

**To:** Jan Owen, Commissioner, Department of Business Oversight  
Colleen Monahan, Senior Counsel, Department of Business Oversight

**From:** Ari A. Matusiak, Chief Strategy Officer

**Date:** January 5, 2018

**Subject:** Renovate America Response to the Department of Business Oversight's Invitation for Comments on Proposed Rulemaking Implementation of AB 1284 and Licensure of PACE Program Under the California Financing Law (PRO 2/17)

### Overview

This memorandum contains Renovate America's initial responses to DBO's invitation for comments on proposed rulemaking implementation of AB 1284 and licensure of PACE programs under the California Financing Law. Renovate America was a strong supporter of AB 1284 and SB 242, and we believe that consumer protections and DBO's regulatory authority are vital to the sustainability of the PACE marketplace. DBO's rules will create much needed uniformity and certainty across the market in California. We look forward to working with DBO as it considers rulemaking for PACE programs. Given the comprehensive nature of the legislative requirements, we urge DBO to consider the operational impacts of any potential regulations, as well as timing for compliance of program administrators.

### DBO Questions

- 1. Definitions: AB 1284 establishes terms under the CFL that identify the individual and entities that fall within the Department's jurisdiction. Are additional definitions needed? For the terms already defined, are any of the definitions unclear, and if so, why? Can the definitions be read to encompass an individual or entity not intended to be regulated under the licensing scheme? Does any definition result in ambiguity regarding whether an individual or entity falls within it?**

For AB 1284, we recommend providing clarity around the use of "property owner" with respect to its usage as both a singular and plural noun, and adding a definition of "extinguishment." We also recommend DBO consider providing clarity around the definitions of "PACE solicitor" and "PACE solicitor agent," as discussed in response to Question 12 regarding the appropriate scope of enrollment.

- **Clarify Definition of Property Owner (Singular vs. Plural):** AB 1284 defines "property owner" as "all property owners of record on the property subject to the PACE assessment." This definition of "property owner" is consistent with the SB 242 definition but, as with SB 242, it requires further clarification in instances where it is intended to refer to a single property owner rather than all property owners.

For example, SB 242 provides that only a single property owner is required to participate on the oral confirmation call. As such, SB 242 refers to "the property owner on the call" and not "the property owner." A similar issue presents itself in the Ability to Pay section of AB 1284 where only a single property owner's income is required for the purposes of the residual income calculation. A program administrator *may* collect additional income and debt information from more than one property owner if needed, but it is not required to do so. However, the legislative language in this section is unclear and fluctuates between singular and plural usage.

In addition, section 22687(b)(1) of AB 1284 states: “The program administrator shall determine and consider current or reasonably expected income or assets of *the* property owner that the program administrator *relies on* in order to determine a property owner’s ability to pay the PACE assessment . . . .” This assumes that for the Ability to Pay analysis the program administrator is considering a single property owner’s income, not that of all property owners. Section 22687(a)(2) also states that “for *any person* whose income is considered, their debt obligations must also be considered,” similarly implying that not all property owners are required to be considered. However, other areas in the same section use the term “property owner” without qualification. For example, section 22687(a) states, “[a] program administrator shall determine . . . 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.”

Our recommendation is that DBO clarify that program administrators need only perform the Ability to Pay analysis on a single property owner applicant. There may be additional instances that also require clarification with respect to the term “property owner” and its treatment as singular or plural, which Renovate America is currently reviewing and will provide to DBO separately.

- **Add Definition for Extinguishment.** The concept of “extinguishment” is introduced in Section 22157, which pertains to the timeframe for keeping records. The statute requires that a “[f]inance lender, broker, and mortgage loan originator licensees shall preserve their books, accounts, and records, if any, for at least three years after making the final entry on any loan recorded therein. Except as otherwise specified by applicable law, program administrator licensees shall preserve their books, accounts, and records for at least three years after the *extinguishment* of a PACE assessment is recorded therein.” For the purposes of clarity, we recommend DBO consider defining the term “extinguishment” as the date upon which a notice of discharge is recorded.
- **PACE Solicitor and PACE Solicitor Agent.** Please see our response to Question 15.
- **Clarifications of SB 242 Terms.** There are also several important clarifications and definitions in SB 242 that we believe DBO should consider. These considerations relate to aligning the definitions of “contractors” and “other third parties” with the AB 1284 definitions of “PACE solicitors” and “PACE solicitor agents” and defining the term “thing of material value.” These clarifications and concepts are discussed in response to Question 14.

**2. Applications: The Department has an existing CFL application that contains general information necessary for the licensure of an individual or entity providing financial services to consumers. What types of information are unique to program administrators that a regulator would want included in an application, and why?**

The primary distinction between program administrators and traditional financial services providers is that program administrators are not originating creditors. Assessment contracts are made by and between municipal entities and consumers, and the payment servicing function is performed by county tax collectors as part of their ordinary tax servicing function. As a result, the role performed by program administrators is almost exclusively originations-based. Because program administrators do not own, acquire, sell, or service assessments directly, the information obtained in the application should be oriented toward assessment origination activity rather than servicing and collections.

**3. Annual Report Data: AB 1284 requires a program administrator to submit an annual report to the Department. What information should the Department be gathering from a program administrator, and why?**

Data reporting and transparency is critical to better understanding the PACE product, how PACE operates in the broader home improvement industry, as well as the benefits of PACE programs.

DBO's annual report should provide a comprehensive picture of the aspects of PACE programs, such as those required in SB 242. These data reporting requirements were discussed at length during the legislative negotiations by a diverse group of stakeholders including government partners, consumer advocates, the financial services industry, and PACE providers, and cover the core attributes of PACE programs, including geographic location, performance metrics, and public benefits.

Further, aligning with SB 242's reporting requirements will create a statewide picture of the PACE programs operating in the state. Currently, SB 242 requires these data reports be submitted to the bond issuing partners, which are typically regional in their coverage. Renovate America, for example, has three bond issuing partners in California. By requiring program administrators to report the same SB 242 data in a consolidated form, DBO would be able to create a uniform, consistent data reporting environment.

In interpreting the SB 242 requirements, we would recommend that DBO clarify certain requirements, particularly around delinquency data. This clarification is discussed in Question 15 regarding rulemaking around 242 provisions.

**4. Advertising Standards: AB 1284 prohibits false, misleading, or deceptive advertising. Are there any advertising practices that raise consumer protection concerns? Why? What are ways the Department can protect against misleading advertising that is not initiated by a program administrator?**

Given the unique nature of PACE as a public-private partnership, it is important that PACE advertisements not initiated by program administrators do not contain representations that could be construed by the average consumer to mean that PACE programs are free government programs or means-based government assistance programs. One way that DBO could address potential confusion would be to provide guidance specific to this issue, or to require program administrators to implement commercially reasonable controls over the marketing and advertising materials that they produce or endorse.

With respect to advertisements created by PACE solicitors, close coordination with CSLB would enhance DBO's overall objective of protecting against misleading advertising not initiated by a program administrator. We urge DBO and CSLB to consider this in any applicable memoranda of understanding or other coordinating agency activities.

**5. Books and Records: AB 1284 requires a program administrator to maintain books and records. What books and records are unique to the PACE industry? How long should these records be maintained? Why?**

Books and records maintained by program administrators are generally consistent with those maintained by current CFL licensees. However, because program administrators provide originations-based services on behalf of municipal entities, payment servicing and collection information is primarily maintained by county tax collection authorities, not program administrators. As a result, there should be no requirement for the program administrator to maintain information associated with payment servicing and collection.

**6. Complaint Processes and Procedures: What are reasonable processes that can be implemented to help a consumer resolve his or her complaints? Have homeowners encountered hurdles to having their complaints addressed? What are these hurdles, and what processes can eliminate them? Why?**

A reasonable complaint process for a program administrator includes providing accessible channels for consumers to lodge complaints (particularly via telephone), maintaining a function dedicated to investigating, tracking, and responding to complaints, and holding PACE solicitors accountable for responding to complaints. The majority of complaints fielded by program administrators relate to contractor workmanship. As a result, program administrators should establish processes to communicate issues to PACE solicitors, and to incentivize PACE solicitors to respond to consumers.

Renovate America has created a comprehensive contractor management system for PACE solicitors that limits the instance rate of complaints and incentivizes the responsiveness of contractors. This resource-intensive process has proven effective, and we believe it is the appropriate compliance solution for the industry. However, it should be recognized that there are limitations to the control that program administrators can exercise over the outcome of disputes between property owners and their home improvement contractors, which is accounted for in AB 1284.

**7. Unfair Business Practices: AB 1284 prohibits a program administrator from engaging in unfair business practices. Are there any unfair business practices occurring? How can they be prevented?**

Unfair business practices are unacceptable. We believe that the best way to prevent unfair business practices in the PACE industry is to establish regulatory oversight, as AB 1284 did, and to properly align incentives for all parties involved in PACE financing. One way DBO could prevent unfair business practices from occurring would be to review program administrators' compliance with AB 1284 and SB 242, as of their respective applicable effective dates, as part of the licensure application process.

**8. Periodic Review Standards: AB 1284 requires a program administrator to conduct a periodic review of its PACE Solicitors at least every two years for compliance with the requirements of AB 1284. What should be required in this review? Why?**

This review of PACE solicitors every two years should include an assessment of a PACE solicitor's compliance with the enrollment criteria established in Section 22680 of AB 1284, which contains the substantive requirements related to PACE solicitors. These criteria assess three areas: (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; and (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. These criteria require a review of a PACE solicitor's behavior with respect to misrepresentation and fraud, advertising, and the treatment of homeowner complaints. Renovate America believes these requirements are critical not only to enrolling PACE solicitors, but also to determining their good standing in PACE programs.

Fundamental to the periodic review of PACE solicitors is program administrators establishing and maintaining their own robust contractor management system. Absent a comprehensive contractor management system, the ability of a program administrator to consistently review PACE solicitor compliance is limited.

Renovate America created a contractor management system which has enabled us to better monitor contractor compliance with our program guidelines, enabling Renovate America to make informed, consistent, and data-based decisions with respect to contractors and their program status. We encourage DBO to consider similar system requirements for all program administrators.

**9. Solicitor Enrollment Standards or Processes: AB 1284 sets forth enrollment standards for PACE solicitors and PACE solicitor agents. What types of acts or practices, and how often must they occur before a program administrator should deny enrollment to a PACE solicitor or PACE solicitor agent? Why?**

Section 22680 of AB 1284 establishes criteria regarding the types and frequency of the acts or practices of PACE solicitors or PACE solicitor agents that would cause a program administrator to deny their enrollment. These criteria, which Renovate America fully supports, create an appropriate threshold for preventing contractors from becoming authorized to offer PACE financing, and include: (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; and (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.

We believe defining the specific types and corresponding frequency of acts or practices that should be determinative is not practicable given the dynamic nature of the home improvement industry. However, the DBO may consider providing guidance by way of example to clarify the enrollment provisions. We welcome collaborating with DBO in the development of such guidance.

***CSLB's Home Improvement Salesperson Registration Requirements and AB 1284***

AB 1284 requires program administrators to comply with specific registration requirements for PACE solicitor agents. **However, there is currently no commercially reasonable method available for Renovate America or any other program administrator to credibly verify and monitor the registration and standing of PACE solicitor agents.** This is a critically important issue and one which we believe requires the immediate attention of DBO, CSLB, and program administrators if program administrators are to comply by the January 2019 effective date.

The specific registration requirements in question are (1) that PACE solicitor agents “[m]aintain a registration in good standing with the Contractors’ State License Board as a home improvement salesperson” and (2) that program administrators establish and maintain a process that includes a “procedure to regularly monitor the license or registration status of . . . PACE solicitor agents.”

Further discussion is needed in early 2018 between the DBO, the CSLB, and program administrators about existing levels of PACE solicitor agents compliance with CSLB’s registration requirements. Otherwise **these requirements will significantly disadvantage the PACE market as no other form of home improvement financing is required to comply.** To the extent program administrators are required to monitor the registration of PACE solicitors and PACE solicitor agents, it will be critical that program administrators and the CSLB collaborate to define approaches to data sharing via an API, or other automated data format to support this verification process.



**12. Education Program: AB 1284 requires a program administrator to provide each PACE solicitor agent with six hours of education on specified topics. What minimum standards should this training include? Why?**

Section 22681(b) of AB 1284 requires program administrators to provide each PACE solicitor agent with six hours of education within three months of completing the program administrator's enrollment process. The statute requires training to be administered on the following seven topics: (1) PACE programs and assessment contracts; (2) PACE disclosures; (3) ethics; (4) fraud prevention; (5) consumer protection; (6) nondiscrimination; and (7) senior financial abuse. These topics represent strong minimum standards of training for PACE solicitor agents.

To operationalize such training, we believe it is important to develop an industry solution. An industry-wide solution would provide for a high-quality training and uniformity across PACE solicitors. This would minimize misunderstandings and miscommunications and promote increased contractor awareness of PACE programs. Furthermore, should updates need to be made to the education curriculum, a centralized solution would provide quality control and would better facilitate the training of the contractor workforce. Renovate America, Renew Financial, and Ygrene are currently discussing a potential RFP for a third party to develop such a training program that each program administrator would be able to administer. PACE solicitor agents who completed the training program with one program administrator would be considered to have satisfied the training requirement with respect to all program administrators.

An industry solution versus independent training by individual companies would also provide for a better contractor experience as PACE solicitors and PACE solicitor agents could more easily offer financing from multiple program administrators without having to complete duplicative 6-hour training sessions. Once a PACE solicitor agent has successfully completed their 6-hour training with one program administrator, the completion would be documented in a central database and reported to DBO. That PACE solicitor agent could then enroll with another program administrator without having to retake the 6-hour training, which would support the development of a dynamic and free PACE market. Absent such an industry solution, the training requirements could become a restraint on trade for PACE solicitors, and undermine competition in the PACE market overall as it would favor large, incumbent program administrators.

**13. Underwriting: AB 1284 contains minimum standards that a property, a property improvement, and a borrower must meet to qualify for a PACE assessment agreement. Do any of these standards require clarification, and if so, which ones, and why?**

AB 1284 defines critically important new Ability to Pay underwriting requirements for which we are actively developing systems, processes, and controls. There are at least two technical issues with respect to the Ability to Pay requirements that we recommend DBO consider:

- **Clarify Forms of Income Documentation.** Section 22687(b)(1) of AB 1284 provides a non-exhaustive list of examples of records that program administrator may use to verify the property owner's income or assets. By providing examples rather than prescribing what records may be used, the statute permits program administrators to use other forms of records. However, one of the listed examples refers to "a paystub showing the most recent 30-day pay period." Because most wage-earners are paid in 14-day cycles, we recommend that DBO clarify that the most recent paystub, regardless of the period, is a satisfactory form of documentation.



- **“Reasonably Reliable Third Party Records” with Respect to Alimony and Child Support.** Third party records that substantiate alimony and child support obligations cannot be obtained in a reasonably reliable manner from sources other than credit reports (in cases where there are arrearages) or income documentation (in cases of garnishment). Renovate America supports using these third-party records, but in cases not involving arrearages or garnishment, court records are the only method of verifying alimony and child support obligations, and there are no reasonably reliable methods of searching all available court records to identify these obligations. As a result, Renovate America recommends that “reasonably reliable third party records” be construed to mean credit reports and the information obtained from income documentation, with respect to its applicability to alimony and child support.

*Note:* The above comments on AB 1284’s underwriting provisions are not exhaustive. Renovate America may provide additional comments with regard to the Ability to Pay provisions as we continue to operationalize the provisions in anticipation of the April 1, 2018 effective date.

**14. SB 242: AB 1284 authorizes the Department to require licensee compliance with the requirements of SB 242 (except the reporting requirement), and the financial disclosure requirements, and minimum standards, set forth in Streets and Highways Code sections 5898.16 and 5898.17. Are there any requirements in these laws that require clarification by rulemaking?**

As the dates for compliance with SB 242 and AB 1284 are staggered, we recommend that the DBO clarify that a program administrator’s good faith compliance with SB 242 from its effective date (January 2018) is a consideration for obtaining licensure by DBO in 2019.

There are also several provisions in SB 242 that we believe would benefit from more regulatory clarity from DBO, including the definitions of “contractor” and “other third party,” the interpretation of “thing of material value,” the consideration of contractor training reimbursement requirements and practices, and the interpretation of data reporting requirements (as discussed in Question 3).

- **Align and Clarify Definition of Contractor.** SB 242 does not have a definition of “contractor” or “other third party.” We recommend that in the absence of a definition DBO clarify that “contractor” and “third party” are to be interpreted in a manner that is consistent with AB 1284’s definition of “PACE solicitor” and “PACE solicitor agent” (i.e., “contractor” defined as a “PACE solicitor” and “third party” defined as “PACE solicitor agent”). Otherwise, SB 242’s definitional requirements may be in direct conflict with AB 1284’s definitional requirements. For example, SB 242 5922(a) states that a “program administrator shall not permit contractors or other third parties to advertise the availability of assessment contracts” unless such contractor or third party is licensed by the CSLB. If “third parties” were construed to mean parties other than contractors (PACE solicitors) or their sales representatives (PACE solicitor agents), then the language may be construed to eliminate the ability for program administrators to advertise on behalf of their own programs, or to engage third party advertising or marketing firms to advertise on behalf of the programs. This was obviously not the intent of the legislation, and is inconsistent with the definitional framework established in Section 22017 of AB 1284.

Similarly, Section 5923(A) of SB 242 prohibits program administrators from providing “any direct or indirect cash payment or other thing of material value to a contractor or other third party in excess of the actual price charged by that contractor or third party to the property owner for the sale and installation of one or more efficiency improvements financed by an assessment contract.” If “third



party” is left unclarified, the provision could be construed to mean that program administrators are unable to make payments to any third parties unless such third parties are home improvement contractors that have completed projects for homeowners. In effect, program administrators would be unable to pay any other parties completely unrelated to home improvement contracting activities (e.g., employees, facilities vendors, software vendors, etc.).

- **Add Definition of “Thing of Material Value.”** SB 242 5923(a) states: “A program administrator shall not provide any direct or indirect cash payment or other *thing of material value* to a contractor or third party in excess of the actual price charged by that contractor or third party to the property owner for the sale and installation of one or more efficiency improvements financed by an assessment contract.” We recommend that DBO provide clarity through rulemaking on the interpretation and scope of what may or may not be considered a “thing of material value.” Contractors may receive incidental benefits as a result of enrolling with a program administrator, which should be excluded from the definition of “thing of material value.” For example, contractors may receive training, have their contact information listed on the program administrator’s website, and receive information about prospective applicants for financing through the program administrator, among other incidental benefits that are inextricably linked to their enrollment with the program administrator and their participation in the program.
- **Clarify Contractor Training and Reimbursement Requirements.** Section 5923(b) of SB 242 provides that “a program administrator may reimburse a contractor’s bona fide and reasonable training expenses related to PACE financing, provided that: (1) the training expenses are actually incurred by the contractor; (2) the reimbursement does not exceed one hundred dollars (\$100) per each salesperson or agent of the contractor who participated in the training; and (3) the reimbursement is paid directly to the contractor, and is not paid to its salespersons or agents.” Renovate America understands this language to permit program administrators to make payments to contractors in order to reimburse contractors for expenses actually incurred in connection with training activities, but not to permit program administrators to compensate contractors for theoretical costs, like lost profits or opportunity costs. We recommend the DBO clarify this language, as there appears to be confusion in the marketplace. In addition, this provision is silent as to training scenarios not involving reimbursement payments to contractors. For example, if a program administrator wishes to provide an in-person training to contractors, and for logistical convenience prefers to provide a meal to the trainees as opposed to reimburse each trainee for a meal purchased at their own expense, Renovate America believes this should be expressly permitted by the DBO under the same principles that apply to reimbursement (including the \$100 cap per person).
- **Add Context to Delinquency Reporting Requirements.** SB 242 requires program administrators to report all delinquent assessments, including the delinquent amount, the number and dates of missed payments, and the location of the underlying property. While we understand the importance of reporting delinquencies, we believe the data show that delinquencies alone do not provide an accurate picture of the performance of a PACE assessment. Unlike forms of traditional credit, the tax bill that includes the PACE assessment is billed annually, but paid in two installments. As such, the definition of delinquency is unclear. Moreover, data show that delinquent properties generally do not remain in that state for long: delinquency rates tend to “cure” – or decline – rapidly as property owners catch up on their back taxes. Given this high cure rate, and in order to provide more accurate delinquency data, we recommend that the DBO require and report on supplemental historical data with respect to delinquencies.

**15. Exemptions from Enrollment: AB 1284 authorizes the Commissioner to exempt any class of persons from the enrollment requirement for PACE solicitors and PACE solicitor agents. Is there any class of persons that should be exempt? Is there a public benefit to having a solicitor for a commercial assessment agreement undergo six hours of training directed at protecting consumers?**

DBO should consider elaborating on the exemptions enumerated in Section 22107(c). Under Section 22107(c)(2), the persons exempt from the definitions of “PACE solicitor” and “PACE solicitor agent” include contractors who do not “solicit property owners to enter into assessment contractors.” To render this exemption meaningful, DBO should consider establishing criteria that exempt certain contractors who offer PACE financing but who do not actively engage in solicitation activities. For example, contractors that provide potential PACE financing applicants with minimal information, like information regarding how to apply for PACE financing or a link to a website that would enable the homeowner to apply for PACE financing, should not be considered PACE solicitors.

In addition, under Section 22107(c)(4), persons or entities that merely advertise PACE are exempt. This exemption could be clarified to make it apparent that advertisers that are not engaging in in-home sales or home improvement contracting are specifically exempt. Similarly, persons or entities engaging in information collection and sharing activities that do not specifically advertise PACE are exempt under Section 22107(5). This definition is intended to apply to lead generation activities, and DBO could provide additional information for clarity.

Section 22107(3) exempts persons who “perform purely administrative or clerical tasks.” DBO should clarify that this exemption applies to all persons who are not directly interacting with consumers, or whose interactions with consumers are administrative or clerical in nature.

In addition to providing clarity around existing exemptions, DBO should consider whether certain classes of contractors should be exempt from enrollment. For example, it may be appropriate to exempt contractors of a specified size, net worth, geographic footprint, or track record. DBO could consider allowing contractors to apply for such an exemption by submitting certain information to DBO in order to qualify and maintain the exempt status.

**Additional Priority Items to Consider for Rulemaking and Continuing Engagement**

- **Establishing a Registry for PACE Assessments.** Section 22693 of AB 1284 gives the Commissioner the ability, by rule, to require a program administrator to use a real-time registry or database system for tracking PACE assessments. By January 2, 2020, the Commissioner will determine whether to proceed with such a rulemaking. Renovate America believes that the creation of such a registry would be a significant consumer protection in the PACE industry, and would create much needed transparency in the PACE market with significant and positive implications for underwriting. For example, the assessment contract criteria in 22684(k) requires that the program administrator verify the existence of recorded assessments and ask the property owner if they have authorized additional PACE assessments on the same subject property that have not yet been recorded. Absent a registry, it is impossible for a program administrator to verify any authorized but unrecorded assessments given the broader tax collection and title processes.

- **Clarity around transacting business online and telephonically.** Section 22155 of AB 1284 permits program administrators to transact business using “‘home pages’ or similar methods by the licensee on the Internet, World Wide Web, or similar proprietary or common carrier electronic systems, and the prospective borrower or property owner may transmit information over these electronic systems to the licensee in connection with the licensee’s offer” to make an assessment contract. In addition, AB 1284 recognizes throughout that PACE financing is offered by PACE solicitors who perform in-home sales. As a result, we believe the DBO should clarify that program administrators’ use of online and telephonic means to conduct transactions that are facilitated by a PACE solicitor outside of the program administrator’s licensed place of business is permitted under Section 22155 of AB 1284.
- **Continuing Engagement.** The above responses to the DBO’s invitation for comment on proposed rulemaking and implementation of AB 1284 and licensure of PACE programs under the California finance law are not exhaustive. Renovate America may provide additional comments with respect to AB 1284 and SB 242’s requirements as we continue to operationalize and learn from implementation.