

Date of Hearing: June 20, 2018

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Cecilia Aguiar-Curry, Chair

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

**SENATE VOTE:** 38-0

**SUBJECT:** PACE program: program administrators.

**SUMMARY:** Makes numerous changes to California’s Property Assessed Clean Energy (PACE) program. 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) Clarifies the criteria that must be met before a program administrator submits, presents, or otherwise approves an assessment for recordation.
- 6) Clarifies that program administrators are responsible for obtaining valuations of property and prohibits program administrators from basing their underwriting decisions on appraisals provided by property owners.
- 7) 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.

- 8) Requires the DBO Commissioner to include the report on all PACE assessments in his or her annual report.
- 9) Subjects program administrators to all provisions of the California Financial Information Privacy Act that are applicable to financial institutions for purposes of compliance with these requirements.
- 10) 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.
- 11) 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.
- 12) 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.
- 13) 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.
- 14) 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.
- 15) Requires DBO to issue a public order when it cancels the enrollment of a PACE solicitor or PACE solicitor agent.
- 16) 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.
- 17) Clarifies that finance lenders, finance brokers, and mortgage loan originators are exempt from provisions of the Financial Code applicable to the solicitation of PACE assessments, *unless they engage in the business of a program administrator, PACE solicitor, or PACE solicitor agent.*
- 18) 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) **History and Statutory Authorization.** Utilizing the authority to create a financing district as a charter city, the City of Berkeley, in 2007, established a citywide voluntary program to allow residential and commercial property owners to install solar energy systems and make energy efficiency improvements to their buildings and to repay the cost over 20 years via an assessment on the property tax bill. In 2008, the Legislature granted the statutory authority to cities and counties to provide up-front financing to property owners to install renewable energy sources or energy efficiency improvements that are permanently fixed to their properties, which is repaid through the property tax bill.

Most PACE programs are implemented and administered under two statutory frameworks: AB 811 (Levine), Chapter 159, Statutes of 2008, which amended the Improvement Act of 1911, to allow for voluntary contractual assessments to finance PACE projects, and SB 555

(Hancock), Chapter 493, Statutes of 2011, which amended the Mello-Roos Community Facilities District Act to allow for Mello-Roos special taxes (parcel taxes) to finance PACE projects.

The Legislature has 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. Local agencies create PACE assessment districts under AB 811 or establish a Community Facilities District (CFD) under SB 555, allowing the local agency to issue bonds to finance the up-front costs of improvements. In turn, property owners enter into a voluntary contractual assessment agreement with the local agency or agree to annex their property into a CFD to re-pay the bonds via an assessment or special tax, secured by a priority lien, on their property tax bill. The intent of the program is that the assessment or parcel tax remains with the property even if it is sold or transferred, and the improvements must be permanently fixed to the property.

- 2) **PACE Models.** In California, there are several models available to local governments in administering a PACE program. Only the counties of Sonoma and Placer administer their own PACE programs. The majority of local governments contract with a private third-party or join a JPA, 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 PACE loan financing. Some of these programs focus on residential projects, others target commercial projects, and some handle both residential and commercial portfolios.
- 3) **Evolution of PACE.** At the inception of the PACE program, the presence of third party administrators and the accompanying complex financing structures were not contemplated by the Legislature. Nearly all local governments utilize the JPA and administrator model for PACE programs, and as PACE continues to evolve, the realities are very different than those imagined at the outset of legislative authorization. One of the key features of the PACE program when it was created was that the efficiency improvement would remain with the property, as well as the obligation to repay the contractual assessment. In reality, though, homeowners, mortgage and realtor industry stakeholders, PACE administrators, local governments, including tax collectors, and now consumer groups, have seen the consequences when homeowners are forced to repay the entire PACE assessment in order to sell or refinance their homes or cannot afford to make the payments on their property tax bills. The Legislature continues to grapple with laws which govern local government assessments, including lien priority, unpaid payments, foreclosure, and noticing requirements, and lending practices in determining which requirements PACE should be subject to in light of the current realities of the program.

According to a Wall Street Journal article published August 15, 2017 ("More Borrowers Are Defaulting on Their Green PACE Loans"), a Wall Street Journal analysis using tax data from 40 California counties found the number of PACE assessment delinquencies has grown by nearly 450% in the last year. Approximately 1,100 California borrowers with PACE assessments missed two consecutive payments through the tax year that ended June 30, 2017, compared with 245 the previous year. Furthermore, because they are placed on a homeowner's property tax bill, delinquent PACE assessments accrue additional interest rapidly, at a rate of 18% annually, making delinquencies, once incurred, that are much harder for property owners to cure. PACE assessments totaling nearly \$3.7 million are past due

across California through the 2016-17 tax year, up from about \$520,000 in the 2015-16 tax year.

- 4) **Prior and Related Legislation and Hearings.** The Local Government Committee, jointly with the Banking and Finance Committee, held an oversight hearing in June 2016 to provide oversight on the current administration of PACE programs and to gain a better understanding on concerns expressed over residential PACE and the impacts on the financial market.

AB 2693 (Dababneh), Chapter 618, Statutes of 2016, established a number of consumer notice requirements and sought to tighten financing standards for PACE assessments for residential properties. AB 2693 prohibited a local agency from allowing a homeowner to participate in PACE, unless the homeowner is provided both the right to cancel and a financing estimate and disclosure document; and, required that the financing estimate and disclosure must include specified information, including product costs, financing costs, additional information to use to compare to other financing options, and a number of statements that require the homeowner to initial. AB 2693 applied to all PACE programs, regardless of whether local agencies use a PACE administrator, for residential properties with four or fewer units.

AB 242 (Skinner), Chapter 484, Statutes of 2017, established requirements for third-party PACE administrators of PACE programs, including an oral confirmation of key terms of an assessment contract with a property owner, prohibited PACE administrators from engaging in a number of activities, required PACE administrators to biannually report to a public agency, and established requirements around home improvement contracts.

AB 1284 (Dababneh), Chapter 475, Statutes of 2017, established requirements for PACE administrators that must be met before PACE assessment contracts may be funded and recorded by a public agency, renamed the California Finance Lenders Law (CFL) as the CFL, required PACE administrators to be licensed under the CFL, and established a regulatory scheme for the oversight of PACE solicitors and PACE solicitor agents.

This year, AB 2063 (Aguiar-Curry) requires that an assessment contract cannot be executed, no work can commence under a home improvement contract that is financed by that assessment contract, nor can such a home improvement contract be executed until the homeowner's ability to repay has been verified. This bill specifies that a PACE administrator must provide a written explanation as to how ability to pay was determined, if there is a difference between the amount determined and the actual amount financed. Lastly, this bill states that it is the responsibility of the property owner to contact the property owner's insurance provider to determine if the improvement is covered, among other provisions.

- 5) **Bill Summary.** This bill makes numerous changes to the requirements placed upon the DBO, PACE administrators, PACE solicitors and PACE solicitor agents. This bill makes solicitors and their agents subject to the enforcement authority of DBO. This bill requires program administrators to be subject to all provisions of the California Financial Information Privacy Act that are applicable to financial institutions and 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. This bill provides that the DBO Commissioner shall, upon 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. This bill 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. Additionally, the bill makes many other technical and clarifying changes to existing law. This bill is sponsored by the author.

- 6) **Author's Statement.** 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."
- 7) **Underwriting.** The underwriting provisions implemented by AB 1284 *did not require a PACE administrator to underwrite the property owner before that property owner obligates him or herself on a home improvement contract that will be paid for using PACE financing.* Instead, existing law requires a PACE administrator to undertake an ability-to-pay determination of a property owner "prior to funding, and recordation by a public agency of the assessment contract." Funding and recordation of a PACE assessment occurs after all of the efficiency improvements are installed on a property, and the homeowner is obligated to pay for them. Essentially, a property owner can enter into an assessment or home improvement contract before ability to pay is determined, leaving the homeowner on the hook for work they potentially cannot afford.

According to conversations with interested parties who negotiated the final language of AB 1284 last year, the decision to use the "funding or recordation" language, rather than alternative language that would require underwriting much earlier in the PACE assessment process, was deliberate. In the absence of stronger language that would have required underwriting earlier in the process, consumer advocates settled for the language in Section 22687(g), which is intended to ensure that, if a property owner obligates him or herself on a home improvement contract for an amount greater than he or she is ultimately approved based on the required underwriting language, the PACE administrator is "responsible for the difference." However, AB 1284 was silent on how a program administrator is expected to comply with this requirement. AB 1284 did not require that the homeowner is provided any information as to how a program administrator, utilizing the flexibility granted to them, has determined their ability to pay. It is unclear how this section will be enforced, especially in the absence of any additional requirements that the homeowner is provided information regarding the determination of their ability to pay.

Lastly, there is no requirement that the individual property owner receiving payment from the PACE administrator has to use it to repay a portion of the assessment. Homeowners may not have a complete understanding of why they are receiving the payment, may use the payment for other purposes, and therefore still carry the risk of defaulting on the assessment.

- 8) **Enforcement.** AB 1284 does not require PACE solicitors or PACE solicitor agents to be licensed or regularly examined by the DBO. Instead, DBO is authorized to investigate PACE solicitors and PACE solicitor agents only when the department believes that a PACE solicitor or PACE solicitor agent may have violated the law or when the Commissioner requires information necessary to administer the law.

When DBO examines a PACE solicitor or PACE solicitor agent and identifies items the department wants corrected, Financial Code Section 22690 requires DBO to follow a cumbersome, two-step process, as follows:

- a) **Step One:** If, upon inspection, examination, or investigation, the Commissioner has cause to believe that a PACE solicitor or PACE solicitor agent is violating the law, the Commissioner must issue a report to the program administrator, PACE solicitor, and, if applicable, the PACE solicitor agent identifying each violation. Next, the program administrator, PACE solicitor, and PACE solicitor agent may provide written responses to the allegations. After reviewing those written responses, the Commissioner may demand that corrective action be taken. If the entity directed to perform the corrective action agrees to comply with DBO's request or the entity and DBO reach another mutually agreeable resolution of DBO's concerns, the results of the investigation of the PACE solicitor or PACE solicitor agent, including all corrective actions taken and all correspondence related to the investigation, are kept confidential. DBO is authorized, but not required, to make publicly available the identity of any PACE solicitor or PACE solicitor agent who voluntarily agrees to discontinue soliciting property owners.
- b) **Step Two:** If the program administrator, PACE solicitor, or PACE solicitor agent do not agree to the corrective action demanded by DBO or otherwise fail to reach a mutually agreeable resolution of the Commissioner's concerns, the Commissioner may issue an order requiring the PACE solicitor or PACE solicitor agent to desist and refrain from engaging in specified activities (a D&R order) or an order censuring, suspending, or barring an individual from soliciting property owners for up to 12 months (a bar order). Both D&R orders and bar orders are public documents.

SB 1087 makes three key changes to these rules:

- a) The bill eliminates Step One in instances where DBO 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. This change is intended to allow DBO to take immediate action to stop harmful behavior without having to expend what may be considerable time completing Step One;
- b) The bill also eliminates the requirement that the results of a Step One investigation, including all corrective actions taken and all correspondence related to that investigation, be kept confidential. Instead, the bill provides that, whenever a PACE solicitor or PACE solicitor agent take corrective action demanded by the Commissioner, all documents,

records, files, and communications relied upon by the Commissioner as the basis for demanding such corrective action may be requested pursuant to the Public Records Act; and,

- c) The bill 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. This requirement will ensure that Public Records Act requests are not necessary to obtain this information.

- 9) **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.

“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.

- 10) **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.”

11) **Double-Referral.** This bill is double-referred to the Banking and Finance Committee.

**REGISTERED SUPPORT / OPPOSITION:** (based on May 25, 2018 version)

**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  
Contractors State License Board  
Consumers Union  
Housing and Economic Rights Advocates  
National Housing Law Project

**Opposition**

California Solar and Storage Association (unless amended)  
Cleantech San Diego  
Renew Financial (unless amended)  
Renovate America (unless amended)  
Spruce Finance  
Ygrene Energy Fund (unless amended)

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