressly prohibits statements that are untrue or misleading. However, this provision is still constitutionally defective due to its overbreadth, because it does not take into consideration the numerous attributes that contribute to the cost of financing (like the project amount, which may fluctuate as the project progresses, and the time of year, which affects when the first assessment payment will be due and what the annual percentage rate will be), or the reasonableness of a statement that ultimately turns out to be inaccurate.

By compelling program administrators to prohibit PACE solicitors from making true statements to property owners, Rule 1620.10(b)(15) would violate PACE solicitors' rights to free speech under the United States Constitution and the California Constitution.

xix. Rule 1620.10(b)(16)

Rule 1620.10(b)(16) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor a PACE solicitor agent "[s]uggests to the property owner that the payment may be made in monthly installments."

Rule 1620.10(b)(16) would compel program administrators to act on behalf of the state to engage in the unlawful prior restraint of constitutionally protected commercial speech. Many property owners make PACE assessment payments in monthly installments through a mortgage impound account. Therefore, a suggestion that PACE assessments may be made in monthly installments is a true statement. In fact, suggesting otherwise would be an untrue statement, and would misinform many property owners who may otherwise anticipate paying an annual or semi-annual interval. Section 5913(a)(2)(H) of the Streets and Highways Code itself acknowledges that PACE assessment payments may be made in monthly installments through a mortgage impound account, and requires program administrators to inform property owners that "[i]f the property owner pays his or her taxes through an impound account he or she should notify their mortgage lender to discuss adjusting his or her monthly mortgage payment by the estimated monthly cost of the PACE assessment." As a result, this provision would prohibit PACE solicitors and PACE solicitor agents from making statements and representations that are true.

By compelling program administrators to prohibit PACE solicitors from making true statements to property owners, Rule 1620.10(b)(16) would violate PACE solicitors' rights to free speech under the United States Constitution and the California Constitution.

xx. Rule 1620.10(b)(17)

Rule 1620.10(b)(17) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor a PACE solicitor agent "[r]etaliates against a property owner for canceling the assessment contract during the three-day right to cancel period, including intimidating the property owner with hardship claims or threats."

While Renovate America appreciates the sentiment behind Rule 1620.10(b)(15), it is not sufficiently tailored to avoid infringing upon constitutionally protected commercial speech, and it would compel program administrators to act on behalf of the state to engage in the unlawful prior restraint of such speech. This provision is vague and overbroad. By defining retaliation to include making "hardship claims" and "threats," Rule 1620.10(b)(17) could be interpreted to prohibit notifying a property owner of his or her obligations under the home improvement contract and the consequences of failing to satisfy those obligations. It could also be construed to refer to any communications regarding the property owner's obligation to return any improvements to the PACE solicitor if the home improvement contract was also cancelled, in accordance with Section 5940(c)(1) of the Streets and Highways Code. It could also be construed

to prohibit any true statements regarding the adverse economic impact borne by the PACE solicitor if goods and services had already been provided.

By compelling program administrators to prohibit PACE solicitors from making true statements to property owners, Rule 1620.10(b)(17) would violate PACE solicitors' rights to free speech under the United States Constitution and the California Constitution.

xxi. Rule 1620.10(b)(18)

Rule 1620.10(b)(18) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor a PACE solicitor agent "[c]harges higher prices for efficiency improvements than the regional market without economic justification."

Rule 1620.10(b)(18) would almost certainly require program administrators to engage in price fixing, price discrimination, and other restraints of trade prohibited by the federal Sherman Antitrust Act, 15 U.S.C. §§ 1-7, and the federal Clayton Antitrust Act, 15 U.S.C. §§ 12-27. Such activities are by their nature harmful to competition and therefore harmful to consumers, which directly conflicts with the CFL's stated purpose of consumer protection.

Moreover, this provision is vague, referring to prices that are higher than the "regional market" and "without economic justification." It is unclear what would qualify as a regional market, and it would be inappropriate to assume that the market is so uniform and undifferentiated that there would be a standard regional market price of a given improvement. The differing sizes, structures, and levels of complexity of home improvement contractors have an arguably greater impact on pricing than the "regional market."

It is also unclear what would constitute an "economic justification." Would the program administrator be expected to obtain a detailed pricing breakdown for each completed home improvement project, and perform an analysis to determine whether the pricing was justified? Such a requirement would impose an enormous burden on program administrators and would likely be impossible to satisfy, given the inherent complexity in determining pricing information on a project-level basis, the likely resistance of PACE solicitors to providing proprietary pricing information, and the massive resource commitment required.

xxii. Rule 1620.10(b)(19)

Rule 1620.10(b)(19) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor a PACE solicitor agent "[i]ncludes home improvements not eligible for PACE financing in an assessment contract."

Rule 1620.10(b)(19) is vague, and appears to suggest that PACE solicitors are able to include or exclude any improvements in an assessment contract. However, the PACE solicitor is not a party to – and therefore cannot control – what is included or excluded in an assessment contract. To the extent that this provision is intended to prohibit the *installation* of improvements that are not eligible under a given PACE program, such a prohibition bears no reasonable relation to the CFL's statutory purpose of consumer protection. Product eligibility is foundational to PACE, and

Renovate America has expended substantial resources to establish processes designed to prevent ineligible improvements from being financed through their respective PACE programs. Fortunately, these efforts have been extraordinarily effective. However, if a program administrator inadvertently finances an improvement that does not meet the eligibility criteria of its PACE program, a property owner who obtains that improvement receives the value of the improvement nonetheless, and cannot be said to incur any injury as a result.

xxiii. Rule 1620.10(b)(20)

Rule 1620.10(b)(20) states that a program administrator shall implement policies and procedures intended to ensure that neither a PACE solicitor nor PACE solicitor agent does the following:

> Initiates 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.

While Renovate America appreciates the sentiment behind Rule 1620.10(b)(15), it is vague and overbroad, and its plural reference to "efficiency improvements" could be construed to prohibit property owners from obtaining financing from multiple PACE programs for the same home improvement project or the same collection of efficiency improvements, rather than for a single improvement. This is especially true because the second sentence of Rule 1620.10(b)(15) purports only to allow multiple PACE financing *offers* – not assessment contracts – to be obtained, and such offers may only be obtained if "the property owner only enters into one assessment contract to finance the efficiency improvements." If interpreted to be applied in a manner that only permits one assessment contract to be obtained for a home improvement project involving multiple improvements, Rule 1620.10(b)(20) would lack statutory foundation, and conflict with the CFL's stated purpose of consumer protection.

To prohibit property owners from obtaining financing from multiple PACE programs for the same home improvement project would in many cases prohibit property owners from being able to obtain the most advantageous economic outcome, because a given PACE program may offer better terms for one improvement, while a separate PACE program may offer better terms for another. For example, Program A may offer lower interest rates than Program B for longer-term financing, while Program B offers lower interest rates than Program A for shorter-term financing. If a property owner has engaged a PACE solicitor to install solar panels and an HVAC unit, the property owner would benefit from being able to finance the solar panels, which have a long useful life, through Program A, and to finance the HVAC unit, which has a shorter useful life, with Program B. By mandating that "the property owner enters into one assessment contract to finance the efficiency improvements," Rule 1620.10(b)(20) would limit consumer choice and contradict the statutory purpose of the CFL.

XI. Rule 1620.11: Solicitor Enrollment Standards or Processes

A. Overview of Response to Rule 1620.11

Rule 1620.11 of the Draft Regulations raises significant concerns regarding the Department's treatment of contractual agreements between program administrators and PACE solicitors. In effect, the Department would use these agreements to compel program administrators to regulate the activities of PACE solicitors and PACE solicitor agents on behalf of the Department, thereby expanding the Department's regulatory authority beyond the reach of the PACE Statutes.

Rule 1620.11 is of one of several sections in the Draft Regulations that work together to accomplish this overreach. First, Rule 1620.11(b) would permit the Department to establish what contractual obligations PACE solicitors had to program administrators. Then, Rule 1620.15(a)(2) would require program administrators to perform "[a]n analysis of whether the PACE solicitor is complying with the terms of the written enrollment agreement between the program administrator and the PACE solicitor." Then, Rule 1620.16(b)(2)(C)(xi) would require the program administrator to notify the Department of instances where "[a] program administrator has found that a PACE solicitor or PACE solicitor agent has failed to comply with the terms of the enrollment agreement with the program administrator, and the program administrator, PACE solicitor, or PACE solicitor agent has canceled enrollment of the PACE solicitor or PACE solicitor agent." This notification is distinct from the notification of an enrollment cancellation due to a violation of the PACE Statutes, and would therefore cover a range of activities permissible under the PACE Statutes but otherwise prohibited by the Department through the prescribed contractual provisions within enrollment agreements. *See* § 1620(b)(2)(C)(ix).

This structure would enable the Department to create obligations of PACE solicitors that otherwise do not exist, then require program administrators to enforce compliance with those obligations and notify the Department of any enrollment cancellations based on a breach of those obligations. Indeed, the contractual terms that Rule 1620.11(b) would require have no foundation within the PACE statutes. For example, Rule 1620.11(b)(3)(D) would require enrollment agreements to prohibit PACE solicitors from " begin[ning] work on a home improvement contract until the three-day right to cancel has passed," an activity otherwise permitted by the PACE Statutes.

As another example, Rule 1620.11(b)(3)(H) would require PACE solicitors to be contractually obligated to "maintain a process for receiving and responding to property owner inquiries and complaints related to the assessment contract," while Rules 1620.11(b)(4)(A)-(G) would dictate in great detail the mechanics of such complaint management process. Recognizing the burden this would place on many PACE solicitors, the Department has proposed a safe harbor, permitting program administrators to "administer the complaint process on behalf of the PACE solicitor." However, the creation of a safe harbor does not erase the overreach in requiring PACE solicitors to contractually obligate themselves to maintain a complaint process designed from end to end by the Department. Moreover, this safe harbor is impracticable, as each instance of maintaining a complaint process "on behalf" of a PACE solicitor would amount to the administration of a separate complaint process altogether. No program administrator can realistically avail itself of this safe harbor in entirety, because it would effectively amount to the

administration of hundreds or thousands of separate and distinct complaint processes, given the unique operational characteristics of each PACE solicitor.

Renovate America rejects the approach to regulation described above. However, this should not be misconstrued as a blanket rejection of the policy goals reflected in some of the proposed contractual provisions in Rule 1620.11. For example, Renovate America shares the goals of promoting compliance of PACE solicitors with respect to licensure requirements and other applicable laws, preventing unapproved improvements from being financed by PACE, and preventing misrepresentations regarding PACE. Under the PACE Statutes, program administrators are required to implement processes to maximize these goals with respect to the PACE programs they administer. However, neither program administrators nor the Department are the regulators of home improvement contractors simply because they participate as PACE solicitors. Home improvement contractors introduce property owners to a variety of other financing options, and they are separately licensed and overseen by the CSLB, which is empowered to take action against home improvement contractors that fail to comply with all applicable laws.

B. Response to Rule 1620.11

i. Rule 1620.11(b)(1)

Rule 1620.11(b)(1) states that the written enrollment agreement between the program administrator and the PACE solicitor shall include "[t]hat the PACE solicitor maintains in good standing any necessary license from the Contractors State License Board."

Renovate America recognizes that it is critically important for PACE solicitors to maintain the appropriate licenses. To that end, it has implemented various controls to prevent unlicensed home improvement contractors from enrolling in their respective PACE programs, and to prevent PACE solicitors who fail to maintain such licenses from continuing to access its PACE program. In addition, Renovate America includes provisions within its existing agreements with PACE solicitors that require PACE solicitors to maintain the appropriate licenses. However, there is no basis within the PACE Statutes – and no precedent elsewhere with respect to other CFL licensees – for the Department to dictate to program administrators the content of their agreements with independent third-party home improvement contractors.

Section 22680(a)(1) states only that a program administrator's enrollment process must include "[a] written agreement between the program administrator and the PACE solicitor, which shall set forth the obligations of the PACE solicitor and its PACE solicitor agents." It does not authorize the Department to determine the obligations of the PACE solicitor and its PACE solicitor agents to a program administrator. Such an intrusion into the contractual relationships between two arms-length commercial entities, without any statutory basis, is unprecedented and legally impermissible.

Rule 1620.11(b)(1) is duplicative; the PACE Statutes and the Business and Professions Code already contain provisions that independently require PACE solicitors to maintain the appropriate licenses from the CSLB. Section 5922(a) of the Streets and Highways Code requires

PACE solicitors to maintain an appropriate license from the CSLB. Moreover, Section 22680(a)(c)(1) of the Financial Code prohibits program administrators from enrolling PACE solicitors that do not maintain a license from the CSLB. Further still, Section 7028(a)(1) of the Business and Professions Code, which is enforced by the CSLB, requires all home improvement contractors to maintain an appropriate license from the CSLB. As a result, no additional consumer protection purpose is served by forcing program administrators to require this by contract.

ii. Rule 1620.11(b)(2)

Rule 1620.11(b)(2) states that the written enrollment agreement between the program administrator and the PACE solicitor shall include:

> That the PACE solicitor complies with the laws regarding PACE programs, including those set forth in division 7 of the Streets and Highways Code, division 16 of the Public Resources Code, and division 9 of the Financial Code.

Renovate America recognizes that compliance with all applicable laws, whether or not specific to PACE, is paramount. This is true not only of program administrators, but of all enterprises, including PACE solicitors. To that end, Renovate America includes provisions within its existing agreements with PACE solicitors that require PACE solicitors to comply with all applicable laws. However, as discussed, there is no basis within the PACE Statutes – and no precedent elsewhere with respect to other CFL licensees – for the Department to dictate to program administrators the content of their agreements with independent third-party home improvement contractors.

In addition, Rule 1620.11(b)(2) is overbroad, referring to compliance with all laws "regarding PACE programs," which includes many laws that are specific to the structural features of PACE or to requirements related to public agencies and program administrators only. For example, Sections 5898.20 through 5899.3 of the Streets and Highways Code relate to the establishment of PACE programs, which is unrelated to the conduct of PACE solicitors or program administrators. Similarly, Sections 5898.10 through 5898.18 require, among other things, for property owners to receive certain disclosures, but they are unrelated to the conduct of PACE solicitors.

The requirement to comply with applicable law is an inherent function of the law itself. As a result, no additional consumer protection purpose is served by forcing program administrators to require this by contract.

iii. Rule 1620.11(b)(3)(A)

Rule 1620.11(b)(3)(A) states that the written enrollment agreement between the program administrator and the PACE solicitor shall include the following term: "[a] PACE solicitor shall only offer a property owner an assessment contract for efficiency improvements approved under the PACE program."

While Renovate America appreciates the sentiment of this provision, there is no basis within the PACE Statutes – and no precedent elsewhere with respect to other CFL licensees – for the Department to dictate to program administrators the content of their agreements with independent third-party home improvement contractors. Moreover, this provision does not take into account operational models that inherently prohibit PACE solicitors from "offering" assessment contracts, a model employed by Renovate America. Although Renovate America authorizes PACE solicitors to introduce PACE financing to property owners, Renovate America directly communicates financing offers to property owners who are approved for PACE financing, and directly delivers assessment contracts to such property owners. Under this model, PACE solicitors are inherently unable to "offer" assessment contracts. The above provision would have the consequence of forcing program administrators to contractually permit PACE solicitors to "offer" assessment contracts, a model that Renovate America has chosen not to implement.

Rule 1620.11(b)(3)(A) relates back to Section 22689(a)(2) of the Financial Code, which prohibits program administrators from permitting PACE solicitors to "*offer[] an assessment contract* with terms, conditions, or disclosures that are not in compliance with applicable laws or that omits terms, conditions, or disclosures required by applicable law . . ." (emphasis added). The concept of *offering* is distinct from *soliciting*, which is addressed in the statutory provision that immediately precedes Section 22689(a)(2). That provision prohibits program administrators from permitting PACE solicitors to "*[s]olicit a property owner to enter into an assessment contract* with a program administrator, unless the PACE solicitor and the program administrator comply with the requirements of this chapter and any rules adopted by the commissioner" (emphasis added). Cal. Fin. Code § 22689(a)(1).

The distinction between "soliciting" and "offering" is meaningful, as illustrated by how the Legislature addressed them independently: the requirements applied to soliciting are general in nature, referring to compliance "with the requirements of this chapter"; in contrast, the requirements applied to offering are specific to an assessment contract's "terms, conditions, or disclosures" or the omission of such terms, conditions, or disclosures. If a PACE solicitor is unable to offer an assessment contract, and has no control over the terms, conditions, or disclosures of an assessment contract, the "offering" provision becomes moot.

Even if Rule 1620.11(b)(3)(A) were revised to refer to solicitation, it would still present substantive problems. To the extent this provision could be read to apply to the solicitation activities of a PACE solicitor in relation to another PACE program, it is both vague and overbroad. For example, public agencies have approved different efficiency improvements to be financed through their respective PACE programs, and PACE solicitors who participate in multiple PACE programs may solicit property owners to enter into an assessment contract for an efficiency improvement approved under one PACE program in which they participate, but not another. Rule 1620.11(b)(3)(A) would have the effect of inducing these PACE solicitors into breaching their contractual obligations to a program administrator merely because they happened to install efficiency improvements that were approved by one PACE program and not another.

Rule 1620.11(b)(3)(A) would become all the more problematic under the application of Rule 1620.15(a)(2), which would require a program administrator to perform analyses on all PACE

solicitors to determine compliance with this contractual provision. There is no realistic method of conclusively determining whether a PACE solicitor "offers" an assessment contact or "solicits" a property owner to enter into an assessment for unapproved efficiency improvements, unless it is tied to the submission of an application for financing. Program administrators are able to communicate with PACE solicitors and property owners once an application for financing has been received, and to determine what improvements are *requested to be financed* by an assessment contract, but a broad requirement that would compel program administrators to monitor all communications regarding PACE creates an impossible standard.

iv. Rule 1620.11(b)(3)(B)

Rule 1620.11(b)(3)(B) states that the written enrollment agreement between the program administrator and the PACE solicitor shall include the following term: "[a] PACE solicitor shall ensure that disclosures required by law or regulation are provided to property owners."

There is no basis within the PACE Statutes – and no precedent elsewhere with respect to other CFL licensees – for the Department to dictate to program administrators the content of their agreements with independent third-party home improvement contractors. Moreover, this provision is overbroad to the extent that it would apply to any disclosures unrelated to PACE. It also fails to take into account operational models that do not permit PACE solicitors to "offer" assessment contracts.

Rule 1620.11(b)(3)(B) relates back to Section 22689(a)(2) of the Financial Code, which prohibits program administrators from permitting PACE solicitors to "offer[] an assessment contract with terms, conditions, or disclosures that are not in compliance with applicable laws or that omits terms, conditions, or disclosures required by applicable law . . . ." By its terms, Section 22689(a)(2) refers to the "terms, conditions, or disclosures" of an *assessment contract*, not any other disclosures unrelated to the assessment contract that may be required by any other law outside of the PACE Statutes. In addition, as discussed above, the restrictions that relate to disclosures only arise in circumstances where a PACE solicitor is permitted to "offer" assessment contracts to property owners. For program administrators that employ a model that does not enable PACE solicitors to "offer" assessment contracts, this requirement is moot. This is the true with respect to Renovate America, which directly communicates financing offers to property owners who are approved for PACE financing, and directly delivers assessment contracts to such property owners.

For a program administrator that employs the operational model described above, Rule 1620.11(b)(3)(B) would force the program administrator to contractually require PACE solicitors to ensure the delivery of disclosures over which the PACE solicitors have no control, and would thereby induce PACE solicitors into breaching their contractual obligations to the program administrator. Program administrators are already required to confirm that property owners received a copy of their assessment contract documents (which include the required disclosures), which further renders Rule 1620.11(b)(3)(B) unnecessary.

v. Rule 1620.11(b)(3)(C)

Rule 1620.11(b)(3)(C) states that the written enrollment agreement between the program administrator and the PACE solicitor shall include the following term: "[a] PACE solicitor may not directly or indirectly make any misrepresentations regarding PACE financing."

While Renovate America appreciates the sentiment of this provision, there is no basis within the PACE Statutes – and no precedent elsewhere with respect to other CFL licensees – for the Department to dictate to program administrators the content of their agreements with independent third-party home improvement contractors. Moreover, Rule 1620.11(b)(3)(C) is impermissibly vague in its reference to "*indirectly* mak[ing] any misrepresentations regarding PACE financing" (emphasis added). This requirement is unclear on its face, and it is uncertain whether or how it could be enforced as a contractual obligation, because there is high likelihood that the parties would not have a mutual understanding of its definition.

Rule 1620.11(b)(3)(C) would become all the more problematic under the application of Rule 1620.15(a)(2), which would require a program administrator to perform analyses on all PACE solicitors to determine compliance with this contractual provision. There is no realistic method of conclusively determining whether a PACE solicitor "indirectly makes any misrepresentations" without knowing what activity is covered by that phrase.

vi. Rule 1620.11(b)(3)(D)

Rule 1620.11(b)(3)(D) states that the written enrollment agreement between the program administrator and the PACE solicitor shall include the following term: "[a] PACE solicitor may not begin work on a home improvement contract until the three-day right to cancel has passed."

There is no basis within the PACE Statutes – and no precedent elsewhere with respect to other CFL licensees – for the Department to dictate to program administrators the content of their agreements with independent third-party home improvement contractors. Moreover, Rule 1620.11(b)(3)(D) conflicts with the requirements set forth in the PACE Statutes. Specifically, Section 5940(a) of the Streets and Highways Code provides:

> (a) It shall be *unlawful to commence work* under a home improvement contract, and the home improvement contract shall be unenforceable, *if both of the following occur*:
>
> (1) The property owner entered into the home improvement contract *based on the reasonable belief* that the work would be covered by the PACE program.
>
> (2) The property owner applies for, accepts, and cancels the PACE financing within the right to cancel period set forth in subdivision (b) of Section 5898.16.

(Emphasis added). Section 5940(a) is clear: it is unlawful to commence work under a home improvement contract *if* two independent conditions are satisfied. A property owner must enter into the home improvement contract based on the reasonable belief that the work would be covered by the PACE program *and* the property owner must apply for, accept, and cancel the PACE financing within the cancellation period. This does not mean the PACE solicitor *cannot* begin work during the three-day cancellation period. For example, a property owner may have

entered into a home improvement contract without a reasonable belief that the work would be covered by PACE.

However, under Section 5940, the PACE solicitor does bear the risk associated with commencing work, to the extent that the property owner satisfies the "reasonable belief" requirement and the assessment contract is cancelled within the cancellation period. The consequences of taking this risk are laid out by the Legislature in great detail in Sections 5940(b)-(c), which require a PACE solicitor to restore the property to its original condition and to return any consideration received.

The contractual provision required under Rule 1620.11(b)(3)(D) would conflict with Section 5940, and would induce PACE solicitors otherwise acting in accordance with Section 5940 into breaching their contractual obligations to the program administrator. Rule 1620.11(b)(3)(D) would become all the more problematic under the application of Rule 1620.15(a)(2), which would require a program administrator to perform analyses on all PACE solicitors to determine compliance with this contractual provision. There is no realistic method of conclusively determining the exact date upon which work commenced for a given home improvement in the context of a backward-looking review, and such an exercise would impose an extreme burden on program administrators without advancing any consumer protection purpose.

vii. Rule 1620.11(b)(3)(E)

Rule 1620.11(b)(3)(E) states that the written enrollment agreement between the program administrator and the PACE solicitor shall include the following term: "[a] PACE solicitor shall ensure a property owner receives a confirmation of key terms call prior to proceeding with work under a home improvement contract."

There is no basis within the PACE Statutes – and no precedent elsewhere with respect to other CFL licensees – for the Department to dictate to program administrators the content of their agreements with independent third-party home improvement contractors. Moreover, nowhere do the PACE Statutes prohibit PACE solicitors from performing work under a home improvement contract prior to the occurrence of the terms confirmation call. In fact, the PACE Statutes specifically consider the issue of when work may commence, which is addressed in Section 5940 of the Streets and Highways Code, as discussed above.

Section 5940 places limitations on the commencement of work if two conditions are satisfied, neither of which is the receipt of a terms confirmation call. This approach was purposeful, and accounted for various circumstances, including circumstances where PACE financing was introduced to a property owner after work had already commenced under a home improvement contract. This could happen for a variety of reasons, including circumstances where other perceived or intended financing options had become unavailable. In such cases, where the property owner entered into a home improvement contract without a "reasonable belief that the work would be covered by a PACE program," work may well have commenced prior to the property becoming introduced to PACE financing, applying for PACE financing, being approved for PACE financing, or receiving a terms confirmation call in the process of obtaining PACE

financing, which is in part why the Legislature did not require the terms confirmation call to be a condition precedent to limiting the commencement of work.

Not only does Rule 1620.11(b)(3)(E) conflict with the PACE Statutes, it also directly conflicts with a separate provision within the Draft Regulations. Rule 1620.03(d) states 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." In effect, the Draft Regulations would require program administrators to attempt to *ensure* that PACE solicitors are not present for the terms confirmation call, while at the same time contractually obligating PACE solicitors to *ensure* that a property owner receives the terms confirmation call.

Rule 1620.11(b)(3)(E) would become all the more problematic under the application of Rule 1620.15(a)(2), which would require a program administrator to perform analyses on all PACE solicitors to determine compliance with this contractual provision. Because program administrators are themselves required to perform terms confirmation calls, evaluating whether PACE solicitors "ensured" that such calls were made would be a meaningless exercise.

viii. Rule 1620.11(b)(3)(F)

Rule 1620.11(b)(3)(F) states that the written enrollment agreement between the program administrator and the PACE solicitor shall include the following term: "[a] PACE solicitor shall be responsible for the actions of a PACE solicitor agent when the agent is acting on behalf of the PACE solicitor."

There is no basis within the PACE Statutes – and no precedent elsewhere with respect to other CFL licensees – for the Department to dictate to program administrators the content of their agreements with independent third-party home improvement contractors. Moreover, it is unclear what this provision would accomplish. While it would render a PACE solicitor *contractually* responsible for the actions of its PACE solicitor agents, this obligation would run only to the program administrator as a matter of contract. As a matter of law, whether a PACE solicitor would be responsible for the actions of a PACE solicitor agent in a given circumstance would be determined in a court of competent jurisdiction, with all the due process rights that attach to the judicial process.

Rule 1620.11(b)(3)(F) would become all the more problematic under the application of Rule 1620.15(a)(2), which would require a program administrator to perform analyses on all PACE solicitors to determine compliance with this contractual provision. It is unclear how a program administrator would go about determining whether a PACE solicitor was complying with its contractual obligation to be responsible for the actions of its PACE solicitor agents, which would arise only in the event of a dispute involving the contractual liability of PACE solicitors to program administrators.

ix. Rule 1620.11(b)(3)(G)

Rule 1620.11(b)(3)(G) states that the written enrollment agreement between the program administrator and the PACE solicitor shall include the following term: "[a] PACE solicitor shall require each PACE solicitor agent employed or retained by the PACE solicitor to undertake the training required by Financial Code section 22681."

There is no basis within the PACE Statutes – and no precedent elsewhere with respect to other CFL licensees – for the Department to dictate to program administrators the content of their agreements with independent third-party home improvement contractors. Moreover, this provision is unnecessary, because program administrators are themselves required to provide training to PACE solicitor agents, as a condition of enrollment. *See* Cal. Fin. Code § 22681.

Rule 1620.11(b)(3)(G) would become all the more problematic under the application of Rule 1620.15(a)(2), which would require a program administrator to perform analyses on all PACE solicitors to determine compliance with this contractual provision. Because program administrators are themselves required to administer training to PACE solicitor agents, evaluating whether PACE solicitors required such training would be a meaningless exercise.

x. Rule 1620.11(b)(3)(H)

Rule 1620.11(b)(3)(H) states that the written enrollment agreement between the program administrator and the PACE solicitor shall include the following term: "[a] PACE solicitor shall maintain a process for receiving and responding to property owner inquiries and complaints related to the assessment contract."

There is no basis within the PACE Statutes – and no precedent elsewhere with respect to other CFL licensees – for the Department to dictate to program administrators the content of their agreements with independent third-party home improvement contractors. Moreover, the Department lacks the statutory authority to compel PACE solicitors to maintain complaint processes, whether directly or by requiring program administrators to enforce this requirement on behalf of the Department through their agreements with PACE solicitors.

Section 22683 of the Financial Code sets forth the only requirement in the PACE Statutes that relates to the complaint handling process, and it applies *only* to program administrators, not PACE solicitors: "[a] program administrator shall develop and implement policies and procedures for responding to questions and addressing complaints as soon as reasonably practicable." From this single provision, which reserves to the program administrators the responsibility to "develop and implement" their own policies and procedures, the Department has proposed a byzantine set of oppressive requirements applicable to program administrators. This is discussed at length in Section VIII. Extending this exercise by an additional order of magnitude, the Department also proposes to dictate the complaint management processes of PACE solicitors, using the program administrator's enrollment agreement as means to work around the obvious limitations of Section 22683. *See* §§ 1620.11(b)(4)(A)-(G).

It is instructive to note that nowhere in the Business and Professions Code is there a requirement for home improvement contractors to even maintain a complaint process, much less one of this detail. Assessing a burden of this type constitutes yet another disincentive, or "PACE penalty," for a home improvement contractor to become a PACE solicitor.

Rule 1620.11(b)(3)(G) would become all the more problematic under the application of Rule 1620.15(a)(2), which would require a program administrator to perform analyses on all PACE solicitors to determine compliance with this contractual provision. It would be enormously burdensome for program administrators to review the complaint management processes of every PACE solicitor, especially given the numerous requirements imposed under Rules 1620.11(b)(4)(A)-(G).

xi. Rule 1620.11(b)(3)(I)

Rule 1620.11(b)(3)(I) states that the written enrollment agreement between the program administrator and the PACE solicitor shall include the following term: "[a] PACE solicitor shall notify the program administrator, in the manner provided by the program administrator, about complaints regarding the assessment contract."

There is no basis within the PACE Statutes – and no precedent elsewhere with respect to other CFL licensees – for the Department to dictate to program administrators the content of their agreements with independent third-party home improvement contractors. Moreover, the Department lacks the statutory authority to compel PACE solicitors to maintain complaint processes, whether directly or by requiring program administrators to enforce this requirement on behalf of the Department through their agreements with PACE solicitors.

Rule 1620.11(b)(3)(I) exemplifies the Department's approach to reaching through program administrators to impose requirements on PACE solicitors. On its face, the provision would require PACE solicitors to notify program administrators about complaints "in the manner provided by the program administrator." Although the manner of notification would ostensibly be determined by the program administrator, this determination would be a direct consequence of the requirements imposed upon the program administrator through the Draft Regulations, and would be substantively governed by various requirements in Rule 1620.11, including Rules 1620.11(b)(4)(E)-(F), which would require the PACE solicitor to (i) notify the program administrator of *each* complaint received, (ii) provide a copy of the written resolution for each complaint, and (iii) prioritize certain complaints to be sent immediately to the program administrator for investigation and resolution by the program administrator.

It is also unclear whether complaints "regarding the assessment contract" are intended to be defined in the same manner as a complaint "related to an assessment contract," which is defined in Rule 1620.11(b)(4)(B). If so, PACE solicitors would be required to notify program administrators about a significant number of complaints not truly related to PACE programs.

xii. Rule 1620.11(b)(3)(J)

Rule 1620.11(b)(3)(J) states that the written enrollment agreement between the program administrator and the PACE solicitor shall include the following term: "[a] program administrator shall prepare or approve all advertisements, marketing materials, and other information about the PACE program that is provided to property owners, including all documentation related to an assessment contract."

There is no basis within the PACE Statutes – and no precedent elsewhere with respect to other CFL licensees – for the Department to dictate to program administrators the content of their agreements with independent third-party home improvement contractors. Moreover, by prohibiting PACE solicitors from providing *any information* about a PACE program, unless that information is prepared or authorized by a program administrator, this provision is an unconstitutional restraint of commercial speech. Moreover, there is no foundation for any blanket advertising restrictions anywhere in the PACE Statutes.

Rule 1620.11(b)(3)(J) imposes an enormous burden on program administrators, requiring the preparation or approval of all information provided to property owners about their PACE programs. Absent any clarification, this provision could be interpreted to apply even to unauthorized disseminations of information, about which program administrators would have no awareness. While program administrators are accustomed to providing guidelines to PACE solicitors that seek to refer to their PACE programs in advertising materials, and to reviewing and approving co-branded advertising materials they participate in creating, it would overwhelm the resources of program administrators to review and approve every single utterance about their PACE programs.

xiii. Rule 1620.11(b)(3)(K)

Rule 1620.11(b)(3)(K) states that the written enrollment agreement between the program administrator and the PACE solicitor shall include the following term: "[a] PACE solicitor shall maintain all advertising for at least 24 months."

There is no basis within the PACE Statutes – and no precedent elsewhere with respect to other CFL licensees – for the Department to dictate to program administrators the content of their agreements with independent third-party home improvement contractors. There is also no statutory authority to require PACE solicitors to implement any retention requirements for all of their advertising materials, whether or not such materials are related to PACE. This would impose an unreasonable burden on PACE solicitors.

xiv. Rule 1620.11(b)(4)(A)

Rule 1620.11(b)(4)(A) states that a PACE solicitor shall maintain a complaint process that "[s]hall allow a property owner the opportunity to submit a complaint related to an assessment contract by telephone, Internet and mail."

Rules 1620.11(b)(4)(A)-(G) purport to determine the components of the complaint process that program administrators would be compelled to contractually require PACE solicitors to implement pursuant to Rule 1620.11(b)(3)(H). However, there is no basis within the PACE Statutes – and no precedent elsewhere with respect to other CFL licensees – for the Department to dictate to program administrators the content of their agreements with independent third-party home improvement contractors. Moreover, the Department lacks the statutory authority to compel PACE solicitors to maintain complaint processes, let alone to dictate the substantive features of those processes, whether directly or by requiring program administrators to enforce these requirements on behalf of the Department through their agreements with PACE solicitors.

Rule 1620.11(b)(4)(A) would impose a substantial burden on PACE solicitors, one that many PACE solicitors would be unable to satisfy. For example, while the Department may assume that all PACE solicitors maintain websites, and would be able to easily implement an Internet-based complaint intake process, this is not true. Many PACE solicitors are small businesses with small staffs and simple operating structures, and creating and maintaining an online complaints process would be extremely difficult for some of these small businesses. Even maintaining a formalized telephone-based or mail-based complaints intake process would present challenges. If the process were limited to providing a contact address and phone number, and responding to complaints in the ordinary course, that would not create unreasonable hurdles. However, under the formalized process envisioned by the Department, many PACE solicitors would be unable to participate in PACE on account of their status as small businesses.

Finally, as noted before, home improvement contractors are subject to no such requirements under the Business and Professions Code or imposed by the CSLB.

xv. <u>Rule 1620.11(b)(4)(B)</u>

Rule 1620.11(b)(4)(B) states:

> A complaint is related to an assessment contract if:
>
> (i) The complaint involves a representation that the efficiency improvements failed to perform as represented.
>
> (ii) The complaint involves an issue related to the assessment contract.
>
> (iii) The complaint involves representations made in the solicitation of the assessment contract.
>
> (iv) The complaint involves the conduct of a PACE solicitor agent during the solicitation of an assessment contract.

The definition of a complaint "related to an assessment contract" far exceeds the scope of the PACE Statutes. For example, the failure of an improvement to perform as represented is entirely unrelated to the method used to finance the installation of the improvement. As discussed in Section III.B.vi, the PACE Statutes acknowledge the role of program administrators as organizations acting on behalf of public agencies in administering the financial aspects of PACE financing, not as regulators of construction practices and the logistics of installing improvements. A performance failure of an improvement is an installation issue or a manufacturer's warranty issue, and is decidedly *not* "related to an assessment contract."

In addition, the mere fact that a PACE solicitor makes a representation or engages in conduct in the context of a solicitation of an assessment contract does not inherently render any resulting complaints "related to an assessment contract." For example, during the solicitation of an assessment contract, a PACE solicitor agent may communicate to a property owner an estimate of the amount of time that it will take to install an improvement. If this estimate proves to be overly optimistic, and the property owner lodges a complaint, it is inappropriate to consider that complaint "related to an assessment contract." Similarly, if a PACE solicitor agent accidentally knocks a vase off a shelf during the solicitation of an assessment contract, it would be inappropriate to consider a resulting complaint to be "related to an assessment contract." Rules 1620.11(b)(4)(B)(iii) and (iv) are therefore overbroad. They are also unworkable in practice, because it is impossible to consistently identify whether a representation is made "in" a solicitation of an assessment contract, or whether conduct occurs "during" a solicitation of an assessment contract. The home improvement sales process is dynamic and fluid, and multiple financing options may be discussed throughout conversations that also focus on the improvements to be installed and the work to be performed.

Unfortunately, the only component of the definition of "related to an assessment contract" that does not expand beyond matters actually related to an assessment contract is somewhat circular. Rule 1620.11(b)(4)(B)(ii) provides that a complaint is related to an assessment contract it if "involves an issue related to the assessment contract." Despite this inherent circularity, this provision is meaningfully grounded in issues related to PACE financing.

xvi. Rule 1620.11(b)(4)(C)

Rule 1620.11(b)(4)(C) states:

> A property owner will receive a written acknowledgement of the receipt of the PACE complaint within 10 days which shall include the following.
>
> (i) A single point of contact for the property owner, who may be a representative of the PACE solicitor, the program administrator, or the sponsoring public agency.
>
> (ii) Contact information for the PACE solicitor, the program administrator, the sponsoring public agency, and the Department of Business Oversight.

The Department lacks the statutory authority to compel PACE solicitors to maintain complaint processes, let alone to dictate the substantive features of those processes, whether directly or by requiring program administrators to enforce these requirements on behalf of the Department through their agreements with PACE solicitors. In Rule 1620.11(b)(4)(C), the Department would dictate the time period for acknowledging a complaint (within ten days), the manner and form of the acknowledgement (in writing, and including certain contact information), and how the complaint would be assigned (i.e., to one single point of contact). The burden imposed by these requirements on PACE solicitors would be extraordinary, particularly for small home improvement contractors without entire departments dedicated to administrative functions.

The definition of "PACE complaint," while presumably synonymous with a complaint "related to an assessment contract," is unclear. Even if it refers to a complaint related to an assessment

contract, the definition of that term is unworkable, and would sow confusion among PACE solicitors in determining whether to handle a given complaint through their established processes or whether to subject it to the labyrinth of administrative processes required by the Draft Regulations.

xvii. Rule 1620.11(b)(4)(D)

Rule 1620.11(b)(4)(D) states that "[t]he complaint process shall require the timely written resolution of each PACE complaint" and that the "[t]he written resolution shall notify the property owner of the ability to appeal the resolution to the program administrator if the property owner is unsatisfied with the resolution."

The Department lacks the statutory authority to compel PACE solicitors to maintain complaint processes, let alone to dictate the substantive features of those processes, whether directly or by requiring program administrators to enforce these requirements on behalf of the Department through their agreements with PACE solicitors. Moreover, the burden imposed by these requirements on PACE solicitors would be extraordinary, particularly for small home improvement contractors without entire departments dedicated to administrative functions, like managing an appeals process.

This provision refers to a "PACE complaint." To the extent that term is synonymous with a complaint "related to an assessment contract," as defined in Rule 1620.11(b)(4)(B), it would be inappropriate to insert program administrators into disputes between independent third-party home improvement contractors and their customers, particularly disputes that do not truly relate to an issue regarding PACE financing. By manufacturing an appeals process that would permit property owners to appeal the resolution of a dispute between a PACE solicitor and property owner, Rule 1620.11(b)(4)(D) would require program administrators to insinuate themselves into disputes unrelated to their respective PACE programs, creating liability for program administrators where it did not previously exist. This is unacceptable.

In addition, these requirements would create a conflict with existing procedures established by the CSLB for the resolution of disputes. To the extent that a complaint involves the performance of an installed improvement, there exist arbitration procedures that a home improvement contractor and property owner may engage in under Section 7085 of the Business and Professions Code. These procedures become moot if a property owner pursues a separate avenue to resolve a dispute with his or her home improvement contractor.

xviii. Rule 1620.11(b)(4)(E)

Rule 1620.11(b)(4)(E) states that "[t]he PACE solicitor shall notify the program administrator of each PACE complaint received, and provide a copy of the written resolution."

The Department lacks the statutory authority to compel PACE solicitors to maintain complaint processes, let alone to dictate the substantive features of those processes, whether directly or by requiring program administrators to enforce these requirements on behalf of the Department through their agreements with PACE solicitors. Moreover, the burden imposed by these

requirements on PACE solicitors would be extraordinary, particularly for small home improvement contractors without entire departments dedicated to administrative functions.

This provision refers to a "PACE complaint." To the extent that term is synonymous with a complaint "related to an assessment contract," as defined in Rule 1620.11(b)(4)(B), it would be inappropriate to insert the program administrator into a dispute between an independent third-party home improvement contractor and one of its customers, unless that dispute truly relates to an issue regarding PACE financing.

xix. Rule 1620.11(b)(4)(F)

Rule 1620.11(b)(4)(F) states:

> If the complaint involves a representation made during the financing of an assessment contract, the PACE solicitor shall immediately refer the complaint to the program administrator for investigation and resolution.
>
> (i) The PACE solicitor shall notify the consumer that the complaint was transferred to the program administrator, and provide a complaint reference number and point of contact.

The Department lacks the statutory authority to compel PACE solicitors to maintain complaint processes, let alone to dictate the substantive features of those processes, whether directly or by requiring program administrators to enforce these requirements on behalf of the Department through their agreements with PACE solicitors. Moreover, the burden imposed by these requirements on PACE solicitors would be extraordinary, particularly for small home improvement contractors without entire departments dedicated to administrative functions, like creating a complaint referencing system and assigning out individual points of contact.

It is unclear what type of complaint would qualify as a complaint that "involves a representation made during the financing of an assessment contract." This concept appears similar to the reference in Rule 1620.11(b)(4)(B)(iii) to a complaint that "involves representations made in the solicitation of the assessment contract," and it presents the same defects. It is overbroad, and can potentially pick up a variety of complaints that do not actually relate to PACE financing.

It would be inappropriate to insert program administrators into disputes between independent third-party home improvement contractors and their customers, particularly disputes that do not truly relate to an issue regarding PACE financing. By manufacturing a subrogation process that would force program administrators to step into the role of PACE solicitors for a very broad class of complaints, Rule 1620.11(b)(4)(F) would require program administrators to insinuate themselves into disputes unrelated to their respective PACE programs, creating liability for program administrators where it did not previously exist. This is unacceptable.

xx. **Rule 1620.11(b)(4)(G)**

Rule 1620.11(b)(4)(G) states "[t]he program administrator shall intervene in investigating and resolving the complaint if the complaint resolution is unreasonably delayed, based on the facts of the complaint."

The Department lacks the statutory authority to compel PACE solicitors to maintain complaint processes, let alone to dictate the substantive features of those processes, whether directly or by requiring program administrators to enforce these requirements on behalf of the Department through their agreements with PACE solicitors. Moreover, the burden imposed on program administrators would be enormous, requiring program administrators to reach into the complaints handling process of every single PACE solicitor, monitor any perceived delays in those processes, analyze the factual background of each complaint, determine whether any perceived delays were unreasonable based on the factual background of each complaint, and, if the resolution of a given complaint appeared to be "unreasonably delayed," force themselves into the dispute.

On its face, Rule 1620.11(b)(4)(G) applies to all complaints received by PACE solicitors, not just complaints "related to an assessment contract." The sweeping scope of this provision renders it all the more unreasonable. In addition, it would be inappropriate to insert program administrators into disputes between independent third-party home improvement contractors and their customers, particularly disputes that do not truly relate to an issue regarding PACE financing. By manufacturing a subrogation process that would force program administrators to step into the role of PACE solicitors for an undefined class of complaints, Rule 1620.11(b)(4)(G) would require program administrators to insinuate themselves into disputes unrelated to their respective PACE programs, creating liability for program administrators where it did not previously exist. This is unacceptable.

Rule 1620.11(b)(4)(G) would also have the consequence of incentivizing PACE solicitors to allow unreasonable delays in the resolution of complaints. Because program administrators would be forced to become a backstop for all complaints, PACE solicitors would benefit from delays that would shift the burden of resolving complaints to program administrators.

vi. **Rule 1620.11(c)**

Rule 1620.11(c) states:

> A program administrator may, but is not required to, administer the complaint process on behalf of the PACE solicitor.
>
> (1) A program administrator shall maintain records of the PACE solicitor's complaints and resolutions in the same manner as other books and records under rule 1620.07.
>
> (2) The program administrator shall process complaints referred by a PACE solicitor in accordance with the program administrator's complaint process under rule 1620.08.

The Department lacks the statutory authority to compel PACE solicitors to maintain complaint processes, let alone to dictate the substantive features of those processes, whether directly or by requiring program administrators to enforce these requirements on behalf of the Department through their agreements with PACE solicitors. The Department also lacks the statutory authority to determine the extent to which program administrators become involved in the administration of the complaint processes of PACE solicitors. Program administrators will determine the extent of their involvement based on their tolerance for the risks and liabilities associated with insinuating themselves into the processes of PACE solicitors, as well as the extent to which a given PACE solicitor agrees to their involvement.

Rule 1620.11(c) is fashioned as a safe harbor to alleviate the burden on PACE solicitors by allowing program administrators to take over the entire complaints process on their behalf. However, it imposes such a heavy burden upon program administrators as to render it impracticable. Each instance of maintaining a process "on behalf" of a PACE solicitor would amount to the administration of a separate process altogether. No program administrator can realistically avail itself of this safe harbor in entirety, because it would effectively amount to the administration of hundreds or thousands of separate and distinct complaint processes, given the unique operational characteristics of each PACE solicitor. The records retention burden alone would be so consuming as to render reliance on the safe harbor untenable. The retention requirements applicable to complaints is discussed in greater detail in Section VII.B.i.

vii. Rule 1620.11(d)

Rule 1620.11(d) states that "[a] program administrator shall develop a process to evaluate publicly available information on a PACE solicitor to determine whether the sample size of information is statistically valid and provides reliable information on the expected future performance of a PACE solicitor and a PACE solicitor agent."

Rule 1620.11(d) requires program administrators to do the impossible: for each PACE solicitor who seeks enrollment, the program administrator would be forced to determine how much publicly available information would be enough to be considered "statistically valid" and to provide "reliable information on the expected future performance" of PACE solicitors *and* PACE solicitor agents. This entirely misconceives the inherently *qualitative* – not quantitative – nature of the process of reviewing publicly available information, and the inherent impossibility of creating a statistical framework in the review process.

Taking aside the lack of statutory foundation for imposing such a requirement, there are numerous reasons that demonstrate the impossibility of compliance. Statistically significant sampling requires sample sizes that will often far exceed the number of publicly available records regarding a given PACE solicitor, if reflected as a function of the number of projects completed by a given PACE solicitor. If a "statistically valid" sample size simply cannot be obtained, would a program administrator be expected to turn away that PACE solicitor? This is one of many problems establishing the "numerator" in an enrollment review. There are also difficulties in establishing the "denominator." Determining the number of completed projects, for example, will be largely based on guesswork, and there are too many factors that would render this number even more unreliable, like changes in control, changes in management, changes in

staff, the applicable lookback period, seasonality, fluctuations in project completion volume, and so forth.

Not only will the number of projects completed by a given PACE solicitor be based on guesswork, but how a given piece of publicly available information should be treated is inherently subjective, not statistical, and what it means with respect to future performance is even more subjective. For example, one compliance professional may determine that an online review that rates a contractor "3" on a scale of "5" is indicative of good performance, while another may disagree. If the content of the review contains both positive and negative information, reasonable minds could disagree. This makes the process of establishing the "numerator" non-statistical in nature. It is simply not possible to assign statistical significance to such a process.

For the reasons provided above, as well as many others, the Legislature intentionally set a high threshold for denying enrollment to a PACE solicitor based on the three characteristics reviewed in the program administrator's enrollment process: (i) "[a] *clear pattern* of consumer complaints about the PACE solicitor regarding dishonesty, misrepresentations, or omissions"; (ii) "[a] *high likelihood* that the PACE solicitor will solicit assessment contracts in a manner that does not comply with applicable law"; (iii) "[a] clear pattern on the part of the PACE solicitor of failing to timely receive and respond to property owner complaints regarding the PACE solicitor." Cal. Fin. Code § 22680(d). This language was designed to exclude PACE solicitors that showed unquestionably poor conduct, not to create an unrealistic framework requiring statistical sampling and elaborate prognostication.

xxi. Rule 1620.11(d)(1)

Rule 1620.11(d)(1) states:

> To review readily and publicly available information with regard to each PACE solicitor, a program administrator shall establish and implement a process for reviewing the following.
>
> (A) The Contractors State License Board's website.
> (B) Consumer rating websites.
> (C) The website of the Department of Business Oversight.
> (D) Any other source identified by the program administrator, if economically feasible for the program administrator, such as subscription-based services or court records.

Renovate America believes that Rule 1620.11(d)(1) intends to provide an appropriate level of discretion to program administrators, but Rule 1620.11(d)(1)(D) is unclear to the extent it *requires* the review "of any other sourced identified by the program administrator." If this provision were read to *permit* program administrators to review other information, it would provide program administrators with the flexibility to determine the most meaningful and reliable sources from which to gather information. If, however, this provision were read to *require* program administrators to review any other source identified, merely because it was economically feasible, it would be unduly burdensome and impossibly overbroad.

Moreover, Rule 1620.11(d)(1)(B) would require the use of consumer rating websites. However, to the extent this information is available from another source (such as a subscription-based service) in an aggregated format, it would be unnecessary and duplicative to also obtain information directly from consumer rating websites.

xxii. Rule 1620.11(d)(2)

Rule 1620.11(d)(2) states:

> The process established and maintained by the program administrator need not include a review of all publicly-available information, provided that the process is designed to include a review of a sufficient sampling of public sources of information that is likely to contain consumer feedback regarding the business practices of a PACE solicitor.

This provision's requirement to review "a sufficient sampling of public sources of information" is unclear. To the extent that it intends to require a *statistically valid* sample, Renovate America objects to it for the reasons discussed in Section XI.B.vi.

xxiii. Rule 1620.11(d)(3)

Rule 1620.11(d)(3) states that "[t]he program administrator shall establish standards for evaluating public information obtained pursuant to this rule."

This provision provides the appropriate discretion to program administrators to discharge their obligations under Section 22680 of the Financial Code.

xxiv. Rule 1620.11(d)(4)

Rule 1620.11(d)(4) states that "[t]he program administrator shall document the results of the review of publicly available information, and maintain the documentation in books and records as required by rule 1620.07."

While this provision is not objectionable in isolation, the retention requirements set forth in Rule 1620.07 are overbroad and unduly burdensome, as discussed in Section VII.

xxv. Rule 1620.11(e)

Rule 1620.11(d)(4) states that "[a] program administrator shall notify the Commissioner of the enrollment of a PACE solicitor within 30 days of enrollment in the form required by the Commissioner, which may be in the form of an electronic transfer of data, and which may include personally identifying information."

Rule 1620.11(d)(4) relates back to Section 22682 of the Financial Code, which provides that "[a] program administrator shall, in the manner prescribed by the commissioner, notify the commissioner of each PACE solicitor and PACE solicitor agent enrolled by the program

administrator." Renovate America objects to any expansion of this requirement, as it applies to PACE solicitors, to require the submission of personally identifying information. This would clearly exceed the scope of Section 22682, and would be an unwarranted intrusion on privacy unrelated to the CFL's statutory purpose of consumer protection.

XII. Rule 1620.12: Solicitor Agent Enrollment Standards or Processes

A. Response to Rule 1620.12

Rule 1620.12 of the Draft Regulations states:

(a) Every program administrator shall maintain a process for enrolling a PACE solicitor agent that complies with the requirements of this rule.
(b) The process for enrolling a PACE solicitor agent shall include a background check, which may be accomplished through any of the following methods:
(1) The program administrator may rely on a background check conducted by the Contractors State License Board.
(2) The program administrator may utilize a third-party service that conducts employment background checks.
(3) The program administrator may establish a process to review the background of a PACE solicitor agent.
(c) If a program administrator establishes a process to review the background of a PACE solicitor agent, that process must meet the following requirements:
(1) The process must identify whether the PACE solicitor agent maintains a license or registration in good standing from the Contractors State License Board, or is otherwise exempt from, or is not subject to, licensure or registration.
(2) The process must be designed to identify whether the PACE solicitor agent has done any of the following:
(A) Been convicted of a crime as provided in subdivision (a)(1) of Business and Professions Code section 480.
(B) Engaged in any act involving dishonesty, fraud, or deceit as provided in subdivision (a)(2) of Business and Professions Code section 480.
(C) Engaged in any act that would constitute grounds for discipline under Financial Code section 22690.
(d) The enrollment process shall require the PACE solicitor agent completes the training required by Financial Code section 22681 and Rule 1620.17 of these rules prior to enrollment.
(1) A PACE solicitor agent shall complete the introductory training prior to soliciting a property owner to enter into an assessment contract.
(e) A program administrator may conditionally enroll a PACE solicitor agent if the program administrator complies with the following:
(1) The program administrator verifies that the PACE solicitor agent has applied for licensure or registration with the Contractors State License Board and is waiting for the processing of the registration and fingerprints.
(2) The program administrator independently conducts a background check of the PACE solicitor agent as provided in paragraphs (1) and (2) of subsection (b).
(3) The PACE solicitor agent has completed the introductory training required by Financial Code section 22681.
(f) A program administrator shall notify the Commissioner of the enrollment of a PACE solicitor agent within 30 days of enrollment in the form required by the Commissioner,

which may be in the form of an electronic transfer of data, and which may include personally identifying information.

Rule 1620.12 is largely dedicated to clarifying processes related to how program administrators may obtain and perform background checks related to the enrollment of PACE solicitor agents. Rule 1620.12(b)(3) creates a safe harbor designed to permit program administrators to perform their own background review process in lieu of obtaining a background check from a third party, while Rule 1620.12(e) creates a safe harbor that would allow program administrators to "conditionally enroll" PACE solicitor agents whose registration is pending with the CSLB. Renovate America supports the Department's efforts in proposing these safe harbors. However, as currently proposed, the safe harbors contain requirements that render them impracticable.

Rule 1620.12(b)(3) permits program administrators to "establish[] a process to review the background of a PACE solicitor agent" instead of "rely[ing] on a background check conducted by the Contractors State License Board" or "utiliz[ing] a third-party service that conducts employment background checks." Rule 1620.12(c) describes the requirements that this process would need to satisfy, which include identifying whether the PACE solicitor agent (i) maintains a license or registration in good standing from the CSLB, and (ii) has been convicted of certain types of crimes, engaged in any act involving certain types of conduct, or engaged in any act that would constitute grounds for discipline.

Unfortunately, this process simply adds to background check requirement, rather than creating a meaningful alternative. Program administrators are statutorily permitted to rely upon background checks conducted by the CSLB. Cal. Fin. Code § 22680(b). A PACE solicitor agent who is registered with the CSLB will inherently have been subject to a background check conducted by the CSLB, so verifying the PACE solicitor agent's registration status with the CSLB will be independently sufficient to satisfy the statutory requirement to conduct a background check. Therefore, if a program administrator satisfies the first prong of the safe harbor alternative, it has already satisfied its statutory obligation, and would have no reason to review the past conduct of a PACE solicitor agent.

Rule 1620.12(e) permits program administrators to "conditionally enroll a PACE solicitor agent" whose application for registration is pending with the CSLB. However, Rule 1620.12(e)(2) requires that, prior to conditionally enrolling a PACE solicitor agent, the program administrator must either rely on a background check conducted by the CSLB (which will not be possible given the pending status of the registration), or use a third-party service to perform a background check. By requiring program administrators to independently conduct a background check while a background check with the CSLB is pending, Rule 1620.12(e) effectively duplicates the background check requirement, which would result in significant resource outlays from program administrators merely to cover the temporary period during which a PACE solicitor agent's registration is pending.

Finally, the reference to "employment background checks" in Rule 1620.12(b)(2) is problematic. PACE solicitor agents are not employees of program administrators (employees are expressly exempt from the definition of "PACE solicitor agent" in Section 22017(c)(1) of the Financial Code), and there is no requirement in the PACE Statutes to conduct "employment" background

checks. Adding any modifier to the term “background check” would narrow the range of options available to program administrators to satisfy this obligation, and use of the term “employment” also implies a higher standard than would ordinarily be used outside of the employment context. The relationship between PACE solicitor agents and program administrators is by statutory definition not an employer-employee relationship, a fact which must be recognized in approaching the requirement to perform a background check.

XIII. Rule 1620.13: Enrollment Denial

A. Overview of Response to Rule 1620.13

Rule 1620.13 of the Draft Regulations addresses the circumstances under which a program administrator is required to deny the enrollment of a PACE solicitor. This provision establishes the specific processes for how program administrators determine whether there is (i) a "clear pattern" of consumer complaints against a PACE solicitor, (ii) a "high likelihood" that a PACE solicitor will break the law, and (iii) a "clear pattern" of failing to respond to complaints.

Rule 1620.13 relates back to Section 22680(a) of the Financial Code, which requires program administrators to "establish and maintain a process for enrolling PACE solicitors," and Section 22680(d), which states:

> A program administrator shall not enroll a PACE solicitor if, as a result of the review conducted as part of the program administrator's enrollment process, the program administrator finds any of the following:
>
> (1) A clear pattern of consumer complaints about the PACE solicitor regarding dishonesty, misrepresentations, or omissions.
>
> (2) A high likelihood that the PACE solicitor will solicit assessment contracts in a manner that does not comply with applicable law.
>
> (3) A clear pattern on the part of the PACE solicitor of failing to timely receive and respond to property owner complaints regarding the PACE solicitor.

Rule 1620.13 conflicts with Sections 22680(a) and (d), and with other provisions of the Draft Regulations. It also tasks program administrators with an impossible burden – knowing information that can only be known by PACE solicitors.

The CFL leaves the details of the enrollment process to program administrators, stating that program administrators must "*establish* and *maintain* a process for enrolling PACE solicitors" (emphasis added). *Id.* § 22680(a). However, through Rule 1620.13, the Department has effectively established the enrollment process, leaving only the maintenance to program administrators.

Rule 1620.13(a)(1)(A) defines a "clear pattern" of complaints as "more than one" complaint that alleges deception, misrepresentation, or the omission of a material fact. Rule 1620.13(a)(1)(B) prescribes the factors program administrators must assess in evaluating whether a PACE solicitor has a "clear pattern" of consumer complaints, including the volume of complaints, egregiousness of alleged conduct, and the PACE solicitor's response and resolution to complaints. Rule 1620.13(a)(1)(C)(ii) goes a step further, requiring that if a program administrator enrolls a PACE solicitor with "more than one" consumer complaint regarding dishonesty, misrepresentation, or the omission of material fact, the program administrator must document its rationale for permitting that PACE solicitor to enroll in the PACE program.

Rule 1620.13(a)(2)(A) establishes a list of "evidence" that demonstrates a "high likelihood" that a PACE solicitor will solicit contracts in an unlawful manner, including "knowingly" permitting

a property owner to make a false statement to a program administrator, having been held liable in a civil action involving dishonesty, fraud, or deceit up to ten years previously, and being subject to an ongoing action by a regulatory agency for alleged fraud, misrepresentation, or deceit.

Rule 1620.13(a)(3)(A) provides examples of a "clear pattern" of failing to timely receive and respond to complaints, which include failing to "record" multiple complaints and "unreasonably delaying" the response to, or investigation of, multiple complaints.

B. Response to Rule 1620.13

i. Rules 1620.13(a)(1)(A)-(B)

Rules 1620.13(a)(1)(A)-(B) state:

> (a) A program administrator shall not enroll a PACE solicitor if as a result of the review conducted as part of the program administrator's enrollment process, the program administrator finds any of the following:
>
> (1) A clear pattern of consumer complaints about the PACE solicitor regarding dishonesty, misrepresentations, or omissions.
>
> (A) A clear pattern may be evidenced by more than one complaint regarding the PACE solicitor in the same geographical area that alleges deception, misrepresentation, or omission of a material fact, or where the complaints contain information that suggests a pattern of dishonest business practices.
>
> (B) In considering whether a clear pattern of a dishonest business practices exists, the program administrator may consider the volume of complaints relative to the size of the PACE solicitor, the egregiousness of the alleged conduct, the PACE solicitor's response to the allegations, and the PACE solicitor's subsequent resolution of the complaints.

The text of Rule 1620.13(a)(1), requiring a "clear pattern of consumer complaints," is identical to the statutory text. *See* Cal. Fin. Code § 22680(d)(1). However, Rule 1620.13(a)(1)(A) departs from the statute by defining a "clear pattern" as "more than one complaint." This definition is unreasonable and unworkable. "More than one" is inconsistent with the accepted definition of "pattern," which is "[a] *recurring* characteristic that helps in the identification of any problem" (emphasis added). *Pattern*, BLACK'S LAW DICTIONARY. Here, the Legislature chose to modify the requirement for a "pattern" by adding the adjective "clear," requiring that the pattern be absolute and unqualified. To define a "clear pattern" as "more than one" defies the plain language of the statute. While Rule 1620.13(a)(1)(A) attempts to confine "more than one" to "the same geographical area," it is unclear what is meant by a geographical area, and it may well be the case that most PACE solicitors operate in a single geographical area.

Rule 1620.13(a)(1)(B) identifies elements that a program administer may consider in determining whether a "clear pattern" of dishonest business practices exists. As an initial matter, it asks the program administrator to do the impossible: conduct on an analysis on the basis of information that is unobtainable. Although a program administrator can access certain

information about a home improvement contractor that is readily and publicly available, such as whether any complaints have been made about the contractor on various Internet review sites, it cannot realistically determine the "volume of complaints relative to the size of the PACE solicitor," which is not possible for the program administrator to ascertain at the point of enrollment.

Yet another unknowable area of consideration is the "egregiousness" of the PACE solicitor's conduct. Information regarding complaints is obtained from public sources, such as online review portals like Google, Yelp, and the Better Business Bureau. Egregiousness of conduct cannot necessarily be gleaned from such sources. Additional areas of consideration, like how the PACE solicitor responded or how the complaint was resolved, is also often unavailable from these public sources. Moreover, complaints do not all follow a similar format. Complaints range in detail, clarity, and credibility.

ii. Rule 1620.13(a)(1)(C)

Rule 1620.13(a)(1)(C) states:

> A program administrator shall keep in its books and records documentation regarding
> (i) the evaluation of consumer complaints against a PACE solicitor, and
> (ii) the rationale for the determination that the existence of more than one consumer complaint regarding dishonesty, misrepresentation, or omission of a material fact, with similar fact patterns in the same geographical area, does not constitute a clear pattern of a dishonest business practice.

Rule 1620.13(a)(1)(C)(i) requires program administrators to retain their evaluations of consumer complaints against PACE solicitors. Rule 1620.13(a)(1)(C)(ii) requires a program administrator to retain its rationale for determining that "[t]he existence of *more than one* consumer complaint regarding dishonesty, misrepresentation, or omission of material fact . . . does not constitute a clear pattern of dishonest business practices" (emphasis added). This provision appears to create a rebuttable presumption with respect to the evaluation of a "clear pattern." It defines a "clear pattern" as "more than one" consumer complaint. Then, if a program administrator finds "more than one" consumer complaint and proceeds with enrolling a PACE solicitor, the program administrator must retain in its books and records the rationale for why there is not a "clear pattern."

Section 1620.13(a)(1)(C) would impose a significant burden on program administrators. Above and beyond identifying a "clear pattern" of complaints, this provision would require program administrators to qualitatively evaluate a PACE solicitor's complaints *and* provide a rationale for its discretionary decision as to why more than one complaint does not amount to a clear pattern. It is unclear on the face of this provision how the rationale would need to be expressed, but documentation of these requirements would necessarily impose a substantial resource burden on program administrators, which would need to divert and direct resources not only to evaluating and determining the severity of property owner complaints, but also to documenting that process.

Finally, the he requirements here necessarily involve making legal determinations – i.e., whether certain conduct rises to a level that would constitute a "clear pattern." In many cases, program administrators may perform these determinations at the direction of legal counsel. The documentation of these legal assessments would likewise be privileged, and would be afforded the protection from disclosure afforded to any privileged material pursuant to Section 954 of the California Evidence Code.

iii. Rule 1620.13(a)(1)(D)

Rule 1620.13(a)(1)(D) states:

> For purposes of establishing a clear pattern of consumer complaints about a PACE solicitor, complaints against a PACE solicitor agent employed or retained by a PACE solicitor, shall constitute complaints about the PACE solicitor.

Rule 1620.13(a)(1)(D) is problematic, because it imputes complaints against PACE solicitor agents to PACE solicitors without any regard to whether a given PACE solicitor agent was acting on behalf of a given PACE solicitor at the time the complaint was lodged, or whether the PACE solicitor agent was engaging in an *ultra vires* activity. Although Rule 1620.13(a)(1)(E) modifies this imputation into a rebuttable presumption, the requirements to rebut this presumption are too onerous to realistically satisfy, as discussed below.

Many PACE solicitor agents are independent contractors that over time may work on behalf of multiple PACE solicitors. Some PACE solicitors may work on behalf of more than one PACE solicitor at the same time. Because Rule 1620.13(a)(1)(D) is indefinite as to time and scope, a PACE solicitor would be held responsible for the actions of a PACE solicitor agent that received a complaint (i) before and after being "employed or retained" by the PACE solicitor, (ii) while "employed or retained" by the PACE solicitor but in the scope of an activity related to another home improvement contractor, and (iii) while engaging in an activity that was clearly outside the scope of any employment or retention. Each of these scenarios is simply unfair to the PACE solicitor.

Moreover, it would be impossible to determine as part of the enrollment process which home improvement salespersons worked for which home improvement contractors throughout time, and then attempt to track down complaints against those home improvement salespersons. Out of respect for individual privacy, most online review sites do not allow individuals to be identified by their full names. More importantly, the CFL does not require the review of complaints against individual PACE solicitor agents as part of the PACE solicitor enrollment process. *See* Cal. Fin. Code § 22680(d)(1).

iv. Rule 1620.13(a)(1)(E)

Rule 1620.13(a)(1)(E) states:

> The acts of a PACE solicitor agent acting on behalf of a PACE solicitor shall not be considered when considering whether a clear pattern of consumer complaints is present, if all of the following conditions exist:
>
> (i) The PACE solicitor did not know of past instances of the conduct giving rise to the complaint prior to the solicitation of the property owner, and did not recklessly disregard evidence that, upon investigation, would have revealed past instances;
>
> (ii) The conduct giving rise to the complaint was not sanctioned or otherwise expressly or implicitly authorized by the PACE solicitor; and
>
> (iii) Upon receiving notice of the unauthorized conduct, the PACE solicitor took affirmative steps to remedy the harm caused by the conduct, and if warranted by the conduct, the PACE solicitor took timely steps to discontinue the engagement of the PACE solicitor agent in that capacity.

Rule 1620.13(a)(1)(E) permits program administrators to rebut the presumption in Rule 1620.13(a)(1)(D) that "complaints against a PACE solicitor agent . . . shall constitute complaints about the PACE solicitor." However, this rebuttable presumption is unavailing in practice, because it requires program administrators to obtain and evaluate information that is not accessible or knowable. For example, it is impossible for a program administrator to know what a PACE solicitor (a business entity) "knew" about a given complaint at a given time. Similarly, it is impossible to know whether a solicitor "authorized" the conduct that gave rise to the complaint, let alone whether it "implicitly" authorized the conduct.

v. Rule 1620.13(a)(2)(A)

Rule 1620.13(a)(2)(A) states:

> A high likelihood that a PACE solicitor will solicit assessment contracts in a manner that does not comply with applicable law may be evidenced by the following:
>
> (i) The PACE solicitor has made a false statement of a material fact to the program administrator.
>
> (ii) The PACE solicitor has advised or knowingly permitted a property owner to make a false statement of a material fact to the program administrator.
>
> (iii) The PACE solicitor, or an individual with control over the operations of the PACE solicitor, has, within the last 10 years, been convicted of or pleaded nolo contendere to a crime, or committed an act and been held liable in a civil action, involving dishonesty, fraud, or deceit.
>
> (iv) The PACE solicitor has had its license revoked by the Contractors State License Board or, within the past 36 months, has been disciplined by the Contractors State License Board for an act that directly resulted in harm to the public. This paragraph shall not include disciplinary action for failing to renew a

license, failure to maintain books and records, failing to maintain a bond, failing to maintain insurance, or failing to maintain a minimum net worth.
(v) The PACE solicitor has a disciplinary action against it by another regulatory agency for fraud, misrepresentation, or deceit.
(vi) The PACE solicitor has engaged in elder abuse or vulnerable population abuse.

Rule 1620.13(a)(2)(A) addresses factors a program administrator must consider when determining if there is a "high likelihood" that a PACE solicitor will solicit assessment contracts in a manner that does not comply with applicable law.

Renovate America recognizes that the conduct identified in this provision raises serious concerns. However, the ability of program administrators to uncover some of the identified conduct is limited at the time of enrollment, because program administrators rely on publicly available information, voluntary disclosures by the PACE solicitor, and determinations by the CSLB. Moreover, some of the identified conduct, like convictions and disciplinary action taken by the CSLB, will be known to the CSLB. Program administrators should be able to rely upon the determinations of the CSLB, which will be reflected in licensure status.

Rule 1620.13(a)(2)(A)(i) requires a program administrator to determine if "[t]he PACE solicitor has made a false statement of a material fact to the program administrator." This is extraordinarily difficult, if not impossible, for the program administrator to uncover in the context of enrollment, because it has few points of comparison to confirm the veracity of statements made by the PACE solicitor.

Similarly, Rule 1620.13(a)(2)(A)(ii) requires a program administrator to determine if "[t]he PACE solicitor has advised or knowingly permitted a property owner to make a false statement of material fact to the program administrator." At the point of enrollment, a PACE solicitor has not yet participated the PACE program so it is not possible for the PACE solicitor to have advised a property owner to make a false statement to the program administrator.

The disclosure of the information listed in Rule 1620.13(a)(2)(A)(iii) runs contrary to the same public policy considerations underpinning the recently adopted Fair Chance Act, which prohibits employers from inquiring about an applicant's conviction record until they have extended a conditional job offer to the applicant. To the extent that this provision is intended to reveal a problematic background, that is already addressed through the CSLB's background check and licensure process. If the CSLB has reviewed a home improvement contractor's background – including related convictions – and has issued a license, why is it permissible for that home improvement contractor to introduce property owners to every form of home improvement financing except for PACE?

Rule 1620.13(a)(2)(A)(iv) requires program administrators to consider if the home improvement contractor has had its license revoked by the CSLB within the last 36 months. This is also unnecessary. If the CSLB has revoked a home improvement contractor's license but reinstated it after the home improvement contractor satisfied a corrective action plan, why then should that

home improvement contractor be permitted to introduce property owners to every form of home improvement financing except for PACE?

Rule 1620.13(a)(2)(A)(v) requires a program administrator to consider a "disciplinary action against [the PACE solicitor] by another regulatory agency for fraud, misrepresentation, or deceit." Certainly, if another agency has issued an "order" or conducted an enforcement against a home improvement contractor, that should be considered as a part of the enrollment process. However, the language in this provision casts too wide of a net and creates a significant due process problem. The provision potentially disqualifies a home improvement contractor prior to a determination having been made by the regulatory agency, depriving the home improvement contractor of an the opportunity to participate in PACE based on pending allegations.

Rule 1620.13(a)(2)(A)(vi) requires a program administrator to determine if a PACE solicitor "[h]as engaged in elder abuse or vulnerable population abuse." This behavior is absolutely unacceptable and should be a consideration during the enrollment process.

vi. Section 1620.13(a)(3)(A)

Section 1620.13(a)(3)(A) states:

> A clear pattern on the part of the PACE solicitor of failing to timely receive and respond to property owner complaints regarding the PACE solicitor.
>
> (A) A clear pattern of a PACE solicitor failing to timely receive and respond to property owner complaints regarding the PACE solicitor may be established by actions by a PACE solicitor such as failing to record multiple complaints; failing to respond to multiple complainants over a sustained period of time, notwithstanding repeated contact by the complainants; or unreasonably delaying the response to, or investigation of, multiple complaints.

Section 1620.13(a)(3)(A) requires a program administrator to consider a PACE solicitor's internal complaint processes, the responses rates and outcomes of those processes, and the recordkeeping associated with those processes. There is no statutory basis for the Department to require such an intrusive review at the point of enrollment.

The purpose of the enrollment process set forth in Section 22680 of the Financial Code is to provide a mechanism for program administrators to evaluate publicly available information with respect to a prospective PACE solicitor at the time of enrollment. The CFL does not contemplate extensive reviews of a home improvement contractor's books and records to evaluate every aspect of every complaint received. Nor does it require program administrators to evaluate a home improvement contractor's recordkeeping and complaint investigation processes as a condition of enrollment.

Conducting a full-scale investigation in the manner prescribed by Section 1620.13 is impossibly burdensome, and few if any home improvement contractors would permit this level of intrusion into their businesses merely to be able to introduce property owners to another financing option.

XIV. Rule 1620.14: Monitoring Compliance

A. Overview of Response to Rule 1620.14

Rule 1620.14 addresses the requirement for program administrators to evaluate the compliance of PACE solicitors and PACE solicitor agents with applicable provisions of the PACE Statutes.

This Rule relates back to Section 22680(e)(1) of the Financial Code, which requires a program administrator to "[e]stablish and maintain a process to promote and evaluate the compliance of PACE solicitors and PACE solicitor agents with the requirements of applicable law . . . which shall include . . . a risk-based, commercially reasonable procedure to monitor and test the compliance of PACE solicitors and PACE solicitor agents . . . ."

Renovate America believes that Rule 1620.14 strikes the appropriate balance by providing clear interpretive guidance of Section 22680(e)(1) while not overprescribing every facet of the actions of program administrators with respect to their internal operations and their interactions with PACE solicitors and PACE solicitor agents. Rule 1620.14 provides program administrators with a framework of how to comply with the statute without attempting to create a step-by-step operational process without unnecessary administrative burden. For example, Rule 1620.14(a)(1)(A) clarifies that a "risk-based, commercially reasonable procedure" includes selecting a sample of PACE solicitors and efficiency improvements, and Rule 1620.14(a)(1)(B) permits program administrators to "test" compliance by "posing questions" to property owners during the terms confirmation call.

Rule 1620.14 serves as a model for the rest of the Draft Regulations. Renovate America is encouraged by the Department's approach in this rule and urges the Department to take a similar approach to other rules in the Draft Regulations.

B. Response to Rule 1620.14

i. Rule 1620.14(a)(1)

Rule 1620.14(a)(1) states:

> (a) A program administrator shall establish and maintain a process to promote and evaluate the compliance of a PACE solicitor and PACE solicitor agent with the requirements of applicable law.
>
> (1) The process shall include a risk-based, commercially reasonable procedure to monitor and test the compliance of PACE solicitors and PACE solicitor agents with the requirements of Financial Code section 22689, subdivision (a).
>
> (A) A "risk-based, commercially reasonable procedure" includes, but is not limited to, a procedure that selects a sample of solicitors and a sample of efficiency improvements, based on factors or algorithms that are intended to identify noncompliance.
>
> (B) A program administrator may test the compliance of PACE solicitors and PACE solicitor agents by posing questions to property owners during

the oral confirmation of key terms required under Streets and Highways Code section 5913.
(C) A program administrator shall maintain the results of the compliance monitoring and testing in its books and records, as required by Rule 1620.07 of these rules.

Rule 1620.14(a)(1) employs a tempered approach to rulemaking. This provision provides program administrators with clarity regarding the "risk-based, commercially reasonable procedure" without eliminating the program administrators' discretion. It would enable program administrators to design and implement processes tailored to the PACE market, and to determine how to most effectively allocate their resources to address the challenges involved in managing networks of PACE solicitors and PACE solicitor agents.

Rule 1620.14(a) stands in stark contrast to other rules within the Draft Regulations, many of which conflict with the PACE Statutes, exceed the authority conferred by the PACE Statutes, impose significant operational and economic burdens on program administrators and PACE solicitors, and reach too far into dictating the processes intended to be established and maintained by program administrators.

ii. <u>Rule 1620.14(a)(2)</u>

Rule 1620.14(a)(2) states:

> The process shall include a procedure to regularly monitor the license or registration status of PACE solicitors and PACE solicitor agents.
> (A) The regular monitoring of the license or registration status of a PACE solicitor or PACE solicitor agent does not require continuous monitoring.
> (B) Except as provided in paragraph (3), a program administrator shall confirm the licensure or registration status of a PACE solicitor or PACE solicitor agent at the following times:
> (i) When a PACE solicitor or PACE solicitor agent submits a property owner's application for an assessment contract to the program administrator.
> (ii) When a program administrator approves the advertising of a PACE solicitor or PACE solicitor agent.
> (iii) When a program administrator processes a complaint about a PACE solicitor or PACE solicitor agent.
> (iv) When a program administrator enrolls a PACE solicitor or PACE solicitor agent.

Rule 1620.14(a)(2) creates a sensible rubric for how program administrators can achieve compliance with the statutory requirement to establish and maintain a procedure to "[r]egularly monitor the license and registration status of PACE solicitors and PACE solicitor agents" set forth in Section 22681(e)(2) of the Financial Code. In general, Renovate America supports the framework established by Rule 1620.14(a)(2), particularly when paired with the safe harbor contained in Rule 1620.14(a)(3).

Rule 1620.14(a)(2) identifies several points at which the licensure status of PACE solicitors and the registration status of PACE solicitor agents must be verified. While each of these points are reasonable in isolation, they can become duplicative when taken together. For example, if program administrators are required to confirm licensure or registration status each time a financing application is received, it becomes duplicative to also verify the status when approving advertising, because the status will be confirmed every time a property owner responds to such advertising by submitting a financing application. Moreover, while Rule 1620.14(a)(2)(A) states that the "regular monitoring of the license or registration status of a PACE solicitor or PACE solicitor agent does not require continuous monitoring," the requirement to confirm licensure status every time an application is submitted effectively amounts to continuous monitoring.

iii. Rule 1620.14(a)(3)

Rule 1620.14(a)(3) states that "[a] program administrator that has a process for routinely monitoring the licensure or registration status of a PACE solicitor or PACE solicitor agent not less than once every 30 days need not confirm licensure or registration status in the circumstances described in paragraph (2)."

This provision would create a reasonable safe harbor that would enable program administrators to avoid the compliance pitfalls that may otherwise arise in attempting to verify license or registration status upon the occurrence of one of several distinct events. Renovate America supports this provision and considers it a model for other safe harbors within the Draft Regulations.

XV. Rule 1620.15: Periodic Review Standards

A. Overview of Response to Rule 1620.15

Rule 1620.15 of the Draft Regulations prescribes the process and standards for the periodic review of PACE solicitors conducted by program administrators. Rule 1620.15 relates back to Section 22680(e)(3) of the Financial Code, which requires a program administrator to perform "[a] periodic review of the solicitation activities of PACE solicitors enrolled with the program administrator, to be conducted at least once every two years."

Section 22680(e)(3) expressly limits the periodic reviews to "solicitation activities." However, Rule 1620.15 would extend beyond solicitation activities to other aspects of the interactions between program administrators and PACE solicitors. It would also establish a wide range of extensive obligations on program administrators to make legal determinations and engage in oversight activities far beyond what the Legislature contemplated in Section 22680(e)(3).

Moreover, the processes prescribed by Rule 1620.15 are unduly burdensome. Most of the thousands of PACE solicitors in California are small businesses, all of which operate fundamentally differently. To comply with Rule 1620.15, program administrators would have to expend a tremendous amount of resources applying the prescriptive process mandated by the Department to thousands of individual home improvement contractors.

This periodic review scheme would also lead to considerable duplication, for both *reviewers* (program administrators) and *reviewees* (PACE solicitors). Because many PACE solicitors are enrolled with multiple PACE programs, and because program administrators administer PACE programs in which numerous PACE solicitors are enrolled, many PACE solicitors will become subject to near-constant "periodic" reviews, and program administrators will become subject to performing "periodic" reviews constantly. These activities will create substantial and unnecessary overlap. As a result of this duplication, many PACE solicitors will choose to enroll with only one program administrator, which will be harmful to competition (and, therefore, consumer protection). Many PACE solicitors will opt out of PACE altogether.

B. Response to Rule 1620.15

i. Rule 1620.15(a)(1)

Rule 1620.15(a)(1) states that the periodic review of a PACE solicitor shall include "[a]n analysis of whether the PACE solicitor maintains the minimum qualifications of Financial Code section 22680."

Rule 1620.15(a)(1) borrows, without authority, the enrollment requirements for PACE solicitors, set forth under Sections 22680(a)-(d) of the Financial Code, and apply them to the periodic review of solicitation activities mandated by Section 22680(e)(3), which occurs after enrollment every two years. This is problematic because the enrollment requirements set forth in Section 22680 assumed the review of "readily and publicly available" information regarding PACE solicitors. This was intentional because, at the point of enrollment, program administrators would

not yet have any internally-derived information regarding a PACE solicitor, based on experience with that PACE solicitor. However, once a PACE solicitor clears the hurdle of enrollment, the analysis shifts to their "solicitation activities" as enrollees of that program administrator's PACE program. Rule 1620.15(a)(1) would deviate from that statutory construct, and effectively require program administrators to re-enroll every PACE solicitor every two years using publicly available information.

By applying enrollment requirements to the periodic review process, Rule 1620.15 pulls concepts from Rule 1620.13, which cause the same problems as identified in Section XIII.

ii. Rule 1620.15(a)(2)

Rule 1620.15(a)(2) states that the periodic review of a PACE solicitor shall include "[a]n analysis of whether the PACE solicitor is complying with the terms of the written enrollment agreement between the program administrator and the PACE solicitor."

Rule 1620.15(a)(2) exceeds the scope of the CFL, which requires a periodic review of "solicitation activities" – not contractual obligations. As discussed extensively in Section XI, this provision would operate to identify breaches of various contractual provisions that the Department would require program administrators to insert into their enrollment agreements under Rule 1620.11(b). The usage of the periodic review requirements in this way is not authorized by the PACE Statutes.

iii. Rule 1620.15(a)(4)

Rule 1620.15(a)(4) states:

> An analysis of whether the PACE solicitor has a clear pattern of consumer complaints about the PACE solicitor regarding dishonesty, misrepresentations, or omissions. For purposes of this review, a clear pattern may be established by more than two complaints about a PACE solicitor in the same geographical area, or where the facts of the complaint indicate deception, misrepresentation, or omission of a material information.

The definition of "clear pattern" as "more than two complaints" in Rule 1620.15(a)(4) is unreasonable and unworkable. While this is more than the one complaint that acts as a trigger in Rule 1620.13(a)(1)(A), it is equally unreasonable and, because it applies a standard from the enrollment process, even less grounded in statute.

iv. Rule 1620.15(a)(5)

Rule 1620.15(a)(5) states:

> An analysis of whether the PACE solicitor has a clear pattern of failing to respond to complaints timely. For purposes of this review, a clear pattern may be established where three or more property owners, or 10 percent or more of the property owners served by the PACE solicitor, in the same geographical area, did not receive a reply to a written

> complaint, including a complaint received by e-mail, for 90 or more days. Acknowledging receipt of the complaint, through letter, e-mail, or phone call, shall constitute a reply, provided the PACE solicitor's records indicate the PACE solicitor has actively investigated the matter since receiving the complaint. A clear pattern may also be established where the PACE solicitor fails to record multiple complaints; fails to respond to multiple complainants over a sustained period of time, notwithstanding repeated contact by the complainants; or unreasonably delays the response to, or investigation of, multiple complaints.

In Rule 1620.15(a)(5), "clear pattern" is defined for a third time, this time listing additional evidence that a program administrator should rely on in performing its periodic review. Rule 1620.15(a)(5) considers a "clear pattern" to occur when "three or more property owners, or 10 percent or more of the property owners served by the PACE solicitor, in the same geographical area" did not receive a reply to a "written complaint." As previously discussed, this type of approach to defining "clear pattern" is inconsistent with the PACE Statutes.

Rule 1620.15(a)(5) also exceeds its statutory mandate by requiring a detailed review of administrative and clerical functions performed by PACE solicitors. This provision presupposes that a program administrator would be able to – or even permitted to – obtain a level of visibility into the complaint processes of PACE solicitors that does not, and cannot, exist in practice. The burden imposed by Rule 1620.15(a)(5) would be immense. Program administrators would be required to engage intensive, detailed investigations into mail correspondence, email communications, and phone records, using such information to reconstruct timelines to determine the responsiveness of a given PACE solicitor. Not only is this not possible, but no PACE solicitor would permit this level of intrusion.

v. Rule 1620.15(a)(6)

Rule 1620.15(a)(6) states that the periodic review of a PACE solicitor shall include "[a]n analysis of whether the PACE solicitor is complying with the procedural requirements of responding to consumer complaints instituted by the program administrator."

Rule 1620.15(a)(6) requires a program administrator to analyze whether a PACE solicitor is complying with the "procedural requirements of responding to consumer complaints *instituted by the program administrator*." These requirements are in reality the requirements established by the Department, using program administrators as its conduit, as discussed in Sections VIII and XI, and they are not supported by the PACE Statutes.

The burden imposed on program administrators by Rule 1620.15(a)(6) would be significant. Because each PACE solicitor is unique, it is effectively impossible to craft universal procedural requirements, which would force program administrators into administering numerous tailor-made complaint-response requirements.

vi. Rule 1620.15(a)(7)

Rule 1620.15(a)(7) states that the periodic review of a PACE solicitor shall include "[a] review of whether the individuals employed or retained by the PACE solicitor to solicit a property owner to enter into an assessment contract are enrolled by the program administrator as PACE solicitor agents."

Rule 1620.15(a)(7) is impossible to comply with, because it would require program administrators to identify every single individual employed or retained by a given PACE solicitor and then make a determination as to whether those persons have engaged in the activities that would meet the extremely broad definition of solicitation adopted by the Department.

vii. Rule 1620.15(a)(9)

Rule 1620.15(a)(9) states that the periodic review of a PACE solicitor shall include "[a] review of advertising related to PACE conducted by the PACE solicitor for compliance with the law."

This Rule calls for a program administrator to assess whether a PACE solicitor's advertising "compl[ies] with the law." As written, program administrators would be obligated to review PACE solicitors' advertising materials for compliance with any aspect of the law. This is calling for a program administrator to make legal determinations regarding the activities of an independent third party on matters unrelated to PACE, which is not the appropriate role of a program administrator.

Rule 1620.15(a)(9) is unduly burdensome – the sheer amount of advertising, whether online, in print or other media, for each of the potentially thousands of PACE solicitors would make a review of such material effectively impossible. How could a program administrator come to know of the existence of all advertising materials, within the possession, custody and control of the PACE solicitor?

viii. Rule 1620.15(a)(10)

Rule 1620.15(a)(10) states that the periodic review of a PACE solicitor shall include "[a]n analysis of the controls maintained by the PACE solicitor to ensure a PACE solicitor agent complies with the law that governs soliciting a property owner to enter into an assessment contract, including such controls as written procedures, supervision, reporting, and resolution of complaints."

Rule 1620.15(a)(10) misconceives overestimates the structural sophistication of the operations of many PACE solicitors. Most home improvement contractors are small businesses that lack the capacity for sophisticated controls, procedures, reporting, and processes. By imposing such process-heavy administrative requirements on small businesses, this provision would discourage most home improvement contractors from becoming or continuing to be PACE solicitors.

Moreover, like so many other provisions within Rule 1620.15 and throughout the Draft Regulations, Rule 1620.15(a)(10) would pose an extreme burden on program administrators responsible for managing a process that would be applied to a large number of PACE solicitors.

ix. Rule 1620.15(a)(11)

Rule 1620.15(a)(11) states that the periodic review of a PACE solicitor shall include "[a]n analysis of the oral confirmation of key terms conducted with property owners solicited by the PACE solicitor or its agents, for patterns suggesting potential misrepresentations or omissions."

This provision is extraordinarily burdensome. It would require program administrators to listen to, analyze, and compare a sufficient number of terms confirmation calls to determine the existence of patterns, an exercise that is not replicable on any scale.

x. Rule 1620.15(a)(12)

Rule 1620.15(a)(12) states that the periodic review of a PACE solicitor shall include "[a]n analysis of whether the PACE solicitor provides a different price for a project financed by a PACE assessment than the contractor would provide if paid in cash by the property owner."

Rule 1620.15(a)(12) relates back to Section 5926 of the Streets and Highways Code, which states that "[a] contractor shall not provide a different price for a project financed by a PACE assessment than the contractor would provide if paid in cash by the property owner." While a PACE solicitor is not charge a difference price for a project financed by a PACE assessment than for a project paid in cash, program administrators do not have the authority (nor does the Department) to force PACE solicitors to provide pricing data regarding home improvement projects unrelated to PACE.

xi. Rule 1620.15(a)(13)

Rule 1620.15(a)(13) states that the periodic review of a PACE solicitor shall include "[a]n analysis of whether the PACE solicitor commences work under home improvement contracts prior to the expiration of the right to cancel period set forth in subdivision (b) of Streets and Highways Code section 5897.16."

Rule 1620.15(a)(13) requires a program administrator to analyze as part of its periodic review whether a PACE solicitor has commenced work under the home improvement contract prior to the expiration of the three-day cancellation period. Section 5940 of the Streets and Highways Code permits work to commence within the three-day cancellation period, so long as two conditions are satisfied. This is discussed at length in Section XI.B.vi. Rule 1620.15(a)(13) has no statutory basis, and bears no reasonable relation to the CFL's statutory purpose of consumer protection.

Moreover, it is unclear how a program administrator would be able to effectively apply with Rule 1620.15(a)(13), because it would have to determine with some level of certainty when work

actually commenced, which is unknowable without being present to observe the commencement of a home improvement project.

xii. Rule 1620.15(a)(14)

Rule 1620.15(a)(14) states that the periodic review of a PACE solicitor shall include an analysis of whether the PACE solicitor commences work under the home improvement contract and "[i]f work is commenced prior to the expiration of the right to cancellation period, an analysis of whether the PACE solicitor is in compliance with Streets and Highways Code section 5940."

Rule 1620.15(a)(15) relates to Rule 1620.15(a)(14) and is objectionable for the same reasons. Section 5940 of the Streets and Highways Code permits work to commence within the three-day cancellation period, so long as two conditions are satisfied, so this type of review bears no reasonable relation to the CFL's statutory purpose of consumer protection.

xiii. Rule 1620.15(b)

Rule 1620.15(b) states:

> In conducting a periodic review, the program administrator shall review a random sampling of PACE solicitor job files for home improvement contracts financed through PACE assessments to evaluate whether the PACE solicitor is in compliance with the requirements for financing through PACE assessments.
>
> (1) The review shall include an analysis of whether the PACE solicitor is only using PACE financing for authorized efficiency improvements.
>
> (2) The review shall confirm that the home improvement contract with the property owner covers the same work for which the program administrator paid the PACE solicitor.
>
> (3) The review shall confirm that efficiency improvements installed are of the same quality and grade as those represented to the program administrator.

Rule 1620.15(b), combined with the many other provisions of Rule 1620, effectively deprives program administrators from establishing their own reviews using the inherent knowledge and experience gained from years of managing large networks of home improvement contractors. The CFL empowers program administrators to both "establish" and "maintain" their own compliance processes, including their periodic review procedures. Rule 1620.15(b) departs from this legislative framework.

In addition to conflicting with the CFL, Rule 1620.15(b) would be extremely burdensome to implement. Confirming compliance with Rules 1620.15(b)(1)-(3) would effectively require on-site inspections for all PACE assessments, which is impracticable.

xiv. Rule 1620.15(c)

Rule 1620.15(c) states:

> A program administrator shall prepare a report summarizing the periodic review of the PACE solicitor, and retain this report in its books and records in accordance with section 1620.07 of these rules.
>
> (1) For each area of review, the report shall confirm the review was conducted, and indicate whether or not the review resulted in any findings.
>
> (2) The program administrator shall review the findings in the report to determine whether the PACE solicitor and the PACE solicitor agents continue to maintain the minimum qualifications under section 22680, or have violated the division, for the purpose of canceling enrollment.
>
> (3) The program administrator shall share the findings with the PACE solicitor and require corrective action where warranted.
>
> (4) The program administrator shall follow up to confirm required corrective actions are taken, and procedures are instituted to address shortcomings.

Rule 1620.15(c) would effectively require program administrators to act as agents of the Department in regulating home improvement contractors. This is problematic and inappropriate for reasons discussed throughout this Response. Rule 1620.15(c) is also extraordinarily burdensome.

Rule 1620.15(c)(1) requires the program administrator to create reports confirm that reviews conducted and whether findings were made for every "area of review." This includes the 15 subcategories listed in Rule 1620.15(a)(1)–(15). Multiplying each area of review by each PACE solicitor for a review that must be conducted at least once every two years means that the program administrator will be permanently preoccupied with trying to keep up its massive investigatory obligations. The burden is further multiplied by the requirements for the program administrator to share the findings with PACE solicitors and engage in follow-up activities. Rule 1620.15(c)(1) raises issues related to attorney-privilege and legal risks.

Finally, as extensively discussed in Section VII.B.i., the records retention requirements are excessive in scope and indefinite in duration, and they would result in massive resource expenditures that would not further the CFL's stated purpose of consumer protection.

These requirements are unduly burdensome, and the burden is not outweighed by any perceived consumer protection rationale. Instead, program administrators would become engulfed in a regulatory quagmire, required to take on regulatory role with unknown legal risks, while being forced to shift resources away from the core processes involved in administering their PACE programs. The Draft Regulations should assist program administrators and property owners in securing financing with confidence and maintaining the integrity of the process, not forcing program administrators to engage in onerous and overwrought oversight activities.

XVI. Rule 1620.16: Canceling Enrollment

A. Overview of Response to Rule 1620.16

Rule 1620.16 of the Draft Regulations addresses the enrollment cancellation of PACE solicitors and PACE solicitor agents. Rule 1620.16 prescribes the process for how a program administrator notifies the Department of the PACE solicitor or PACE solicitor's change in status, including the required form, format, and frequency of such notifications, and the specific substance and categories to explain the basis for the cancellation or withdrawal.

Rule 1620.16 relates back to Sections 22680(f) and 22682(b) of the Financial Code. Section 22680(f) provides that "[a] program administrator shall establish and implement a process for canceling the enrollment of PACE solicitors and PACE solicitor agents who fail to maintain the minimum qualifications required by this section, or who violate any provision of this division." Section 22682(b) provides that "[a] program administrator shall, in the manner prescribed by the commissioner, timely notify the commissioner of each enrollment cancellation and withdrawal of a PACE solicitor or a PACE solicitor agent . . . ."

While Section 22682(b) provides that program administrators must "timely notify" the Department "of each enrollment cancellation and withdrawal" of a PACE solicitor and PACE solicitor agent, nothing in the PACE Statutes requires program administrators to provide the Department with the specific *reason* for the cancellation of withdrawal. The PACE Statutes also do not require program administrators to notify the CSLB – or any other entity besides the Department – of the cancellation or withdrawal. The reason for this is obvious: notifications by program administrators to government agencies could become public records, and potentially may be obtained by third parties. The creation of such public records could lead to unintended consequences that undercut the goals of the statute.

One unintended consequence is the potential for undue harm to PACE solicitors and PACE solicitor agents. A public record stating why their enrollment had been cancelled could subject them to frivolous litigation, impair their ability to pursue future opportunities, lead to disclosures of private information, or otherwise subject them to embarrassment. While the public may have an interest in removing certain entities and persons from acting as PACE solicitors and PACE solicitor agents, even if because they made a mistake, it is unnecessary to create a proverbial scarlet letter that would prevent those persons from moving on in their trade or business. The effect of this publicity would be to push qualified home improvement contractors and home improvement salespersons away from PACE programs, due to a legitimate fear of the draconian consequences of making a mistake.

Another unintended consequence is the harm posed to program administrators. Program administrators are private parties that lack the immunities of a government agency. Since program administrators would be responsible for making the notification, if a PACE solicitor or PACE solicitor agent disagreed with the reason for cancellation or notification, they may pursue legal action against the program administrator for defamation, disparagement, or tortious interference with contract. This would create unnecessary risk to program administrators and undermine the purpose of the enrollment cancellation provision.

There are also various instances of where these proposed regulations are vague, inconsistent, and unworkable, as set forth fully below. Moreover, a continuous notification system for cancellation of enrollment between program administrators and the Department would create significant burden for program administrators.

B. Response to Rule 1620.16

iv. Rule 1620.16(b)(2)(B)

Rule 1620.16(b)(2)(B) states:

> The Commissioner may require a program administrator to notify the Commissioner of changes in status daily through an automated electronic file transfer, or may require continuous updates in real time, or may require notification on a periodic schedule less frequent than real time or daily.

This provision does not achieve the goals of the PACE Statutes. Section 22682(b) of the Financial Code requires a program administrator to "timely notify" the commissioner "in a manner prescribed by the commissioner" of each enrollment cancelation and withdrawal of a PACE solicitor and PACE solicitor agent. However, Rule 1620.16(b)(2)(B) does not identify the manner of notification, but instead states that the Department may prescribe the manner of notification in the future. Since the statute already provides that the Department may prescribe the manner of notification, this provision does not provide any additional clarity to program administrators.

It appears that Rule 1620.16(b)(2)(B) does not contemplate requiring daily or continuous notification immediately upon promulgation of the regulations – the Draft Regulations simply say "may" – but the possibility of continuous or daily notification requirements is troubling, given the operational challenges that would be required to support such a requirement.

Providing the Department with "continuous updates in real time," or even daily updates, would impose a substantial logistical and technological burdens on program administrators. The process of changing status of a PACE solicitor or PACE solicitor agent may require several administrative steps, including fact gathering, notifying affected parties, and documenting a person's enrollment status in internal databases. A real-time process would increase the risk of erroneous reporting, especially with respect to small and new program administrators, who may lack the resources and know-how to comply with such a requirement. In the interest of accurate reporting, the Department should consider permitting monthly updates. A monthly reporting requirement would substantially address the Department's concern, while not unduly burdening program administrators.

v. Rules 1620.16(b)(2)(C)(i)-(xii)

Rules 1620.16(b)(2)(C)(i)-(xii) states:

> (C) If the enrollment of a PACE solicitor or PACE solicitor agent is canceled, the program administrator shall notify the Commissioner using one of the following categories to explain the reason for the cancellation.
>
> (i) Demand to Discontinue Solicitation Activity: the Commissioner has demanded that the PACE solicitor or PACE solicitor agent discontinue solicitation activity under Financial Code section 22690, subdivision (c)(1)(C)(iii).
>
> (ii) Demand to Stop Violating Division: the Commissioner has demanded that the PACE solicitor or PACE solicitor agent stop violating a provision of the Finance Lending Law under Financial Code section 22690, subdivision (c)(1)(C)(ii), and the program administrator, PACE solicitor, or PACE solicitor agent has canceled enrollment of the PACE solicitor or PACE solicitor agent.
>
> (iii) Demand for Corrective Action: the Commissioner has demanded corrective action under Financial Code section 22690, subdivision (c)(1)(C)(i), and the program administrator, PACE solicitor, or PACE solicitor agent has canceled enrollment of the PACE solicitor or PACE solicitor agent.
>
> (iv) Desist and Refrain Order: the Commissioner has ordered the PACE solicitor or PACE solicitor agent to desist and refrain from engaging in business as a PACE solicitor or PACE solicitor agent, or further violating the California Financing Law, or the rules thereunder, under Financial Code section 22690, subdivision (c)(2)(A), and where not ordered by the Commissioner, the program administrator, PACE solicitor, or PACE solicitor agent has canceled enrollment of the PACE solicitor or PACE solicitor agent.
>
> (v) Bar Order: the Commissioner has barred a PACE solicitor or PACE solicitor agent from directly or indirectly soliciting a property owner to enter into an assessment contract, under Financial Code section 22690, subdivision (c)(2)(B), and the program administrator, PACE solicitor, or PACE solicitor agent has canceled enrollment of the PACE solicitor or PACE solicitor agent.
>
> (vi) Suspension Order: the Commissioner has suspended, for a period not exceeding 12 months, a PACE solicitor or PACE solicitor agent from directly or indirectly soliciting a property owner to enter into an assessment contract, under Financial Code section 22690, subdivision (c)(2)(B).
>
> (vii) Discontinuance Order: the Commissioner has ordered the PACE solicitor or PACE solicitor agent to discontinue an unsafe or injurious practice under Financial Code section 22690, subdivision (d), and the program administrator, PACE solicitor, or PACE solicitor agent has cancelled enrollment of the PACE solicitor or PACE solicitor agent.
>
> (viii) Failure to Maintain Minimum Qualifications: A program administrator has found that a PACE solicitor or PACE solicitor agent has failed to maintain the minimum qualifications under Financial Code section 22680, subdivision (f) and the program administrator, PACE solicitor, or PACE solicitor agent has canceled enrollment of the PACE solicitor or PACE solicitor agent.

(ix) Violation of Division: A program administrator has found that a PACE solicitor or PACE solicitor agent has violated a provision of the California Financing Law under Financial Code section 22680, subdivision (f), and the program administrator, PACE solicitor, or PACE solicitor agent has canceled enrollment of the PACE solicitor or PACE solicitor agent.
(x) Voluntary Withdrawal by Solicitor or Agent: A PACE solicitor or PACE solicitor agent has voluntarily withdrawn from enrollment, and the program administrator, PACE solicitor, or PACE solicitor agent has canceled enrollment of the PACE solicitor or PACE solicitor agent.
(xi) Failure to Comply with Terms of Enrollment Agreement with Program Administrator: A program administrator has found that a PACE solicitor or PACE solicitor agent has failed to comply with the terms of the enrollment agreement with the program administrator, and the program administrator, PACE solicitor, or PACE solicitor agent has canceled enrollment of the PACE solicitor or PACE solicitor agent.
(xii) Termination by Program Administrator for Business Reasons: The program administrator has disenrolled a PACE solicitor or PACE solicitor agent for reasons unrelated to the business practices of the PACE solicitor or PACE solicitor agent.

Rule 1620.16(b)(2)(C) merits serious revision. As discussed above, the requirement that program administrators provide the reason for cancellation of enrollment extends beyond the statute and will lead to unintended consequences.

Moreover, this provision appears to improperly convert program administrators into agents of the Department. The CFL requires program administrators to "establish and implement a process for canceling the enrollment of PACE solicitors and PACE solicitor agents" and to notify the Department "of each enrollment cancellation and withdrawal." Cal. Fin. Code §§ 22680(f), 22682(b). However, Rule 1620.16(b)(2)(C) would require program administrators to notify the Department of cancellations that are either *ordered* or *demanded* by the Department itself. For example, the Department would require program administrators to notify *it* when *it* issues a "Desist and Refrain Order" and "Bar Order," both of which inherently result in a cancellation. *See* §§ 1620.16(b)(2)(C)(iv), (iv). The Department would also require program administrators to notify *it* when *it* issues a "Demand to Discontinue Solicitation Activity" that results in a cancellation. *See* § 1620.16(b)(2)(C)(i). It is unclear why the Department expects program administrators to notify the Department why cancellations that occur as a direct consequence of the Department's actions are indeed a consequence of those actions.

In addition, the Department would require program administrators to notify the Department of "voluntary" cancellations that either the program administrator or the Department (it is unclear which) believes are related to the Department's issuance of a "Demand to Stop Violating Division," "Demand for Corrective Action," or "Discontinuance Order." *See* §§ 1620.16(b)(2)(C)(ii), (iii), (vii). The Department would also require program administrators to notify the Department of an action that is neither a cancellation nor a withdrawal, but rather a "Suspension Order" that causes the suspension of a PACE solicitor or PACE solicitor agent. *See* § 1620.16(b)(2)(C)(vi).

The common thread between all of these designations is that the reasons are all known, or should be known, to the Department, because it is instigating the cancellations (or, in one case, the suspension). It is unclear whether the Department views program administrators as exercising some form of delegated power from the Department, but Renovate America is aware of no authority allowing that. The Department may exercise its lawful enforcement authority where appropriate, but assisting in the exercise of this authority is not the responsibility of program administrators. Moreover, the Department should not seek to expand its powers by requiring program administrators to do things that it cannot do or chooses not to do.

Rules 1620.16(b)(2)(C)(viii) and (ix) would require program administrators to report cancellations for the "Failure to Maintain Minimum Qualifications" and a "Violation of the Division." These two provisions substantially overlap, and do not provide sufficient guidance for program administrators to adequately comply. Duplicative designations will lead to confusion, complicate enforcement, and skew reporting results.

Rule 1620.16(b)(2)(C)(xi) would require program administrators to report cancellations for a "Failure to Comply with Terms of Enrollment Agreement with Program Administrator." The challenges posed by this concept are discussed extensively in Sections VIII and XI, because the Department also seeks to dictate the terms of the written agreements between program administrators and PACE solicitors, and prescribe requirements of PACE solicitors and PACE solicitor agents that otherwise do not exist in PACE Statutes. Rule 1620.16(b)(2)(C)(xi) would then require program administrators to report violations of these agreements to the Department.

Rule 1620.16(b)(2)(C)(xii) would require program administrators to report cancellations designated as a "Termination by Program Administrator for Business Reasons." This heavy-handed designation does not clearly match to its description of "reasons unrelated to the business practices of the PACE solicitor or PACE solicitor agent." It appears this category is anticipated to be used as a catchall, capturing cancellations that do not fall into any other designation. There are many reasons that program administrators may cancel enrollment of PACE solicitors or agents. Sometimes the situation will not fit neatly into a category, and program administrators will be forced into choosing this designation, which unfairly portrays cancellations "unrelated to . . . business practices" as a "Termination . . . for Business Reasons."

Finally, all twelve designated categories in Rules 1620.16(b)(2)(C)(i)-(xii) are problematic because they could potentially expose program administrators to significant litigation risk merely for complying with the regulations. Rule 1620.16 would require program administrators to disclose the basis on which the enrollment of PACE solicitors and PACE solicitor agents was terminated, using specific terminology set forth in each designation. That terminology may not fit the individual circumstances, and also could be viewed as defamatory. Renovate America objects to being compelled to communicate the reasons for cancellations and withdrawals, especially using the loaded language set forth in the Rule 1620.16. While program administrators administer PACE programs on behalf of public entities, they are not themselves public entities. As a result, program administrators do not have the same immunities (or other protections) that are afforded to public entities. By communicating the basis on which enrollment is cancelled, program administrators would expose themselves to unnecessary liability.

For example, if a PACE solicitor and program administrator become involved in a contractual dispute, and the program administrator cancels the PACE solicitor's enrollment because it finds that the PACE solicitor failed to "Comply with the Terms of Enrollment Agreement," this designation could become publicly known, and thereafter constitute the basis for legal claims against program administrators, including but not limited to defamation.

vi. Rule 1620.16(c)

Rule 1620.16(c) states:

> A program administrator shall notify a sponsoring public agency and the Contractors State License Board of the cancelation of a PACE solicitor or PACE solicitor agent when the cancelation is for any reason other than "Voluntary Withdrawal by Solicitor or Agent," or "Termination by Program Administrator for Business Reasons."

Rule 1620.16(c) is outside the scope of the statutory authority. Section 22680(f) of the Financial Code does not compel program administrators to communicate with the CSLB or any other public body except for with the Department. If the Legislature sought to require program administrators to communicate to unrelated agencies, it would have provided for this in the PACE Statutes.

Here, as with Rule 1620.16(b)(2)(C), the absence of confidentiality protections or other processes to safeguard information raises significant privacy concerns, and would expose PACE solicitors, PACE solicitor agents, and program administrators to potential liability. Public communications regarding cancellations and withdrawals could lead to frivolous litigation against these entities.

XVII. Rule 1620.17: Education Program

A. Overview of Response to Rule 1620.17

Rule 1620.17 of the Draft Regulations addresses various aspects of the training programs that program administrators are required to establish pursuant to Section 22681 of the Financial Code, including requires related to the involvement of third parties, the Department's "approval" of training programs, record retention requirements, and training content.

Section 22681 requires a program administrator to "[e]stablish and maintain a training program for PACE solicitor agents, which is acceptable to the commissioner." The training program prescribed by the Legislature comprises two distinct components: (i) an introductory training "as part of the program administrator's enrollment process" and (ii) six hours of training "provided by the program administrator within three months of completing the program administrator's enrollment process." Cal. Fin. Code § 22681(a), (b). The Legislature also prescribed the seven specific topics that must be addressed in both components of the training program.

Renovate America supports the Department's clarification of Section 22681 to permit program administrators to provide training through one or more third party entities, and to consider training as being "provided by the program administrator" in instances where training is administered in connection with enrollment of a PACE solicitor by a different program administrator, so long as that program administrator provides consent. Renovate America is actively engaging one or more third party entities to develop and provide a standardized training regime to be used by Renovate America. Renovate America believes this process for training would create flexibility and encourage uniform training curricula throughout the PACE industry, as well as reduce the burden on PACE solicitor agents by avoiding duplicative training obligations.

However, Renovate America is concerned with the Department's rules requiring the "approval" of training programs by the Department, to the extent "approval" is intended to mean "prior approval." Rule 1620.17(a)(4) requires a program administrator to "obtain approval from the Commissioner for a training program provided by a third party prior to using the training program" and Rule 1620.17(c) requires a program administrator "[k]eep evidence in its books and records . . . that the Commissioner has approved the use of its training program." Taken together, these provisions suggest that the Department intends to require prior approval of all training programs, whether or not provided by a third party. However, it is unclear whether the intent of these provisions is for the Department to approve the *process* under which training programs are developed or acquired, the *content* of training programs, or both. Each scenario could be problematic.

First, there is no statutory basis for prior approval. Section 22681 provides that "[a] program administrator shall establish and maintain a training program for PACE solicitor agents, which is acceptable to the commissioner." This provision evidences the Legislature's intent to require regulatory review over education programs, but not to subject training to an arduous and iterative pre-approval process.

To the extent Rule 1620.17 is intended to require prior approval of content of training programs, it could be read to include prior approval of minor modifications and changes to the training programs, which would be excessively burdensome. That level of formality and process, applied broadly, would impair the ability of program administrators to effectively operate and manage their own training programs. For example, program administrators would be unable to update their training programs based on legislative developments, observed or anticipated risks, operational changes, market experience, or issues as minor as user experience enhancements or software updates, without prior approval from the Department. This would hinder the program administrator's ability to adapt to market conditions, increase user engagement, and effectively educate PACE solicitor agents.

Undoubtedly, the Legislature did not intend to strip control away from program administrators, which are required to *establish and maintain* their respective training programs. If that were its intent, the Legislature would have tasked the Department with establishing training programs that program administrators were required to maintain. Renovate America finds no rational basis to interpret the Legislature's use of "*acceptable* to the commissioner" as "*pre-approval* by the commissioner."

Finally, several provisions in Rule 1620.17 create continuous education requirements that are not contemplated by the PACE Statutes. For example, Rule 1620.17(d) establishes a requirement that training occur every 48 months, and Rule 1620.17(c) establishes an annual education requirement. These provisions have no statutory basis. As discussed above, the training program prescribed by the Legislature comprises two distinct components, neither of which provide for re-training or continuous education. The Legislature supplemented its creation of specific training requirements with requirements to maintain processes to promote and evaluate the compliance of PACE solicitors and PACE solicitor agents, which obviate the need for continuous education requirements.

B. Response to Rule 1620.17

i. Rule 1620.17(b)

Rule 1620.17 states:

> A program administrator may establish a training program by acquiring a training program from a third party.
>
> (1) A program administrator that acquires a training program from a third party must verify that the training program meets the minimum requirements of the California Financing Law and these rules.
>
> (2) A program administrator may arrange with a third party to provide training to PACE solicitor agents.
>
> (3) A program administrator that provides training to a PACE solicitor agent through a third party remains responsible for ensuring that each PACE solicitor agent completes the required six hours of education within three months of completing the program administrator's enrollment process.

> (4) A program administrator must obtain approval from the Commissioner for a training program provided by a third party prior to using the training program.
> (5) Upon notice to the Commissioner and approval by the Commissioner, a program administrator may use a training program that has been approved by the Commissioner for use by a different program administrator, provided that the program administrator establishing the training program consents to its use.

Renovate America supports the Department's clarification of Section 22681 of the Financial Code to permit program administrators to provide training through one or more third party entities. If a program administrator chooses to acquire a training program from a third party, it is reasonable to expect the program administrator to remain responsible for "verify[ing] that the training program meets the minimum requirements of the California Financing Law." Similarly, if a program administrator provides training through a third party, it is reasonable to expect the program administrator to remain responsible for verifying that "each PACE solicitor agent completes the six hours of education."

However, Renovate America is concerned that the Draft Regulations would require the Department's prior approval of training programs. In particular, Rule 1620.17(d)(4) requires a program administrator to "obtain approval from the Commissioner for a training program provided by a third party prior to using the training program." This provision suggests that the Department intends to require program administrators to receive formal approval in advance for at least some training programs involving third parties. This raises the specter of implementation delays that could significantly impact a program administrator's ability to administer its PACE program, particularly if the Department intends to dictate the content of training curricula as part of its approval process.

ii. Rule 1620.17(c)

Rule 1620.17(c) states that "[e]ach program administrator shall keep evidence in its books and records, under rule 1620.07, that the Commissioner has approved the use of its training program."

As discussed in Section VII, Renovate America is generally concerned with the retention requirements set forth in Rule 1620.07, which are unduly burdensome. It is unclear which retention requirements would apply to records demonstrating "that the Commissioner has approved the use of [the program administrator's] training program," but all of the requirements contained with Rule 1620.07 are overbroad in application and duration.

iii. Rule 1620.17(d)

Rule 1620.17(d) states:

> A PACE solicitor agent that has completed a training program for a program administrator within the past 48 months need not complete training for another program administrator, provided that the program administrator providing the training has consented to its use by the other program administrator.

(1) A program administrator shall keep in its books and records evidence, under rule 1620.07, that a PACE solicitor agent enrolled by the program administrator has completed the required training, including the date of completion.
(2) Upon completion of a training program, a program administrator shall provide a PACE solicitor agent a certificate that documents completion of the training program, the date of completion, and the identity of all the program administrators for whom the certificate is applicable.
(3) A program administrator seeking to enroll a PACE solicitor agent who completed a training program more than 48 months ago shall require the PACE solicitor agent to complete the updated training on recent developments required by subsection (f).

Renovate America supports the Department's clarification of Section 22681 to permit program administrators to rely upon training administered by a different program administrator, if such program administrator provides consent. The requirement to obtain consent is critical to prevent any potential misuse or misrepresentation of training programs.

However, Rule 1620.17(d)(3) expands training requirements beyond what is required by the PACE Statutes, and is wholly without statutory foundation. There is no requirement for program administrators to retrain PACE solicitor agents at any point after the enrollment training has been completed. Section 22681 of the Financial Code requires a program administrator to "establish and maintain a training program for PACE solicitor agents," and prescribes *the* two specific training requirements program administrators must satisfy and PACE solicitor agents must complete: (i) an introductory training and (ii) six hours of education within three months of enrollment. The imposition of any additional requirements directly contradicts the CFL.

Rule 1620.17(d)(2), which would require a program administrator to provide a PACE solicitor agent with a "certificate" upon completion of the program administrator's training program, conflicts with another provision of the Draft Regulations. Rule 1620.05(b) would require that a program administrator "develop and implement policies and procedures intended to ensure that a PACE solicitor or PACE solicitor agent does not lead a property owner to believe that the PACE solicitor or PACE solicitor agent has been *certified* to provide efficiency improvements under any PACE program." This contradiction undermines the purpose and utility of establishing a formal training program and puts PACE solicitor agents in an impossible position. They must complete an education program but cannot represent having done so.

Rule 1620.17(d) also requires a program administrator to identify "all of the program administrators for whom the certificate is applicable." In many cases, this would not be possible. For example, a PACE solicitor agent may obtain a training certificate from one program administrator, then later enroll with additional program administrators, including program administrators that obtain consent to rely upon the original training to satisfy their obligations. The program administrator that issued the certificate would have no way of knowing which program administrators the solicitor agent would enroll with in the future, and which of them would obtain consent to rely upon the training originally provided, and would therefore have no way of determining which program administrators to associate with the certificate.

Finally, Rule 1620.17(d) requires a program administrator keep in its "[b]books and records evidence, under rule 1620.07, that a PACE solicitor agent enrolled by the program administrator has completed the required training, including the date of completion." Rule 1620.07(f) requires such records to be retained for the entire period during which the PACE solicitor agent is enrolled in the program, plus four years. Because the duration of enrollment is indefinite, this could amount to decades. The burdens associated with the retention requirements set forth in Rule 1620.07 are discussed at length in Section VII.

iv. Rule 1620.17(e)

Rule 1620.17(e) states:

> Each program administrator shall annually provide each enrolled PACE solicitor agent with information on changes to the PACE program and any changes to previous training material.
>
> (1) The program administrator shall require the PACE solicitor agent to confirm receipt and review of the updated material prior to accepting a property owner's application for an assessment contract from the PACE solicitor agent.

Rule 1620.17(e) lacks statutory foundation. There is no requirement for continuous training anywhere in the PACE Statutes. Section 22681 of the Financial Code requires a program administrator to "establish and maintain a training program for PACE solicitor agents," and prescribes *the* two specific training requirements program administrators must provide and PACE solicitor agents must complete: (i) an introductory training and (ii) six hours of education within three months of enrollment. Neither of the time constraints prescribed in these two statutory provisions could reasonably be interpreted to provide a basis for such a continuous education requirement.

Rule 1620.17(e) also requires program administrators to provide PACE solicitor agents with "any changes to previous material." This requirement is overbroad, and it imposes an undue burden on program administrators. "Any" in this context would require program administrators share extraneous updates with PACE solicitor agents, which would include non-substantive and technical revisions that bear no relevance to the activities of PACE solicitor agents. Moreover, as discussed above, the unintended consequence of such an overbroad requirement would be to incentivize program administrators to make as few updates to their training materials as possible, thereby minimizing the administrative burden associated with providing updates to PACE solicitor agents. This would result in fewer process improvements.

Further, Rule 1620.17(e) is not necessary to effectuate the CFL's stated purpose of consumer protection. As discussed, the PACE Statutes already impose specific training requirements upon program administrators, as well as requirements to maintain processes to promote and evaluate the compliance of PACE solicitors and PACE solicitor agents.

v. Rule 1620.17(f)

Rule 1620.17(f) states:

> Every four years a program administrator shall require a PACE solicitor agent to complete a training update which shall include information on recent developments to PACE programs and reminders about practices that constitute unfair business practices under rule 1620.10. The length of the updated training shall not be less than is necessary to provide the updated information and reminders, and a PACE solicitor agent shall receive a certificate upon completion with the date of completion and the identity of all of the program administrators for whom the certificate is applicable.

Rule 1620.17(f) lacks statutory foundation and is not reasonably necessary to effectuate the CFL's statutory purpose of consumer protection. As discussed, Section 22681 of the Financial Code prescribes specific training requirements, none of which include retraining every four years. Moreover, Rule 1620.17(f) is inconsistent with other provisions within the Draft Regulations, as it requires program administrators to provide PACE solicitor agents with a certificate upon completion of the quadrennial retraining program that lists the "identity of all of the program administrators for whom the certificate is applicable." As previously discussed, program administrators would be unable to achieve compliance with this requirement.

vi. Rule 1620.17(g)

Rule 1620.17(g) addresses specific information that program administrators must include in the six-hour component of their training programs.

Rule 1620.17(g) relates back to Sections 22681(b)(1)-(7) of the Financial Code, which requires PACE solicitor agents to complete six hours of education within three months of enrollment, and defines the seven topics that must be addressed: (i) PACE programs and assessment contracts; (ii) PACE disclosures; (iii) ethics; (iv) fraud prevention; (v) consumer protection; (vi) nondiscrimination; and (vii) senior financial abuse. However, Rule 1620.17(g) expands on these seven topics by prescribing a specific list of 53 subtopics, and information that must be addressed for each.

While Renovate America supports the training requirements identified in Section 22681, the Department's creation of a multitude of subtopics would undermine the goals of the PACE Statutes. For example, it would be virtually impossible for a program administrator to thoughtfully address 53 individual topics within a six-hour period – that is, on average, 9 topics per hour. If the program administrator covered all 53 individual topics in the manner they should be addressed, that would certainly exceed the six-hour allotment. The statutory language was clear on this question, specifying that each PACE solicitor agent "complete" six hours of education. The six-hour requirement is not a minimum; it is *the requirement*. In addition, if the program administrator is forced to address all 53 topics in six hours, there will necessarily be a trade-off between the depth and breadth of the content, and program administrators will effectively be stripped of their ability to determine content that may be more relevant than the subtopics listed by the Department.

XVIII. Rule 1620.19: Annual Report Data

A. Overview of Response to Rule 1620.19

Rule 1620.19 of the Draft Regulations prescribes specific data reporting requirements program administrators must submit to the Department as part of an annual report. This data covers the program administrators' activity for the prior calendar year.

There is no statutory basis to compel program administrators to provide much of the information required by Rule 1620.19. This rule relates back to Section 22692 of the California Financial Code, which enumerates specific types of information that program administrators are obligated to provide to the Department in their annual reports, including information about the 97 percent cap on total PACE and mortgage-related debt and information about the impact on property owners of the absence of a minimum residual income threshold. Section 22692 also provides the Department with discretion to request additional information, so long as it is "relevant information that the commissioner reasonably requires concerning the business and operations conducted by the licensee." Cal. Fin. Code § 22159. However, much of the information that Rule 1620.19 would require program administrators to produce falls well outside the scope of "relevant information . . . concerning the business and operations" of program administrators.

Renovate America has included below the categories of information required under Rule 1620.19 that are the most burdensome and problematic to produce in annual reports, or the most irrelevant to the business and operations of program administrators. However, this list is not exhaustive, as much of the other information required under Rule 1620.19 is also burdensome and irrelevant.

The annual disclosure requirements imposed on program administrators appear to be significantly more burdensome than the annual disclosure requirements of other licensees under the CFL. *See* 10 Cal. Code Regs. § 1430; 10 Cal. Code Regs. § 1606. It is unclear why the Department has chosen to single out the PACE industry in this manner. Renovate America believes that data reporting requirements applied to program administrators should be consistent with the requirements applied to all other CFL licensees, taking into account the unique requirements contained within Sections 22692 and 22687(f) of the Financial Code.

Moreover, given the overbroad nature of Rule 1620.19, the economic burden imposed on program administrators would be substantial. For example, Rule 1620.19(a)(3)(D) would require an extremely detailed, comprehensive portfolio analysis by each program administrator. Also, Rules 1620.19(a)(3)(G) and (H) would require program administrators to constantly monitor the status of all properties subject to a PACE assessments with respect to encumbrances unrelated to PACE, without a justification supporting such an onerous requirement. Accordingly, as set forth fully below, the Department must comprehensively revisit this proposed regulation.

Finally, many of the provisions in this rule are unnecessary. Section 5954 of the Streets and Highways Code already prescribes a robust reporting framework for PACE programs, which requires program administrators to report data to public agencies semiannually. Rule

1620.19(a)(1) actually acknowledges these preexisting reporting obligations, and would require program administrators to share that same data with the Department.

B. Response to Rule 1620.19

i. Rule 1620.19(a)(3)(A)

Rule 1620.19(a)(3)(A) states that a program administrator shall report "[t]he number of foreclosure actions on PACE property 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."

There is no statutory authority to require the inclusion of this information in the annual reports of program administrators. The Department is authorized to request the enumerated categories of information set forth in Section 22692 of the Financial Code, as well as "relevant information . . . concerning the business and operations" of program administrators. The information required under Rule 1620.19(a)(3)(A) does not relate to the "business and operations" of program administrators, so this provision exceeds Department's statutory authority.

Rule 1620.19(a)(3)(A) is vague. It is unclear whether the Department seeks *all* foreclosure data, including foreclosures initiated by the public agencies that administer PACE, as well as judicial and nonjudicial foreclosures initiated by other entities. If this is the intent of Rule 1620.19(a)(3)(A), it is overbroad, because it would request a substantial amount of information unrelated to PACE programs themselves, and that may not be collected by program administrators in the ordinary course of business.

Property owners who obtain PACE financing at some point in time may later be foreclosed on for reasons unrelated to PACE financing. For example, a property owner may obtain a second mortgage ten years after obtaining PACE financing, which results in foreclosure five additional years later. It is inappropriate and inaccurate to assume that a foreclosure is inherently attributable to an act or omission related to the PACE financing, and requiring reporting for all reported instances of foreclosures across all PACE programs suggests a correlation none exists.

ii. Rule 1620.19(a)(3)(B)

Rule 1620.19(a)(3)(B) states that a program administrator shall report "[i]nformation regarding complaints submitted by property owners, including the total number of complaints received in the prior calendar year, the number received in the prior calendar year by subject, the total number of complaints awaiting resolution at the end of the year, and the total number of complaints resolved during the prior calendar year."

As set forth fully in the Administrator's response to Rule 1620.08, requiring program administrators to compile complaint information by subject, and to indicate the status of each complaint, is outside the scope of regulatory authority conferred to the Department. Section 22683 of the Financial Code only provides that "[a] program administrator shall develop and

implement policies and procedures for responding to questions and addressing complaints as soon as reasonably practicable." This does not contemplate an elaborate reporting process that identifies complaints by "subject" and "resolution" status.

As fully set forth in Rule 1620.08, the terms "resolved" and "resolution," as used in the Draft Regulations, are vague. The term "subject" is also vague, and may be interpreted to require program administrators to publicly report a level of detail that would unnecessarily bring about vexatious litigation.

This provision goes even further than Rule 1620.08 – it requires program administrators to provide complaint information to the Department in a public format. Complaint data is otherwise available to the Department through the examination process, just as it is with all other CFL licensees, and there is no basis to compel program administrators to provide this information in its annual reports, *unlike all other CFL licensees.* The CFL simply does not contemplate the Department obtaining this kind of information through the annual reporting process, and other licensees regulated by the CFL are not required to turn over complaint related data in their annual reports. *See* 10 Cal. Code Regs. § 1430 (lenders and brokers); 10 Cal. Code Regs. § 1606 (small dollar lenders).

The majority of the complaints received by program administrators are unrelated to financing. Rather, complaints are more likely than not to relate to the installation of improvements, which would exist regardless of whether the installation was financed by PACE, financed through another source, or paid for in cash. The CSLB is tasked with oversight of home improvement contractors with respect to the work they perform. Therefore, the Department has no rational basis to justify regulating the PACE industry differently than all other industries over which it exercises oversight.

iii. Rule 1620.19(a)(3)(C)

Rule 1620.19(a)(3)(C) states that a program administrator shall report "[t]he percentage of property owners entering into a PACE assessment that have outstanding mortgage debt."

There is no statutory authority to require the inclusion of this information in the annual reports of program administrators. The Department is authorized to request the enumerated categories of information set forth in Section 22692 of the Financial Code, as well as "relevant information . . . concerning the business and operations" of program administrators. The information required under Rule 1620.19(a)(3)(C) does not relate to the "business and operations" of program administrators, so this provision exceeds the Department's statutory authority.

The percentage of property owners who have outstanding mortgage debt at the time they obtain a PACE assessment is not determined by program administrators, and bears no relation to the business and operations of program administrators. In general, most property owners have outstanding mortgage debt. This would not be a feature unique to property owners who obtain PACE financing, and there would be no consumer protection purpose served by obtaining this information.

iv. Rule 1620.19(a)(3)(D)

Rule 1620.19(a)(3)(D) states that a program administrator shall report "[t]he average and median percentages of the market value of property that is encumbered by mortgage-related and PACE assessments, for all assessment contracts entered into during the prior calendar year."

Rule 1620.19(a)(3)(D) is vague, which is in part due to an apparent typographical error. It appears that this provision is intended to require program administrators to report on the combined loan-to-value ("CLTV") of properties subject to PACE assessments. To the extent this provision is intended to require reporting on each individual property, rather than aggregate data, it is overly burdensome. Moreover, it is unclear whether the required CLTV information would reflect the point of application, which is the only data available to program administrators. CLTV data reflecting any time after the point of application would be effectively impossible to obtain.

v. Rule 1620.19(a)(3)(F)

Rule 1620.19(a)(3)(F) states that a program administrator shall report "[t]he number of PACE solicitors and PACE solicitor agents, respectively, enrolled during the prior year, withdrawn from enrollment during the prior year, suspended during the prior year, and terminated during the prior year."

Rule 1620.19(a)(3)(F) would require program administrators to report on the number of PACE solicitors and PACE solicitor agents "suspended during the prior year." The PACE Statutes require program administrators to notify the Department in the event of "enrollment" and "enrollment cancellation and withdrawal" of PACE solicitors and PACE solicitor agents. *See* Cal. Fin. Code § 22682. However, the PACE Statutes do not even contemplate the concept of reporting suspensions of PACE solicitors and PACE solicitor agents, so any reporting requirement related to this undefined designation is wholly without statutory support.

vi. Rule 1620.19(a)(3)(G)

Rule 1620.19(a)(3)(G) states that a program administrator shall report "[t]he number of assessment contracts paid in full during the prior calendar year as a result of a residential mortgage refinance, and as a result of a property sale."

There is no statutory authority to require the inclusion of this information in the annual reports of program administrators. The Department is authorized to request the enumerated categories of information set forth in Section 22692, as well as "relevant information . . . concerning the business and operations" of program administrators. The information required under Rule 1620.19(a)(3)(G) does not relate to the "business and operations" of program administrators, so this provision exceeds the Department's statutory authority.

The "business and operations" of program administrators are focused on the administration of PACE programs, which includes assisting property owners in the process of obtaining PACE financing. However, the reasons behind why a property owner pays off an assessment contract, whether as a result of a mortgage refinance, property sale, or one of many other possible reasons,

is decidedly not part of the "business and operations" of program administrators. As a result, it would be impracticable to expect program administrators to ascertain the reasons behind each assessment payoff, which will often be unknown and unknowable. [1] Renovate America is unaware of any other class of licensee upon which the Department has imposed such a burden.

vii. Rule 1620.19(a)(3)(H)

Rule 1620.19(a)(3)(H) states that a program administrator shall report "[t]he title changes for properties with PACE assessments during the prior year that did not result in the payoff of an assessment contract."

Renovate America objects to Rule 1620.19(a)(3)(H) for the same reasons it objects to Rule 1620.19(a)(3)(G). The Department has no legitimate reason to request this data, which is unrelated to the business and operations of program administrators. Moreover, program administrators have no way of knowing about circumstances where the ownership interest in a given property changes and an assessment contract does not get paid off.

viii. Rule 1620.19(a)(3)(I)

Rule 1620.19(a)(3)(I) states:

> For assessment contracts entered into the prior calendar year, the total number of assessment contracts with interest rates
> (i) at or below 2 percent per year;
> (ii) above 2 percent but at or below 4 percent per year;
> (iii) above 4 percent but at or below 6 percent per year;
> (iv) above 6 percent and at or below 8 percent per year;
> (v) above 8 percent and at or below 10 percent per year;
> (vi) above 10 percent and at or below 12 percent per year;
> (vii) above 12 percent and at or below 15 percent per year;
> (viii) above 15 percent and at or below 20 percent per year; and
> (ix) above 20 percent per year.

There is no statutory authority to require the inclusion of this information in the annual reports of program administrators. The Department is authorized to request the enumerated categories of information set forth in Section 22692, as well as "relevant information . . . concerning the business and operations" of program administrators. The information required under Rule 1620.19(a)(3)(I) does not relate to the "business and operations" of program administrators, so this provision exceeds the Department's statutory authority.

This extensive disclosure requirements of Rule 1620.19(a)(3)(I) relate to interest rates established by the public agencies that maintain PACE programs, *not* program administrators. As a result, this information is unrelated to the "business and operations" of program administrators. Moreover, the Department does not require any other class of CFL licensees to

[1] The Western Riverside Council of Governments ("WRCOG") letter to the Department on this subject emphasizes the same point.

provide detailed breakdowns of interest rate bands, as Rule 1620.19(a)(3)(I) would require. *See* 10 Cal. Code Regs. § 1430; Cal. Code Regs. § 1606.

ix. Rule 1620.19(a)(3)(J)

Rule 1620.19(a)(3)(J) states that a program administrator shall report "[t]he average and median annual income of property owners entering into an assessment contract the prior year, by zip code."

In performing the ability to pay analysis, program administrators are not required to verify all of a property owner's income, only the amount of income sufficient to conclude that the property owner has the ability to pay the annual assessment obligation. *See* Cal. Fin. Code § 22687 ("There is no requirement to consider more income than is necessary, nor to verify assets if verified income is sufficient to determine the ability to pay the annual payment obligations.") For example, if a property owner has multiple streams of income, but one stream is sufficient to qualify for financing, that property owner need only provide documentation to verify that one source of income. Therefore, in many circumstances, program administrators do not know the total amount of annual income of a given property owner. Any data reported pursuant to this provision would inherently be misleading and unreliable, and would significantly understate the actual income of property owners.

x. Rule 1620.19(a)(3)(M)

Rule 1620.19(a)(3)(M) states:

> (M) For each PACE assessment 12 months or more delinquent on Dec 31 of the prior year, provide the following information:
>
> (i) The number of PACE assessments above the 97 percent cap on total PACE and mortgage-related debt at the time the assessment contract was entered into; the number of PACE assessments at or below the 97 percent cap on total PACE and mortgage-related debt, but above 87 percent, at the time the assessment contract was entered into; and the number of PACE assessments where the PACE and mortgage related debt of the property owner was below 87 percent of the value of the property at the time the assessment contract was entered.
>
> (ii) The number of PACE assessments for which an automated valuation model was used to determine the market value of the property subject to the PACE assessment; the number of PACE assessments for which an appraisal was conducted to determine the market value of the property subject to the PACE assessment; and the number of PACE assessments where a property valuation was not obtained.
>
> (iii) The number of PACE assessments involving a case of emergency or immediate necessity under Financial Code section 22687, subdivision (e), where the program administrator did not determine and consider the current and reasonably expected income or assets of the property owner prior in accordance with Financial Code section 22687, subdivision (b).

(iv) The average and median residual income of the property owner upon entering into the assessment contract, broken down as follows:

(1) the average and median for a one-person household;
(2) the average and median for a two-person household;
(3) the average and median for a three-person household;
(4) the average and median for a four-person household; and
(5) the average and median for a household of five or more persons.

It is unclear whether this provision is intended to require assessment information on an aggregate basis or an individual assessment-level basis. Because it refers to "each" assessment, it could be construed as the latter. If this is the intent, this provision would be extraordinarily burdensome to program administrators, and would pose serious privacy concerns, because the amount and type of data requested is sufficient to personally identify many property owners.

Rule 1620.19(a)(3)(M)(ii) would require program administrators to report instances in which assessments were originated but property valuations were not obtained. However, Section 22685 of the Financial Code requires the determination of a property valuation for all properties that become subject to a PACE assessment. Therefore, the information sought at the end of Rule 1620.19(a)(3)(M)(ii) would not lead to reporting. It is unclear what the Department seeks here.

Finally, Rule 1620.19(a)(3)(M)(iv), which would require program administrators to provide residual income data for property owners on the basis of household size, far exceeds the scope of what is required in the annual report under Section 22692 of the Financial Code, is unrelated to the "business and operations" of program administrators, and would impose a significant burden on program administrators.

XIX. Rule 1620.20: Underwriting General Standards

A. Overview of Response to Rule 1620.20

Rule 1620.20 addresses general standards with respect to underwriting requirements. It requires program administrators to "use forms and documents written in plain English (or the property owner's primary language) and in a font size and typeface that promote readability" and that program administrators provide a property owner with a copy of the "property owner's application and all forms and documents related to the transaction."

These provisions are overbroad and as a result are inconsistent with PACE statutes. Renovate America supports strong consumer disclosures and the spirit of these provisions, however, as constructed these provisions are impossible to comply with and contradict requirements of the Legislature.

B. Response to Rule 1620.20

i. Rule 1620.20(a)

Rule 1620.20(a) states that "[p]rogram administrators shall use forms and documents written in plain English (or the property owner's primary language) and in a font size and typeface that promote readability."

Rule 1620.20(a) contradicts the PACE Statutes to the extent that it would require a program administrator to provide (i) any documents in any language other than English or one of the languages specified in Rule 1632 of the Civil Code; (ii) any documents in any language specified in Rule 1632 of the Civil Code if such language is not supported by the program administrator; and (iii) any translation of any documents besides the assessment contract, financing estimate and disclosure form, and the cancellation notice.

Section 5913(e)(1) of the Streets and Highways Code provides, in relevant part, that if the terms confirmation call between the program administrator and property owner was conducted "[p]rimarily *in a language other than English that is specified in Rule 1632 of the Civil Code*, the program administrator shall deliver in writing the disclosures and contract or agreement required by law . . . ." (emphasis added). Section 5913(d) states that "[i]f the [property owner's] 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." Section 5913(e)(2) provides that "the program administrator shall deliver a translation of the disclosures, contract, or agreement in the language in which the oral confirmation was conducted . . . ." Section 5913(e)(1) identifies these documents as the assessment contract, financing estimate and disclosure form, and the cancellation notice.

As these statutory provisions confirm, the languages that program administrators are required to support, if they chose to proceed with transactions, are limited to those specified in Rule 1632 of the Civil Code, and the requirement to provide translated documents is limited to the assessment

contract and required disclosures, consisting of the financing estimate and disclosure form and the cancellation notice.

ii. Rule 1620.20(b)

Rule 1620.20(b) states that "[a] program administrator shall provide a property owner with a copy of the property owner's application and all forms and documents related to the transaction."

Rule 1620.20(b) is overbroad and as such is inconsistent with PACE statutes. The provision requires a program administrator to provide a property owner with a copy of "*[a]ll* forms and documents" related to the transaction (emphasis added). However, Section 5913(a)(1)(A) of the Streets and Highways Code lists the documents that the Legislature identified as the *key* consumer-facing documents that are the responsibility of program administrators: "a copy of the contract assessment documents," "the financing estimate and disclosure form," and "the right to cancel form."

Therefore, the use of "all" in Rule 1620.20(b) exceeds the scope of the requirements defined by the Legislature. "All" could be construed to require program administrators to provide property owners with proprietary and internal documentation related to an assessment file. All such documents are proprietary and some may be subject to the attorney work-product doctrine.

XX. Rule 1620.21: Property Owner Protections

A. Overview of Response to Rule 1620.21

Rule 1620.21 of the Draft Regulations would impose restrictions on how program administrators structure their internal operations, by dictating what information certain employees could access, by prohibiting certain employees from interacting with PACE solicitors, PACE solicitor agents, and even other employees, and by limiting how certain employees could be compensated. These proposed restrictions are entirely without precedent, and represent a vast departure from the PACE Statutes. They also raise serious constitutional concerns regarding free association and free speech.

B. Response to Rule 1620.21

i. Rule 1620.21(b)

Rule 1620.21(b) states:

> A program administrator shall implement and maintain a firewall between the persons making the good faith determination that the property owner has a reasonable ability to pay the annual payment obligations for a PACE assessment and the following:
> (1) The persons making the determination on whether to approve funding.
> (2) PACE solicitors and PACE solicitor agents participating in the transaction.
> (3) Information on the status of any other part of the assessment contract application or the home improvement contract.

Rule 1620.21(b) would require program administrators to limit the interactions of employees involved in making the determination that a property owner has a reasonable ability to pay the annual assessment obligations. It prescribes the creation of various "firewalls" to limit the ability of these individuals to interact with other individuals and to access various types of information. Implicit in the language of Rule 1620.21(b) is a view by the Department that program administrators and their employees have inherent, uncontrolled conflicts of interest that will lead to improper approval of assessment contracts. Renovate America disagrees.

Moreover, Rule 1620.21(b) is devoid of any statutory foundation. Nothing in the PACE Statutes authorizes the separation of personnel and information based on job function or any other reason. Section 22686 of the Financial Code requires simply that a program administrator can only approve an assessment contract if it "makes a reasonable good faith determination that the property owner has a reasonable ability to pay the annual payment obligations for the PACE assessment." In this context, the phrase "good faith," preceded by the word "reasonable," means that the program administrator must make the best judgment about a property owner's ability to pay based on available information, and does not imply that decisions are inherently vulnerable to being made in subjective bad faith. Section 22687 sets forth the substantive criteria for determining whether a property owner has the ability to pay the annual assessment obligations. Section 22689 addresses program administrators' authorization of PACE solicitors. None of these sections authorize the Department to separate personnel functions, restrict how individual

employees communicate amongst themselves or with third parties, or otherwise control the organizational structure of program administrators.

Other provisions within the PACE Statutes indicate that the Department lacks authority to prescribe program administrators' internal operations. The statute addresses the conduct of program administrators with respect to authorizing PACE solicitors and PACE solicitor agents to participate in their respective PACE programs. *See, e.g.*, Cal. Fin. Code § 22017-22018. However, the statute expressly exempts the individual persons working for program administrators from the definitions of "PACE solicitor" and "PACE solicitor agent." *See* Cal. Fin. Code § 22010(a) (stating that the term "'program administrator' do[es] not include employees regularly employed at the location specified in the license"); Cal. Fin. Code § 22017(c) (stating that the terms "'PACE solicitor' and 'PACE solicitor agent' do not include . . . [a] person employed by a program administrator"). Since individual employees of program administrators are explicitly exempt from these definitions, it is inconsistent with the PACE Statutes for the Department to regulate the conduct of program administrators with respect to their employees.

The restrictions imposed by Rule 1620.21(b) on the employees of program administrators are vague, overbroad, and unrelated to the CFL's stated purpose of consumer protection. First, the meaning of the term "firewall" is vague and uncertain, as it obviously refers to something other than the term's literal meaning. To the extent that Rule 1620.21(b) addresses the separation of different individual people as opposed to access to information, the state-imposed establishment of "firewalls" likely infringes on those individuals' rights to free association and free speech under the United States Constitution and the California Constitution.

Second, Rule 1620.21(b)(1), which requires the establishment of a "firewall" between "the persons making the good faith determination that the property owner has a reasonable ability to pay" and "[t]he persons making the determination on whether to approve funding," falsely presumes that those two determinations are separate. Section 22686 provides that a program administrator can only approve funding if it determines that a property owner has the ability to pay the annual assessment obligations, so those two determinations are inseparably linked and would in many cases necessarily be made by the same individual employees. Separating these functions would needlessly increase the likelihood of human error, process breakdowns, and other quality control issues, and placing "firewalls" between individuals involved in these processes which are linked would prevent any meaningful quality control from occurring. Renovate America is aware of no reason why they should be separated, or why program administrators should be compelled to designate different employees to make the determinations without contact with one another.

Third, Rule 1620.21(b)(2), which requires the establishment of a "firewall" between "the persons making the good faith determination that the property owner has a reasonable ability to pay" and "PACE solicitors and PACE solicitor agents participating in the transaction," is puzzling. PACE solicitors and PACE solicitor agents are invariably distinct from program administrators: they are not employees of program administrators, they are not agents of program administrators, and are not physically located in the same offices. This provision mistakes the role of PACE solicitor and PACE solicitor agents with respect to underwriting and approving PACE financing – they are

already inherently separate. In the context of these facts, it is unclear exactly what is required by Section 1620.21(b)(2) or how it advances the consumer protection purpose of the CFL. Fourth, Rule 1620.21(b)(3), which requires the establishment of a "firewall" between "the persons making the good faith determination that the property owner has a reasonable ability to pay" and "[i]nformation on the status of any other part of the assessment contract application or home improvement contract" misconceives the requirements of the CFL. The determination of the ability to pay is based on specific underwriting criteria set forth in Section 22687. Because the statute defines the criteria for determining a property owner's ability to pay, access to information extraneous to those factors has no effect on the validity of the determination.

Moreover, Rule 1620.10(b)(3) would deny access to *information* that is frequently necessary to complete the ability to determination, like the status of documentation received, whether the property owner has withdrawn or cancelled the application for financing, relevant information provided by the property owner contained within the property owner's file, and other critical information. Denying access to this information would only serve to increase the likelihood of inaccurate ability to pay determinations. The individuals making those determinations must have full access to each financing application to adequately perform their function. For whatever reason, Rule 1620.21(b)(3) presumes that ability-to-pay and approval determinations are made by separate people or through separate channels and processes, when in fact the ability to pay determinations and approvals are inextricably linked.

ii. Rule 1620.21(c)

Rule 1620.21(c) states that "[a] program administrator shall not compensate any person involved in determining a property owner's ability to pay the PACE assessment annual obligations or involved in approving the funding of an assessment contract based on the outcome of any ability to pay or funding decision."

Rule 1620.21(c) provides that program administrators may not compensate individuals involved in making the ability-to-pay and funding decisions based on the outcome of those decisions. There is no basis in PACE statutes for such a provision. Moreover, the language of Rule 1620.21(c) is unclear as to whether it prohibits favorable compensation decisions (i.e., paying employees more for approving financing applications), unfavorable compensation decisions (i.e., paying employees less for making inaccurate determinations), or both.

The requirements of this provision would result in unintended consequences, including disincentivizing program administrators from paying their employees based on accurate outcomes, which could lead to less accurate outcomes. As discussed above, nothing in the PACE Statutes authorizes the Department to regulate the internal processes of program administrators., and the ambiguity of Rule 1620.21(c) illustrates why the Department should not seek to micromanage these processes.

XXI. Rule 1620.22: Property Owner Income

A. Overview of Response to Section 1620.22

Rule 1620.22 of the Draft Regulations both exceeds the scope and contradicts the CFL.

For example, in assessing whether a property owner should qualify for PACE financing, the CFL prescribes the specific items a program administrator must consider to make a reasonable ability-to-pay determination – *income, assets, debt obligations, and living expenses* – and grants the program administrator some discretion on how to perform the analysis. *See* Cal. Fin. Code §§ 22686 & 22687. However, the Draft Regulations propose *new, additional* requirements that exceed the scope of the PACE Statutes. Rule 1620.22(c)(2) requires that a property owner must demonstrate a "stable and reliable flow of income" for a program administrator to determine that property owner has an ability to pay. This is entirely inconsistent with the CFL, because it mandates that program administrators make an ability to pay determination based on "stable and reliable" income alone, and not the statutorily defined consideration of assets, liabilities, or living expenses.

Rule 1620.22(c)(3) states that program administrators should request records that reflect two years of owner income, but the proposed regulation goes on to say that two years of records are not required when an owner has a "stable and reliable flow of income." Not only is this expression vague, but it also causes an irreconcilable inconsistency with the statute. Together, Rules 1620.22(c)(2) and (c)(3) are circular, with (c)(2) requiring program administrators to determine that property owners have a stable and reliable source of income, and (c)(3) allowing program administrators not to request two years of documented income so long as there is a stable and reliable source of income.

Further, the provisions in this section directly contradict the CFL. Rule 1620.22(c)(3) requires that a program administrator review income documentation demonstrating a two-year history of property owner income, which contradicts Section 22687(b)(1) of the Financial Code, which states that a 30-day pay stub, a 60-day bank statement, or the most recent year's tax information are examples of records that program administrators may rely on to satisfy the ability-to-pay determination. The Department has no basis to require that income be verified for the previous two years, when the PACE Statutes define specific, and significantly shorter look-back periods.

There are numerous other instances, as set forth fully below, where Rule 1620.22 exceeds its statutory authority or conflicts with statutory requirements. Rule 1620.22 would effectively prohibit program administrators from approving PACE financing applications of many property owners who should otherwise easily qualify under the statutory framework. This would significantly impair the public policy purpose of PACE: to expand access to financing for efficiency improvements for all California property owners.

B. Response to Rule 1620.22

i. Rule 1620.22(b)

Rule 1620.22(b) states that "[t]he reasonable good faith determination of whether a property owner has a reasonable ability to pay the annual assessment shall be made and documented independently from any statement by a property owner regarding whether the property owner has the ability to pay the annual payment obligations."

While Rule 1620.22(b) appears to be generally consistent with Section 22687(e) of the Financial Code, it does not account for the "emergency exception" for temperature regulation improvements, which is discussed in greater detail in Section XXIV. Under the emergency exception, program administrators are not required to comply with the income verification process provided in Section 22687(b)(1).

ii. Rule 1620.22(c)(1)

Rule 1620.22(c)(1) states that "[t]he examples of the records that a program administrator may use to verify a property owner's income or assets in subdivision (b)(1) of Financial Code section 22687 are not exhaustive."

Renovate America appreciates that the Department recognizes that Section 22687(b)(1) of the Financial Code provides for a non-exhaustive list of documents that can be used to verify income. However, Renovate America is concerned that the Department has taken this a step further by proposing that program administrators obtain documentation that is inconsistent with the examples provided in Section 22687(b)(1), such as documentation showing two years of income history, or the vague concept of a "stable and reliable flow of income." Renovate America expands on these issues below.

iii. Rule 1620.22(c)(2)

Rule 1620.22(c)(2) states that "[a] program administrator shall determine that a property owner has a stable and reliable flow of income."

This proposed regulation regarding the determination of a property owner's ability to pay is inconsistent with Section 22686(a) of the Financial Code, which requires the ability-to-pay determination to be based on "owner income, assets, and current debt obligations." The Department proposes to substitute this determination with the unclear requirement that a property owner have "a stable and reliable flow of income." This would lead to conflicts with the statute. For example, under the rules set out in Section 22686(a), a property owner with limited debt obligations and a high net worth, whose income is inconsistent due to short-term and staggered consulting contracts, would qualify for PACE financing. However, that property owner would likely not be able to demonstrate "a stable and reliable flow of income." This is beyond the scope of what the Legislature intended.

iv. Rule 1620.22(c)(3)

Rule 1620.22(c)(3) states:

> A program administrator should ordinarily request records that reflect two years of income.
>
> > (A) A program administrator may make a reasonable good faith determination that a property owner has a reasonable ability to pay the annual payment obligations without records of two years of income if factors suggest the determination may be made with other records establishing a stable and reliable flow of income.

This proposed regulation is in direct conflict with PACE Statutes. In particular, Section 22687(b)(1)(A) of the Financial Code states that program administrators may, for example, rely on a "pay stub showing the most recent 30-day pay period or financial institution records showing regular deposits consistent with reported income for the most recent 60 days" to verify a property owner's income. The statute also permits program administrators to rely on the property owner's "most recent" W-2 or tax return. The Legislature specifically considered and incorporated discrete time periods sufficient for determining a property owner's ability to pay. Rule 1620.22(c)(3) would overrule this determination.

Further, the promulgation of a two-year income requirement is at odds with the foundational purpose of the regulatory framework established by the CFL for PACE, namely developing statutory and regulatory requirements that recognize PACE as a distinct and unique product, and doing so in a way that does not undermine the "efficacy or viability" of the program. Here, the Draft Regulations seek to import mortgage-level underwriting requirements that would substantially undermine PACE's position as a point-of-sale home improvement financing product with an average equivalent monthly payment of $220. In addition to exceeding regulatory authority, the two-year income look-back requirement undermines the very purpose of the CFL with respect to PACE.

Rule 1620.22(c)(3)(A), the Department's attempt to craft a safe harbor, is also unworkable: a program administrator cannot reliably know what a "stable and reliable source of income" is or what "factors" would contribute to satisfying that standard. Rule 1620.22(c)(3) is also unclear as to what "other records" would be sufficient to justify such a good faith determination under the safe harbor.

v. Rule 1620.22(c)(4)

Rule 1620.22(c)(4) states that "[t]emporary sources of income are sources that are expected to end within three years, and should not be included in determining income."

Section 22687(b)(2) of the Financial Code prohibits program administrators from considering "temporary sources of income." The Department attempts to expand the scope of this statute by defining a temporary source as one "expected to end within three years." However, there is no

basis to construe the CFL as establishing a "lookahead requirement" for verifying income to determine whether that income may come to a premature end.

Section 22687(b)(2) intends to capture situations where a property owner is truly in a temporary job, from week-to-week or month-to-month. But Rule 1620.22(c)(4) is written so broadly it may capture property owners who, for example, are subject to an employment contract that expires in two years. It could even be read to capture at-will employees, who make up the vast majority of the California workforce, but have no contractual right to continued employment. The Legislature certainly did not intend to classify these kinds of jobs as temporary sources of income.

The Department's interpretation of "temporary sources of income" would also preclude program administrators from considering owners who are seasonal employees. Many people work in seasonal jobs (e.g., landscapers), and earn income during specific times of the year, but not others. Their jobs would be deemed temporary because they end during the winter months, despite often making sufficient money on an annualized basis to qualify for PACE financing. This is not an acceptable result.

Rule 1620.22(c)(4) provides no guidance as to what "expected to end" means. Because almost all forms of employment could be "expected to end" within three years, such as at-will employees or employees with employment contracts, guidance on what the Department is intending to regulate is necessary.

vi. <u>Rule 1620.22(c)(5)</u>

Rule 1620.22(c)(5) states that "[r]ental 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."

There is no statutory basis on which the Department can justify treating rental income differently than other forms of income. The statutes allow program administrators to include rental income in their underwriting analysis. It is therefore outside the Department's regulatory authority to promulgate this proposed regulation.

Further, the time requirement in Rule 1620.22(c)(5) is not reasonable and would result in an undue restriction of access to PACE financing not supported by a public policy rationale consistent with the purpose of the CFL. For example, a property owner who seeks to use PACE financing but has only owned a rental property for one year would potentially be denied access to PACE financing simply as a result of the timing of an investment in real property. Any number of knockout examples could be imagined as a result of this requirement (e.g., the property owner not renewing a lease in order to make improvements to the property that will result in higher rent payments and greater income; the property owner not renewing a lease and having a vacancy period in order to enable the arrival of a multi-year tenant). Further, this requirement could result in irrational behavior in order for a property owner to obtain PACE financing. For example, should a property owner resist evicting a problem tenant before completing the application

process for a PACE assessment? This is an overly broad bright-line rule that is not supported by market realities.

vii. Rule 1620.22(c)(7)

Rule 1620.22(c)(7) states that "[a] program administrator shall not determine the income of a property owner based on records or data that is not specific to the property owner."

This proposed regulation requires clarification. The ability-to-pay income verification process establishes "household income"– that is, income specific to the entire household, not just one property owner. Therefore, each person who is a record owner of the property may be considered for the purposes of establishing income under the ability-to-pay determination process. To the extent Rule 1620.22(c)(7) could be construed to prohibit program administrators from considering household income, it squarely contradicts the CFL. This issue can be corrected by making clear that income is specific to the household.

XXIII. Rule 1620.23: Other Assets

a. Response to Rule 1620.23

Rule 1620.23 states:

> (a) A program administrator may rely on a property owner's assets for the payment of a nonroutine, nonrecurring, or atypical obligation such as the following.
>
> (1) To meet the first payment obligation.
>
> (2) To meet a one-time increase in an impound contribution.
>
> (3) To maintain a reserve amount available for unexpected income and expense variations.
>
> (b) A program administrator need not verify and consider assets if not relied upon in order to determine a property owner's ability to pay the PACE assessment annual payment obligations.

Rule 1620.23 addresses how a property owner's assets are considered in calculating a property owner's ability to pay the annual assessment obligations. Rule 1620.23(a) directly conflicts with the plain language of the CFL, and would effectively modify how assets could be considered as part of the ability to pay determination and as a result is the focus of Renovate America's comments in this Section. *See, e.g.,* Cal. Fin. Code § 22687(b)(1). On the other hand, Rule 1620.23(b) uses language taken directly from the CFL.

First, Rule 1620.23(a) contradicts the statute to the extent that it prohibits program administrators from considering assets to determine a property owner's ability to pay. Section 22687(a) of the Financial Code expressly permits program administrators to consider assets in determining whether a property owner can pay the annual assessment obligations. Cal. Fin. Code § 22687(a) ("A program administrator *shall determine* . . . that the property owner has a reasonable *ability to pay the annual payment obligations* for the PACE assessment *based on the property owner* income*, assets* and current debt obligations" (emphasis added).); Cal. Fin. Code § 22687(b)(1) ("The program administrator *shall determine and consider* the current or reasonably expected income or *assets* … that the program administrator relies on *in order to determine* a property owner's *ability to pay the PACE assessment annual payment obligations*" (emphasis added).).

The only assets the Legislature specified that may not be considered are "the equity of the property that will secure the assessment" and "illiquid assets." Cal. Fin. Code §§ 22687(a)(4), (b)(2). The reason is obvious: some property owners may live off of their liquid assets or draw income from them. For that reason, the statute provides that program administrators may consider "[f]inancial institution records, such as bank statements or investment account statements reflecting the value of particular assets." Cal. Fin. Code § 22687(b)(1)(E). That is also why the statute treats "income" and "assets" interchangeably for purposes of determining ability to pay. Cal. Fin. Code § 22687(b)(1) (directing program administrators to consider "income or assets").

Despite the clarity of Section 22687, Rule 1620.23(a) appears to prohibit the consideration of assets in determining ability to pay the annual assessment obligations. It provides that "[a] program administrator *may* rely on a property owner's assets for the payment of a nonroutine, nonrecurring or atypical obligation" (emphasis added). This implies that assets *may not* be relied on for routine, recurring or typical obligations – which are the "annual payment obligations for the PACE assessment." Cal. Fin. Code § 22687(a). This is inconsistent with the CFL.

Second, Rule 1620.23(a) also impliedly changes the underwriting requirements set forth in the CFL. Section 22687(d) requires program administrators to consider four specific factors "[i]n calculating the ability of the property owner to pay the annual payment obligations": (i) the PACE assessment payment; (ii) mortgage payments; (iii) existing debts and obligations; and (iv) basic household living expenses. This is a closed list of factors that are to be considered; the legislature did not use any open-ended language that would suggest that other factors must be considered. "Maintain[ing] a reserve amount available for unexpected income and expense variations," as provided in Rule 1620.23(a)(3), is not one of the factors listed in the statute. Therefore, the Department has no statutory basis to supply an additional factor in the face of the specific requirements in the statute. *Cf.* Cal. Civ. Code § 3530 (stating the maxim of jurisprudence, "[t]hat which does not appear to exist is to be regarded as if it did not exist").

Third, by distinguishing the first payment obligation from all subsequent payment obligations, and by pointing outside of the assessment to mortgage impound account contributions, Rule 1620.23(a) contradicts the CFL's equal treatment of all "annual payment obligations," a plural term reflecting the recurring nature of the assessment payment. This appears to reflect a fundamental misunderstanding of the financial mechanics of residential PACE programs in California, which are designed to provide participating property owners with a single annual assessment payment amount that reflects the accrual of bond interest at a fixed rate, as required by Section 5898.28 of the Streets and Highways Code.

The Legislature did not intend to limit the consideration of assets to the first annual assessment payment, given that the first payment is merely the first in a series of annual payments of substantially equal amounts, which are assessed for the duration of the assessment. Nor did the Legislature intend to limit the consideration of assets to mortgage impound account contributions, which would narrow the consideration of assets to the one-time impound account adjustment that occurs in some cases as a result of the recordation of the assessment. This limitation would narrow the consideration of assets to a population of property owners whose properties are encumbered by a mortgage, and who have elected to pay their property taxes through an impound account associated with the mortgage. Nowhere is this contemplated by the CFL.

Nothing in the statute indicates that program administrators should conduct a special ability-to-pay determination for the first assessment payment, or that the underwriting analysis should be based on anything other than the ability to pay a recurring obligation. To the extent that this proposed language suggests that the first payment should be treated differently than the other payments, it is not consistent with the PACE Statutes.

XXIV. Rule 1620.24: Basic Household Living Expenses

A. Response to Rule 1620.24

Rule 1620.24 states:

> In making a reasonable estimate of basic living expenses, a program administrator shall additionally obtain information from a property owner on the property owner's expenses related to child care payments, medical expenses, and caregiving expenses. If the program administrator relies on a recognized standard formula for estimating basic living expenses based on household size and region, the program administrator shall add to the amount the actual expenses of the property owner for child care payments, medical expenses, and caregiving expenses.

This provision departs from the CFL by requiring program administrators to obtain information regarding actual expenses from property owners. Section 22687(d)(4) of the Financial Code addresses the determination of basic household living expenses, and provides that "[a] program administrator may make reasonable estimation of basic living expenses based on the number of persons in the household." In other words, a program administrator may use an estimate of those expenses based on a standard formula, and need not obtain information from property owners. Rule 1620.24, on the other hand, requires program administrators to obtain actual expense information from property owners. It therefore changes the statutory requirement from one that requires an estimation of expenses to one that requires a determination of actual costs.

Rule 1620.24 is also inconsistent with the CFL because it obligates program administrators to extract information from property owners that property owners have no obligation to provide. Section 22687(d)(4) does not require program administrators to obtain any information from property owners related to their actual living expenses. By contrast, Rule 1620.24 not only requires program administrators to ask property owners for living expense information, but it requires administrators to actually obtain it. This is at odds with the statute.

Lastly, Rule 1620.24 essentially rewrites the CFL by adding categories of expenses not listed in Section 22687(d)(4), and then prioritizing them over the categories identified by the Legislature. The statute provides a non-exhaustive list of living expenses: "Examples of basic living expenses include, but are not limited to, categories such as food and other necessary household consumables; transportation costs to work or school (fuel, auto insurance and maintenance, public transit, etc.); and utilities expenses for telecommunication, water, sewage, electricity and gas." Program administrators do not have to include any specific category for every property owner, because such expenses "may be variable based on the circumstances and consumption patterns of the household," which is why program administrators are able to use estimates to determine living expenses.

Rule 1620.24, on the other hand, identifies three specific categories of expenses not on the statutory list – "child care payments, medical expenses, and caregiving expenses" – that must be included in the calculation of basic household living expenses every time, using not an estimate but actual costs obtained from property owners. Moreover, the costs of these expenses must be

added to the estimate used for total household living expenses, which may already reflect these types of expenses, which could lead to double-counting the expenses. Rule 1620.24 is not filling in details for Section 22687, but is rewriting the statute to prioritize factors not identified by the Legislature. The Department lacks authority to rewrite the statute in this way.

XXV. Rule 1620.25: Emergency

A. Overview of Response to Rule 1620.25

Rule 1620.25 would impose additional restrictions on waiving the requirement to obtain documentation to verify a property owner's income for installations of temperature regulation improvements in certain circumstances, as set forth in Section 22687(e) of the Financial Code.

Specifically, Rule 1620.25(a) would condition the "emergency or immediate necessity" requirement on the "season and climate where heating or air conditioning is necessary," and Rule 1620.25(d) would extend unrelated foreign language translation requirements in Section 5913 of the Streets and Highways Code to the property owner's required "waiver" of the cancellation right under Section 22687(e).

These restrictions have no statutory foundation. Section 22687(e) provides for a highly-defined and narrow exception to obtaining documentation to verify a property owner's income in the case of an "emergency or immediate necessity" exclusively for PACE assessments "that are financing a heating, ventilation, and air conditioning ("HVAC") system, boiler, or other system whose primary function is temperature regulation in a home." The statute delineates separate specific requirements that a program administrator must consider for a PACE assessment to qualify for the limited exception to obtaining income verification documentation. Given the highly prescriptive nature of Section 22687(e), and the extensive set of restrictions set forth therein, the statute effectively precludes the consideration of new or additional requirements through regulation.

Finally, Rule 1620.25(a) misconceives how HVAC systems operate. Rule 1620.25(d) is inconsistent with the foreign language requirements in the PACE Statues, which the Legislature intended to apply to the property owner's right to cancel PACE financing, not to the property owner's waiver of this cancellation right.

B. Response to Rule 1620.25

i. Rule 1620.25(a)

Rule 1620.25(a) states:

> 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 a season and in a climate where heating or air conditioning is necessary.

Rule 1620.25(a) requires that a program administrator consider the "season" and "climate" to determine whether the PACE assessment financed under Section 22687(e) "is necessary." As stated above, there is no statutory foundation for such a requirement.

Section 22687(e) of the Financial Code is highly prescriptive, defining the specific requirements that a program administrator must consider under the emergency exception, beginning with the improvements that can be considered. An HVAC unit is not the only example of a system eligible for PACE financing whose failure would constitute an "emergency or immediate necessity." A leaking roof or broken window, for example, could easily fit such a description. But the Legislature deliberately narrowed the scope of PACE-eligible products for this exception and instituted a financing cap of $15,000, or a monthly equivalent payment of $125 (adjusted for inflation), to further limit the scope and prevent the exception from becoming too large a financial obligation of the property owner.

Indeed, Renovate America estimates a minimal amount – roughly three percent – of all PACE projects would even qualify for financing under the emergency exception. Renovate America recently analyzed the emergency exception against its existing pool of assessments, and arrived at that figure.[2] To add "season" and "climate" conditions would render this already narrow exception almost meaningless.

In addition to narrowing the PACE-eligible products that can be considered for the exception, the Legislature also limited its application through a highly prescriptive qualification process. A program administrator must: (i) first attempt to "use an automated means of [income] verification"; (ii) ask the property owner "open-ended questions during the oral confirmation to identify their income and the sources of their income"; (iii) limit the funding to the "emergency of immediate necessity improvement and any required improvements directly necessary to the installation and safe operation of the improvement"; (iv) fund an efficiency improvement that is eligible for PACE financing; and (v) limit the amount of the assessment contract to fifteen thousand dollars ($15,000) or a monthly equivalent payment on the PACE assessment of one hundred twenty-five dollars ($125). *See* Cal. Fin. Code § 22687(e).

Moreover, in order for the program administrator to consider the above five conditions, a property owner (1) execute a waiver of the right to cancel pursuant to Section 5940 of the Streets and Highways Code and (2) confirm the emergency. The waiver of the right to cancel under Section 5940(d) further requires that the property owner "initiate[s] the contract for the emergency repair or immediately necessary repair" and "provides a separate statement that is handwritten in ink by a property owner and dated and signed by each property owner, describing the situation that requires immediate remedy, and expressly acknowledges that the contractor has informed them of his or her right to cancel and that he or she waive the right to cancel the sale."

[2] For example, about 25 percent of projects financed by HERO are HVAC units. Data from electronic income verification vendors suggest a 30 percent success rate in using their services, meaning 70 percent of these HVAC projects would be eligible for consideration under the emergency exception provision (25 percent X 70 percent = 17.5 percent) About half these HVAC projects fall within the statutorily required price band. (17.5 percent X 50 percent = 8.75 percent) And, according to a survey conducted by Research in Motion in 2017, 37 percent said they undertook the improvement because it was an emergency. (8.75 percent X 37 percent = 3.2 percent).

The Legislature expressly concluded that, inside the exceedingly narrow boundaries where (i) the property owner initiates the process of securing an improvement (ii) that is a qualifying temperature regulation system (iii) that costs less than the amount of the statutory cap, and (iv) does so while affirmatively waiving the cancellation right with a handwritten statement that provides a reason for the emergency or immediate necessity, then – and only then – can the income documentation requirements be waived by the program administrator. What consumer protection interest is further advanced by adding a climatological and seasonal review to this process?

Moreover, requiring a program administrator to condition a property owner's "emergency or immediate necessity" on the "season" and "climate" and not the property owner's own determination is inconsistent with the rights conferred to property owners in the PACE Statutes. Both Section 5940 of the Streets and Highways Code and Section 22687(e) of the Financial Code provide that a property owner may execute a waiver of the cancellation right by confirming in a handwritten statement the emergency of immediate necessity of the improvement. The proposed seasonal and weather litmus test supplants a property owner's choice and discretion.

Rule 1620.25(a) would also impose an impossible and inherently subjective compliance burden on program administrators. It would effectively require a program administrator to continuously monitor in real time seasonal and weather-related climate data in every jurisdiction in which it operates prior to approving PACE assessments under the emergency exception. Rule 1620.25(a) does not consider irregularities in the weather, which are increasingly common. For example, there are exceedingly hot days during the winter and exceedingly cold days during the spring and fall. Would a property owner in immediate need of replacing an HVAC system in the winter be unable to, simply because it was deemed to be the wrong the season?

The proposed "seasonality' requirement also does not accommodate the needs of the sick and disabled. Temperature, humidity, and allergen-prevention – all part of efficient HVAC systems – are needed by the elderly, those with allergies, people who are ill and need temperature regulation in their home year-round. Are we going to deny them the benefits of the emergency provision simply because they were misfortunate enough to have their system break down in a winter season that is experiencing record-high temperatures?

Finally, this provision misconceives HVAC systems and how they function. As a result, an HVAC unit *is* a necessity regardless of season or climate. HVAC systems are critical to the function and infrastructure of a home every day, month, or season of any given year.

ii. Rule 1620.25(d)

Rule 1620.25(a) states that "[a] waiver of the right to cancel under subdivision (e)(5) of Financial Code section 22687 shall be in the same language as the oral confirmation of key terms under Streets and Highways Code section 5913."

There is no statutory basis for the requirement that a property owner's "waiver" of the cancellation right be in the same language as the oral confirmation of key terms. First, the PACE statutes only prescribe requirements with respect to documents program administrators "deliver"

to property owners as a part of the origination process. For example, Section 5913(e)(2) of the Streets and Highways Code provides that "the program administrator shall deliver a translation of the disclosures, contract, or agreement in the language in which the oral confirmation was conducted . . . ." Section 5913(e)(1) specifically identifies these documents as the assessment contract, financing estimate and disclosure form, and the cancellation notice. The right to cancel is one such document, but the "waiver" of the right to cancel is not.

Second, Section 5913 refers to documents that are required to be provided to property owners, not statements required to be submitted by property owners. This was intentional, because program administrators are responsible for providing translated documents, and therefore have control over the translations. However, Rule 1620.25(d) extends the statutory obligations of program administrators to the handwritten statements of property owners, over which program administrators have no control. This purported requirement has no basis in statute and would be impossible for a program administrator to operationalize.

Third, Rule 1620.25(d) is inconsistent with the processes defined for the cancellation right under the PACE Statutes. For example, Section 5898(d)(3) of the Streets and Highways Code provides that a property owner may waive the cancellation right if "[t]he property owner provides a *separate statement* that is *handwritten in ink by a property owner* and *dated and signed by each property owner*, *describing the situation that requires immediate remedy*, and expressly acknowledges that the contractor has informed them of his or her right to cancel and that he or she waive the right to cancel the sale" (emphasis added). This provision is extremely prescriptive, yet it does not require that the waiver be in the same language as spoken in the terms confirmation call, which it would have done had the Legislature intended it to.

The Legislature did not include a requirement for the waiver of the cancellation right to be written in the same language as the terms confirmation call because such a requirement would lead to unworkable scenarios caused by one property owner participating in the terms confirmation call and another property owner drafting the handwritten statement regarding the emergency or immediate necessity. This mismatch would inevitably occur because the terms confirmation call can take place with a single property owner, whereas all property owners must sign the waiver. A property owner may prefer to speak one language on the oral confirmation of terms call, and another property owner (or that same property owner) may handwrite the waiver in another language that all property owners prefer. A program administrator has no control over property owners' preferred language for the waiver.

Finally, Rule 1620.25(d) adds unnecessary complexity and burden for both property owners and program administrators. For example, circumstances will arise where a property owner has already signed his or her home improvement contract and executed a related waiver, prior to participating in terms confirmation call. During the call, that same property owner may prefer a different language than the language in which the waiver statement had been written. If the program administrator conducts the confirm terms call in that language, Rule 1620.25(d) would require the property owner to provide an additional waiver, this time including a handwritten statement in another language. This would create a gratuitous burden for a property owner in need of emergency services without advancing any consumer protection purpose.

XXVI. Rule 1620.26: Responsible for the Difference

A. Response to Rule 1620.26

Rules 1620.26(a)-(b) state:

> If a program administrator is responsible for the difference between the determination of a property owner's ability to pay the annual PACE obligations and the actual amount financed by the property owner, the following shall apply.
>
> (a) A program administrator may prepay the assessment contract for the amount of the difference.
>
> (1) If a program administrator proceeds under this paragraph, the property owner shall not be subject to any additional recording or other fees for the transaction, including the recording of documents.
>
> (2) The property owner shall receive a revised Financing Estimate and Disclosure as set forth in Streets and Highways 5898.17.
>
> (b) A program administrator may pay the amount of the difference directly to the property owner.

Rule 1620.26 relates back to Section 22687(g) of the Financial Code:

> If there is a difference between the determination of the property owner's ability to pay the annual PACE obligations and the actual amount financed for the property owner, and the property owner is obligated on the underlying home improvement contract, the program administrator shall be responsible for that difference. This subdivision does not apply in a case of intentional misrepresentation by the property owner.

Rule 1620.26(a) lays out a path for program administrators to prepay the assessment contract by the amount of the "difference." Rule 1620.26(b) provides an alternative process by which the program administrator may "pay" the amount of the difference.

Renovate America appreciates the solution that the Department has fashioned with respect to the "difference." This provision has generated considerable debate, and Renovate America believes the Department has presented an approach to defining how to address this issue, which is consistent with the foundational elements of the PACE Statutes, as well as the operational mechanics of PACE. The proposed process provides robust protections for property owners, creates alternatives in the event there is a "difference," eliminates the prospect that property owners would have to bear any associated costs, and provides transparency into the process.

However, Renovate America suggests a minor but important modification to Rule 1620.26(a)(2), which requires a property owner to receive a revised "Financing Estimate and Disclosure as set forth in Streets and Highways 5898.17." The financing estimate and disclosure form by its nature is an *estimate* of the financing terms, which a property owner receives at the outset of a PACE transaction. Redelivering this exact form with slightly new information at the end of the PACE transaction would be confusing and inaccurate. Instead, Renovate America proposes that the Department require program administrators to provide the property owner with a final payment

schedule at the end of the transaction, which reflects the property owner's revised and final annual payment amount and schedule of payments. This would provide more clarity to property owners, because it does not include any references to "estimates."

XXVII. Rule 1620.27: Automated Valuation Model

A. Overview of Response to Rule 1620.27

Rule 1620.27 of the Draft Regulations requires program administrators to maintain evidence documenting the "confidence scores and estimated values" for all of the automated valuation models ("AVMs") used to derive the market value of each property, in accordance with the record retention requirements set forth in Rule 1620.07.

Overall, Rule 1620.27 demonstrates a sensible level of regulation. Renovate America agrees that the maintenance of evidence documenting "confidence scores and estimated values" is important. Moreover, the Administrator's appreciate the Department's clarification in Rule 1620.27(b) that "[a] property value with the lowest standard deviation shall meet the standard of determining the property value with the highest confidence score." Forecast standard deviations ("FSD") are a consistent measure that reflect the statistical reliability of a given value provided by an AVM. FSD's are not proprietary or unique to AVM vendors.

However, as discussed in Section VII, the Department's overall proposed record retention requirements for program administrators are excessive. They exceed any requirements ever promulgated by the Department for record retention for any other regulated entity. The requirements are disproportionate in scope and duration, and they would collectively result in significant resource expenditures that would not advance the CFL's stated purpose of consumer protection. Therefore, this section only adds to the overall burden associated with the record retention requirements the Department set forth in Rule 1620.07.

B. Response to Rule 1620.27

i. Rule 1620.27(a)

Rule 1620.27(a) states that "[a] program administrator shall maintain in its books and records, under rule 1620.07, evidence documenting the confidence scores and estimated values for all of the automated valuation models used to derive the market value of each property."

Rule 1620.07(a) requires that evidence documenting confidence scores and estimated values for all AVMs be maintained in a program administrator's books and records in accordance with Rule 1620.07. While Renovate America supports a requirement to maintain such records, the retention requirement to which these records would be subject sets forth a retention period of three years after a given assessment is extinguished, which can be up to 33 years. *See* § 1620.07(d). This amount of time – nearly a third of a century – is excessive, and it imposes a significant burden on program administrators to expend resources on retaining information through numerous examination cycles, which in no way advances the CFL's stated purpose of consumer protection.

XXVIII. Rule 1620.28: Useful Life of Improvement

A. Response to Rule 1620.28

Rule 1620.28 of the Draft Regulations states:

> (a) A program administrator shall maintain documentation of the useful life of the efficiency improvement in its books and records in accordance with Rule 1620.07 of these rules.
> (b) The documentation shall include source of the standards or criteria used to determine the useful life.

Renovate America does not object to the requirement that program administrators maintain documentation regarding the useful life of efficiency improvements. However, under Rule 1620.07, this documentation would be subject to a retention period of up to thirty-three years (three years after the extinguishment of an assessment), as discussed in Section VII.

There is no basis to require useful life documentation for such an extensive period. In addition, it is unclear whether the useful life of *each individual* efficiency improvement would be required to be documented and obtained, and whether this would therefore require documentation of the *actual* useful life of each individual efficiency improvement. This would render compliance effectively impossible, as it would require continuous monitoring of the performance of efficiency improvements throughout the duration of an assessment contract plus an additional three years.

XXIX. Rule 1620.29: Commercially Reasonable

A. Overview of Response to Rule 1620.29

Section 22684 of the Financial Code states that program administrators "shall not submit, present or otherwise approve for recordation . . . an assessment contract unless the following criteria are satisfied." The statute goes on to list various criteria related to an owner's payment of property tax, involuntary liens, notices of default, bankruptcy history, whether mortgage debt is current, and various other related underwriting matters. Cal. Fin. Code §§ 22684(a)-(k). Section 22684(l) then states that a program administrator "shall use commercially reasonable and available methods to verify" those criteria set forth in Subsections 22684 (a)-(k). Thus, the Legislature specifically intended that program administrators verify the various criterion set forth at Sections 22684(a)-(k) of the Financial Code by using methods that are (1) commercially reasonable and (2) commercially available.

Rule 1620.29 of the Draft Regulations provides guidance to program administrators as to what constitutes "commercially reasonable and available methods" as used in Cal. Fin. Code § 22684(a)-(k). Some of the enumerated examples of "commercially reasonable and available methods" are appropriate and consistent with the PACE Statutes – specifically those listed in Rules 1620.29(b), (c), and (e). These provisions provide that commercially reasonable and available methods include (i) credit reports prepared by national credit reporting agencies, (ii) the market value of a property determined in accordance with Section 22685 of the Financial Code, and (iii) representations of the property owner where information was not reasonably available through an independent source. However, Rule 1620.29 fails to identify the list of enumerated methods as *both* non-exhaustive *and* permissive.

The Department should clarify that the list of enumerated examples in Rule 1620.29 is non-exhaustive. What is "commercially reasonable and available" inherently depends on the marketplace and cannot be provided in a list of fixed requirements. Whether a given method is commercially reasonable and available depends on the unique characteristics of PACE and the information required in the processes for evaluating PACE financing applications, which should not be subject to unyielding regulatory rules. In considering whether to clarify the list as non-exhaustive in nature, the Department should consider the potential economic impact on program administrators absent such clarification, in accordance with established legal precedent. *See Citri-Lite Co. v. Cott Beverages, Inc.*, 721 F. Supp. 2d 912, 926 (E.D. Cal. 2010) (recognizing the principle that, under California law, the term "commercially reasonable efforts" permits a performing party to consider its economic interests in performing its obligations). A full and complete accounting of commercially reasonable and available methods cannot be contained in a list of five methods.

For the same reasons identified above, the Department should clarify that the list contained within Rule 1620.29 is permissive, not required. While some of the methods are specifically required by statute (e.g., the method of determining property value), others are not. Some of these other methods, specifically those contained in Rules 1620.29(a) and (d), are often not commercially reasonable and available. For example, public records are often difficult to obtain and are therefore not reasonably available, and mortgage statements are often unnecessary and

therefore not commercially reasonable, because the same information is contained within credit reports.

B. Response to Rule 1620.29

i. Rule 1620.29(a)

Rule 1620.29(a) states that the verification of criteria for submitting, presenting, or otherwise approving for recordation an assessment contract is "commercially reasonable and available" if "[t]he verification relied on public records, including property tax records, county assessor records, court filings, and information made available on government websites."

As noted above, Rule 1620.29 should clarify that the use of public records is *permitted – not required* – to comply with the verification provisions in the PACE Statutes; this method is one of multiple commercially reasonable and available methods. Other options may include, but are not limited to, using data obtained from independent third parties.

Program administrators cannot be reasonably expected to scour all public records related to a particular property owner. Many public records, including historical property tax payment information, are simply inaccessible, a fact that the Legislature recognized in Section 22684(a) of the Financial Code, which requires program administrators to "[a]sk a property owner whether there has been no more than one late payment of property taxes . . . for the previous three years . . . ."

Moreover, obtaining court records is often extremely burdensome. California has more than fifty superior courts, each boasting several divisions and departments. In many courts, filings are not available online and must be obtained in person. Even where court records can be searched online, identifying information (such as a case number) is often required to perform an accurate search. Likewise, some property records are not available online (especially those records that pre-date the widespread adoption of the Internet), so such records are only available in person. In addition, there are thousands of public websites, many of which are not reliably updated. Renovate America agrees that the use of public records should be permitted to verify relevant criteria, when the information is commercially reasonable and available, but a bright-line rule requiring the use of public records where information can be obtained through another method does not appropriately reflect the meaning of "commercially reasonable and available."

ii. Rule 1620.29(d)

Rule 1620.29(d) states that the verification of criteria for submitting, presenting, or otherwise approving for recordation an assessment contract is "commercially reasonable and available" if "[t]he verification relied on mortgage statements."

As noted above, Rule 1620.29 should clarify that the use of mortgage statements is *permitted – not required* – to comply with the verification provisions in the PACE Statutes; this method is one of multiple commercially reasonable and available methods. A bright-line rule that would require program administrators to use mortgage statements is unnecessary, unrealistic and

duplicative. Relevant information contained in a mortgage statement can often easily be gathered from other sources, including credit reports.

XXX. Rule 1620.30: Application for a Program Administrator License

A. Response to Rule 1620.30

Rule 1620.30 states:

> (a) A program administrator shall provide the general information required by section 1422 of these rules for a license under the California Financing Law, except that a program administrator shall not provide the information related to lending or brokering a loan.
> (b) Applicants for a program administrator license shall submit the following additional documents with an application for a license under the California Financing Law:
> (1) A copy of each agreement between the applicant and a public agency or sponsoring public agency that authorizes the applicant to administer a PACE program on behalf of a public agency.
> (2) A copy of the applicant's agreement(s) with PACE solicitors.
> (3) A copy of the applicant's internal complaint procedures.
> (4) A copy of the applicant's procedures for enrolling PACE solicitors and PACE solicitor agents.
> (5) A copy of the applicant's training program for PACE solicitor agents.
> (6) For applicants engaged in business on or before January 1, 2019, evidence demonstrating compliance with the ability-to-pay provisions in Financial Code sections 22686 and 22687.

Rule 1620.30 of the Draft Regulations does not provide sufficient clarity for program administrators to understand what information, specifically, will be required as a condition of licensure. Rule 1620.30(a) requires program administrators to provide "general information" required of current CFL licensees, but also exempts program administrators from having to provide "information related to lending or brokering a loan." In its current form, Section 1422 only contemplates obtaining information from prospective lenders and brokers, and it does not distinguish "general information" from "information related to lending or brokering a loan." It is therefore unclear what information would be required from program administrators. Unless clarification is provided, program administrators will be incapable of fully understanding the requirements of Rule 1620.30.

Rule 1620.30 appears to subject program administrators to substantially all of the requirements that apply to lender and broker applicants under the CFL, while imposing a laundry list of additional requirements. Unless the Department has evidence demonstrating the public policy benefit of creating hurdles for prospective program administrators that do not exist for the thousands of mortgage lenders, mortgage brokers, finance companies, broker-dealers, and payday lenders overseen by the Department, this approach is demonstrably arbitrary and capricious. Singling out program administrators in this manner disadvantages PACE relative to other industries. Program administrators are not nearly as large or well-resourced as many of the lending institutions overseen by the Department, yet such institutions are held to much lower licensing standards than those proposed for program administrators.

As detailed below, many of the PACE-specific requirements in Rule 1620.30 are duplicative. Others are unworkable and unnecessarily burdensome.

Rule 1620.30(b)(2) requires applicants for a program administrator license to provide to the Department copies of their agreements with PACE solicitors. This is unreasonable. Third-party commercial agreements are not required of any other licensees, including mortgage lenders, who have various agreements with mortgage brokers and mortgage loan originators. Program administrators should not be held to a higher standard than entities responsible for mortgages, which necessarily involve greater financing amounts and a greater likelihood of foreclosure. Further, Rule 1620.30(b)(2) is unclear. To the extent this provision would require copies of *every* agreement with *every* PACE solicitor, it is unduly burdensome. For example, some program administrators have agreements with thousands of PACE solicitors.

Rules 1620.30(b)(3) and (b)(4) require applicants for a program administrator license to provide to the Department copies of their complaint and enrollment procedures. As discussed in Section VIII, Rule 1620.08 would impose substantial requirements on program administrators related to the creation and implementation of complaint processes. As discussed in Section XI, Rule 1620.11 would impose substantial requirements on program administrators related to the creation and implementation of enrollment processes. Renovate America has expressed its objections to these requirements, which exceed the authority conferred to the Department by the PACE Statutes.

The burdens imposed by Rules 1620.08 and 1620.11 would result in the creation of a multitude of new complaint and enrollment procedures to supplement the numerous existing procedures maintained by program administrators. Procedures numbering in the hundreds or thousands of pages would need to be provided to the Department as part of the application process, presumably subject to the Department's scrutiny as a condition of licensure. This level of scrutiny is not applied to any other class of CFL licensees. Existing program administrators could face requirements to modify procedures without any consideration of their effectiveness, which would cause delays that would create fundamental risks to program administrators as going concerns. Entities seeking to become program administrators, especially smaller entities, would face even greater hurdles, given the lack of PACE marketplace experience to inform the design of such extensive procedures.

Even absent the substantive issues posed by Rules 1620.08 and 1620.11, Rules 1620.30(b)(3) and 1620.30(b)(4) remain objectionable. Program administrators would still be required to produce voluminous procedural documentation, and would still be subjected to scrutiny unique among CFL licensees. Moreover, Renovate America has invested substantial resources in developing proprietary and trade-secret processes, which could thereafter become subject to records requests from competitors.

Rule 1620.30(b)(5), which requires program administrators to provide "a copy" of their training programs, suffers from similar deficiencies as those discussed above. New entities applying to become program administrators will not have operational training programs until obtaining a license. Further, training program documentation will contain confidential, proprietary, and trade-secret information that would thereafter be subject to records requests from competitors.

Rule 1620.30(b)(6) must provide additional clarity to program administrators regarding what "evidence" will be required to demonstrate compliance with the CFL's ability-to-pay provision (e.g., procedures, audits, file samples). Unless clarification is provided, program administrators will be incapable of fully understanding the requirements of Rule 1620.30.