

Date of Hearing: June 25, 2018

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Monique Limón, Chair

SB 1087 (Roth) – As Amended June 12, 2018

**SENATE VOTE:** 38-0

**SUBJECT:** PACE program: program administrators

**SUMMARY:** Strengthens state oversight of PACE solicitors and PACE solicitor agents. Clarifies provisions of law that apply to PACE program administrators.

Specifically, **this bill:**

- 1) Amends existing law to make it unlawful to commence work under a home improvement contract, *or deliver any property or perform any services other than obtaining building permits or other similar services preliminary to the commencement of work*, and the home improvement contract shall be unenforceable, if both of the following occur:
  - a) The property owner entered into the home improvement contract based on the reasonable belief that the work would be covered by the PACE program; and,
  - b) The property owner applies for, accepts, and cancels the PACE financing within the right to cancel period *or applies for, but is not approved for PACE financing in the amount requested by the property owner*.
- 2) Specifies that a home improvement contract is not invalidated if the property owner waives his or her right to cancel the home improvement contract and then is not approved for PACE financing in the amount requested by the property owner.
- 3) Requires the processes that must be established for enrolling PACE solicitors and PACE solicitor agents to be in writing.
- 4) Requires the PACE administrator to *timely* notify the Department of Business Oversight (DBO) Commissioner when a solicitor or its agent is enrolled.
- 5) Provides that if a program administrator utilizes the “emergency or immediate necessity” exemption and is unable to verify the property owner’s income before the assessment contract is executed, the program administrator shall do so in a timely manner following the execution of that contract.
- 6) Requires the DBO Commissioner to include the report on all PACE assessments in his or her annual report.
- 7) Subjects program administrators to all provisions of the California Financial Information Privacy Act that are applicable to financial institutions.
- 8) Provides that each PACE solicitor and PACE solicitor agent shall be subject to the enforcement authority of the DBO Commissioner for any violation of any provision of law

that applies to a PACE solicitor or PACE solicitor agent.

- 9) Specifies that no PACE solicitor or PACE solicitor agent shall be subject to the enforcement authority of the DBO Commissioner for a violation if:
  - a) Such provision, by its terms, applies to a program administrator; or,
  - b) Such violation constitutes a violation of the Contractors' State License Law and any regulations, rules, or orders thereunder.
- 10) Authorizes DBO to take immediate corrective action when it has reasonable grounds to believe that a person is conducting business as a PACE solicitor or PACE solicitor agent in an unsafe or injurious manner.
- 11) Provides that, notwithstanding specified provisions of the Public Records Act, the Commissioner shall, upon receipt of a Public Records Act request, release the identity of any PACE solicitor or solicitor agent who has been the subject of a corrective action demand for a serious violation involving that solicitor or solicitor agent's direct interaction with one or more homeowners, and the nature of the corrective action demand.
- 12) Requires DBO to make publicly available on its Internet Web site the identity of any PACE solicitor or PACE solicitor agent who agrees to or is required to discontinue soliciting property owners.
- 13) Requires DBO to issue a public order when it cancels the enrollment of a PACE solicitor or PACE solicitor agent.
- 14) Requires the DBO Commissioner to maintain, on its Internet Web site, a searchable list of PACE solicitors and PACE solicitor agents who have agreed to, or been required to, cease soliciting property owners in connection with PACE assessments. At a minimum, this list shall include PACE solicitors and PACE solicitor agents whose enrollments have been canceled for failure to meet minimum requirements for enrollment and those who have agreed to, or been directed to, cease soliciting property owners.
- 15) Makes numerous other technical and clarifying changes to existing law.

**EXISTING LAW:**

- 1) Authorizes the PACE program through the establishment of voluntary special assessments pursuant to rules contained in the Streets and Highways Code and through the establishment of special tax districts pursuant to the rules contained in specified sections of the Government Code.
- 2) Imposes additional, specified requirements on local agencies that participate in the PACE program.
- 3) Places requirements on PACE administrators that must be met before PACE assessment contracts can be funded and recorded by a local agency.
- 4) Requires PACE administrators to be licensed under the California Financing Law (CFL).

- 5) Establishes a regulatory scheme for oversight of PACE solicitors and PACE solicitor agents.
- 6) Requires PACE administrators to make oral confirmation with property owners regarding the key terms of the assessment contract and the financed improvements.
- 7) Mandates that the PACE administrator record the oral confirmation with the property owner and retain the recording for at least five years.
- 8) Provides additional consumer protections for property owners entering into a PACE assessment contract.

**FISCAL EFFECT:** According to the Senate Appropriations Committee, this bill contains the following:

- 1) Unknown but potentially significant costs to the DBO for responding to Public Records Act requests. It is unknown how many Public Records Act requests DBO will receive; however, a high volume of requests will require greater workload and possibly additional personnel to respond to the requests. (State Corporations Fund)
- 2) Minor and absorbable costs to DBO to post relevant information to its Internet web site. (State Corporations Fund)

**COMMENTS:**

1) PURPOSE

This bill is author-sponsored legislation that follows on last year's AB 1284 (Dababneh), Chapter 475, Statutes of 2017. This bill clarifies and corrects provisions of AB 1284, while also adding new consumer protections and requirements related to PACE financings. According to the author:

*PACE is an important program that has accomplished a great deal of good in our state and has the potential to accomplish a great deal more. SB 1087 is designed to ensure that this important program is marketed and sold in a safe and responsible way. SB 1087 clarifies, corrects and cleans up provisions of last year's AB 1284. One of the most important provisions of this bill ensures that homeowners who opt to use PACE to pay for energy efficiency improvements are not saddled with mechanics' liens, if they have a reasonable belief they will qualify for sufficient PACE financing to fully cover their home improvement contracts, but are ultimately approved for less than the amount for which they applied. Other significant provisions improve the ability of the Department of Business Oversight to take swift enforcement action against home improvement contractors who sell PACE financing in a manner that causes harm to the public and increase public transparency about these and other improper acts by those contractors and their agents. Taken together, the provisions of SB 1087 will ensure that the consumer protections touted by the proponents of last year's AB 1284 are fully realized.*

2) BACKGROUND

In 2008, the Legislature granted statutory authority to cities and counties to provide upfront financing to property owners to install renewable energy equipment or energy efficiency improvements that are permanently fixed to their properties, which is repaid through the owner's

property tax bill. The Legislature subsequently expanded PACE for residential and commercial property owners as an option to pay for renewable energy upgrades, energy and water efficiency retrofits, seismic improvements, and other specified improvements for their homes or buildings.

The majority of local governments either contract with a private third-party (aka program administrator) or join a Joint Powers Agreement which contracts with a private third-party to carry out their PACE programs. The cost of third-party administration is not borne by the local agency, but is built into the costs of a PACE financing and paid by the property owner. Program administrators partner with home improvement contractors (“PACE solicitors” in statute) who offer PACE financing to property owners and conduct the efficiency improvement projects permitted by PACE programs.

One of the key features of the PACE program is that the obligation to repay the contractual assessment remains with the property, rather than remaining the obligation of the property owner that initially agreed to the PACE assessment. Additionally, the PACE assessment has a first-lien priority over other liens on the property, including mortgages. These features complicate the sale or refinance of properties with an existing PACE assessment, which creates problems for mortgage and real estate stakeholders, as well as property owners who did not understand the terms of the PACE assessment that they agreed to.

For consumers who understand the costs and benefits of PACE financing, PACE provides a potentially attractive financing option. There are many consumers, however, that entered into a PACE assessment without a clear understanding of its terms, and the consequences of the PACE assessment have been problematic. The most severe problems occur when a consumer enters into a PACE assessment that they do not have the ability to repay. Failing to repay the annual PACE assessment amount on the property owner’s property taxes can lead to large late fees and exposes the property owner to the risk of foreclosure or county tax sale if they remain in default.

### 3) RECENT LEGISLATION

In 2017 SB 242 (Skinner) and AB 1284 (Dababneh) were widely approved with bipartisan support from both houses of the Legislature and signed into law by the Governor. These bills brought sweeping changes to the regulation of program administrators and the PACE solicitors that program administrators partner with to implement the home improvement projects and arrange PACE financing with property owners.

Last year’s legislation requires program administrators to be licensed by the Department of Business Oversight (DBO) and requires program administrators to register and oversee the activities of PACE solicitors. The legislation also provides important consumer protections, including a requirement that program administrators orally confirm the terms of a PACE assessment contract with a property owner and a requirement for program administrators to determine a property owner’s ability to pay the annual obligations of the PACE financing prior to recording the PACE assessment contract. Pursuant to the provisions of AB 1284, DBO is currently soliciting comments from stakeholders on an initial draft of extensive PACE regulations in anticipation of initiating a formal rule-making action with the Office of Administrative Law. These regulations are expected to clarify and add further specification to the provisions of AB 1284.

### 4) BOLSTERS STATE ENFORCEMENT AUTHORITY OVER PACE SOLICITORS

PACE solicitors and their agents serve as the in-person liaisons between property owners and program administrators to arrange PACE assessment contracts. PACE solicitors are typically home improvement contractors licensed by the Contractors' State Licensing Board that implement efficiency improvements on properties. PACE solicitors and their agents are not required to be licensed by the DBO; rather, AB 1284 established a quasi-regulatory scheme that placed responsibility on program administrators to oversee PACE solicitors and granted DBO limited authority to take enforcement action against PACE solicitors.

This bill would expressly subject PACE solicitors and PACE solicitor agents to the enforcement authority of DBO related to violations of existing law. This bill also permits DBO to immediately issue an order to desist and refrain from engaging in PACE solicitation activities if DBO has reasonable grounds to believe that a PACE solicitor is acting in an unsafe or injurious manner. Under this bill, DBO is required to publicize the identity of any PACE solicitor or PACE solicitor agent who agrees or is required to discontinue PACE solicitation activities. These proposed policies strengthen state enforcement authority over the individuals that help to arrange PACE financings. According to program administrators, excess oversight may deter some home improvement contractors from offering PACE financing, and program administrators have seen a decrease in enrolled PACE solicitors subsequent to the enactment of AB 1284.

#### 5) TIMING OF UNDERWRITING PROCESS

AB 1284 established requirements of program administrators to conduct underwriting of a property owner's ability to pay the PACE payment obligations. Stakeholders negotiated the underwriting provisions of AB 1284 in the days leading up to Interim Recess in September 2017, which concluded in hastily drafted language and concessions that concerned consumer advocates and Legislative committees who were unable to amend the bill on the last day of session without making it a two-year bill.

AB 1284 requires a program administrator to determine a property owner's ability to pay *before funding and recordation of the assessment contract*, which would permit the program administrator to do the underwriting *after* the property owner has signed the assessment contract. Funding and recordation of an assessment contract happens after all efficiency improvements are installed on the property, at which time the homeowner is obligated to pay for the improvements. Consumer advocates argue that the underwriting determination should be conducted *prior* to the execution of an assessment contract to avoid the property owner failing to qualify for a PACE financing amount that fully covers the cost of the efficiency improvement.

A previous version of this bill amended the underwriting provisions of existing law to ensure that the ability-to-pay determination occurred prior to execution of an assessment contract. Recent amendments reversed the proposed change to existing law, meaning that this version of the bill would continue to allow underwriting to take place after a property owner has signed an assessment contract. AB 2063 (Aguiar-Curry), which passed unanimously by the Assembly Banking Committee on 4/23/18, would require underwriting to occur before executing an assessment contract; AB 2063 is currently in Senate Appropriations Committee and has received zero "no" votes in Legislative committees or the Assembly Floor.

#### 6) BALANCING CONSUMER PROTECTIONS WITH GREEN ENERGY GOALS

When initially approved by the Legislature a decade ago, the PACE program lacked important consumer protections. The Legislature did not envision the rise of a for-profit industry of

program administrators that would partner with home improvement contractors to offer a complex financial product directly to consumers. For-profit businesses faced incentives that were significantly misaligned with the best interest of consumers. Program administrators made money regardless of whether consumers could pay back the PACE assessments, which caused them to aggressively pursue all consumers segments, even those in financially vulnerable situations. Home improvement contractors could convince consumers to undertake much larger, and even unnecessary, home improvement projects by misrepresenting the terms of PACE assessment contracts, even claiming that PACE was a free government program. In summary, the Legislature failed to require consumer protections; local governments outsourced the responsibility for PACE program administration to the private sector; and for-profit companies faced incentives that worked against consumers – a set of factors that exposed consumers to predatory practices by bad actors.

Over the last two years, the Legislature decided to take consumer protections in the PACE market seriously, culminating in the passing of SB 242 and AB 1284 which empower DBO to police the industry and stamp out the bad business practices. These bills took significant strides toward better consumer protections, and after full implementation of the legislation, many of the most egregious practices should be regulated out of the market. This bill clarifies provisions of AB 1284 and strengthens state oversight of entities that arrange PACE financings.

While this analysis has focused on PACE as a financial product, the Legislature may also consider the stated intent of the program – to finance efficiency improvement projects that will conserve natural resources, generate renewable energy, and reduce greenhouse gas emissions. To the extent that PACE incentivizes the purchase of efficiency improvements that consumers would otherwise forego, over-regulation of PACE program administrators and PACE solicitors could negatively impact the social benefits generated by environmentally friendly upgrades. Recently published research from the Lawrence Berkeley National Lab<sup>1</sup> estimates that PACE programs increased solar photovoltaic systems in California over the 2010-2015 time period by 7-12% above the level of deployment that would have occurred if PACE was not an option.<sup>2</sup> But incremental environmental benefits may not outweigh acute financial harm to financially vulnerable households if the property owner does not have the ability to pay the PACE payment obligations.

## 7) ARGUMENTS IN SUPPORT

The California News Publishers Association writes, “Pivotaly, SB 1087 repeals Financial Code Section 22690(c)(1)(D), which is essential to undoing the damage that AB 1284 did to the public’s right to know. The bill replaces that provision to mandate the release of any charges of misconduct, any discipline imposed and the information DBO relied on to make a determination. This tracks disclosure requirements across the California Public Records Act. This level of disclosure is wholly appropriate because PACE solicitors and agents are not licensed by the state and thus warrant stricter scrutiny than the majority of licensees regulated by the DBO.

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<sup>1</sup> [http://eta-publications.lbl.gov/sites/default/files/berkeley\\_lab\\_r-pace\\_pv\\_deployment\\_-\\_final\\_03202018.pdf](http://eta-publications.lbl.gov/sites/default/files/berkeley_lab_r-pace_pv_deployment_-_final_03202018.pdf)

<sup>2</sup> The research used econometric techniques that suggest that this increase would likely not have occurred in the absence of PACE programs. In other words, the researchers controlled for other factors that could affect solar deployment and estimated that the ability to choose PACE as a financing option increased solar deployment by 7-12%.

“This bill also takes an additional step to require the DBO to proactively post information online about the enforcement actions taken against PACE solicitors and agents who have been ordered to cease operation. This ensures that communities are on notice that a solicitor is bared from engaging in the PACE program. By requiring additional measures of transparency, the Legislature will protect the integrity of the PACE programs and further the consumer protection mission of the DBO by protecting consumers from bad actors and negligent practices.”

A coalition of banking and real estate trade groups, along with the California Low-Income Consumer Coalition, which includes twelve consumer advocacy and legal aid groups, submitted a joint letter of support. Key elements of SB 1087 supported by the coalition include the bill’s clarification that program administrators are required to comply with laws regarding the duty to safeguard nonpublic personal information, the increased level of authority the bill grants DBO to take immediate action if PACE solicitors and/or solicitor agents are engaging in an unsafe or injurious manner, and the requirement that DBO make public specified information about the discipline it takes against PACE solicitors and solicitor agents. Finally, the coalition observes that SB 1087 includes a number of technical clean-up provisions that are important for ensuring clarity in the new regulatory structure.

#### 8) ARGUMENTS IN OPPOSITION

The three largest PACE program administrators (Renovate America, Renew Financial, and Ygrene) are all opposed to the bill, unless it is amended. Their main points: SB 1087 makes substantive changes that will disable PACE. The bill fundamentally changes DBO’s relationship with PACE solicitors (home improvement contractors) and PACE solicitor agents (home improvement contractor sales representatives). To the extent there would be any need to take action immediately against a PACE solicitor or PACE solicitor agent, the Contractors State Licensing Board is empowered to take that action.

Cleantech San Diego writes, “While SB 1087 purports to be a technical cleanup bill, we are concerned that the bill inadvertently hinders the PACE industry from being able to operate. It is critically important that the industry have time to work through the transformative changes made through SB 242, AB 1284, and AB 2693 and the Department of Business Services rulemaking process before making any further fundamental revisions to PACE’s procedures and processes.”

#### **REGISTERED SUPPORT / OPPOSITION:**

##### **Support**

California Association of County Treasurers and Tax Collectors  
California Association of Realtors  
California Bankers Association  
California Community Banking Network  
California Credit Union League  
California Escrow Association  
California Land Title Association  
California Low-Income Consumer Coalition  
California Mortgage Association

California Mortgage Bankers Association  
California News Publishers Association  
Consumers Union  
Housing and Economic Rights Advocates  
National Housing Law Project

**Opposition**

Advanced Energy Economy  
California Solar And Storage Association  
Center For Sustainable Energy  
Cleantech San Diego  
Climate Action Campaign  
Pacensation  
Renew Financial  
Renovate America, Inc  
Vote Solar  
Ygrene Energy Fund

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