



To: House Energy Committee Members
From: Charlotte Jameson, Program Director for Legislative Affairs, Energy, and Drinking Water, Michigan Environmental Council
Date: September 15, 2020
Re: Testimony on House Bills 6036, 6037, 6038, and 6039

Michigan Environmental Council (MEC) supports Michigan's current commercial property assessed clean energy (PACE) program, which has proven a successful financing tool for businesses and multifamily properties to undertake energy efficiency or renewable energy projects. As such we support House Bill 6039.

And while MEC supports residential PACE programs in principle, we are opposed to House Bill 6036, 6037, and 6038 as currently written. Taken together these bills create a residential PACE program, while also expanding the projects that are allowed under PACE financing to include a broad array of environmental hazards and allowing the use of State Revolving Loan funds to finance residential PACE programs.

Residential PACE is not on its face a bad policy. By and large Michigan's housing stock is old, not energy efficient, and, particularly for low-income residents, full of environmental hazards like lead paint. In many cases the work to address these needed renovations is expensive- tens of thousands of dollars- placing them out of reach for many households unless financing is available. Given that, Michigan should be exploring more no-or-low-cost financing mechanisms for residents to address these issues.

That being said legislators should be extremely cautious when it comes to setting up a residential PACE program. The stakes with residential PACE loans are much higher than with other loans because the loan gets bundled into the property tax bill as a special assessment and a lien is placed on the house to secure the loan. If residents get in over their head and can't afford the property tax bill, they lose their home. The PACE lien is in a superior position to other liens, including the mortgage. The failure to pay the PACE assessment therefore results in delinquent property taxes and subjects the property to tax forfeiture and foreclosure. Additionally, while PACE programs must be authorized by state and local governments they are privately run, often with little or no government oversight.

In other states with residential PACE programs there has been an uptick in homeowners seeking legal assistance for PACE-related foreclosures and loans. In short, poorly designed residential PACE programs and shady practices on the part of some contractors have led to

people agreeing to loans they didn't need, couldn't afford, and/or didn't understand. In California there has been an increase in foreclosures tied to residential PACE¹ so much so that LA County suspended their residential PACE program² and the California General Assembly took up legislation to add in much stronger consumer protections into the program. In 2017 Minnesota suspended its residential PACE program also over concerns about consumer protection. They convened a Residential PACE Consumer Protection Task Force to develop recommendations for consumer protection legislation for residential PACE.³

This is not to say that Michigan should not pursue a residential PACE program. But rather that if we do we should do so thoughtfully and with lots of consumer protections built in. Unfortunately, proponents of these bills did not vet them with Michigan consumer protection or environmental groups prior to introduction nor have they reached out to stakeholders to seek input since. While the bills do have some consumer protection language it is not sufficient (see the document from National Consumer Law Foundation for a full list of consumer protections that should be built into the bills).

Furthermore, the bills go well beyond typical residential PACE programs and envision providing loans to homeowners to take on "environmental hazard" projects that offer *no savings* to offset the cost of the loan. Any residential PACE program should only cover projects that deliver meaningful energy savings like energy efficiency or on-site renewables. Again, the stakes are higher with PACE than other loans because people risk losing their homes; to ensure affordability of the loans it should only be for projects that have offsetting savings to help reduce the cost burden.

Residential PACE is particularly ill suited to serving low-income households because loan burdens are out of their reach. That is why the federal government and states have looked to grant programs as the best means of addressing energy efficiency and household health hazards for low-income residents. Low-income residents should not be talked into a PACE loan when other no-cost programs exist that serve them better. To that end low-income residents should be screened prior to signing a PACE loan for eligibility for the no-cost low-income federal weatherization program, Michigan's lead abatement program, or other no-or-low cost programs. And the legislature should explore creating other grant programs, like pre-weatherization health and safety fund, to help low-income residents address environmental hazards.

Finally, MEC does not support using the state revolving loan funds for residential PACE. The loan funds are a limited source of funding which are and will continue to have increasing demands placed on them. In 2021 water utilities must start replacing lead service lines at a rate of 5 percent each year. The primary source of funding to do this work is the state drinking water revolving loan fund. Additionally, with increasing flooding and precipitation, water utilities will

¹ <https://www.latimes.com/homeless-housing/story/2020-06-29/pace-home-improvement-loans-coronavirus-foreclosure>

² <https://www.latimes.com/homeless-housing/story/2020-05-21/la-fi-pace-home-improvement-loans-la-county>

³ <https://mn.gov/commerce-stat/pdfs/pace-report-2018.pdf>

need to invest even more in our wastewater and stormwater systems to keep up. Governor Snyder's 21st Century Infrastructure Commission identified a nearly billion-dollar gap in funding for water infrastructure in Michigan. The current revolving loan funds can't hope to fill that gap, but they are one of the key financing mechanisms we have to provide some of the funding water utilities need each year to maintain and improve their systems.

MEC does not believe that Michigan should be using one of the state's few tools for financing large-scale water pollution prevention projects for small-scale, potentially individual home improvement projects. That is not the intent of the federal or state revolving loan fund programs. Additionally, MEC has concerns that using the funding in this way could put us out of alignment with federal statute governing the capitalization grants Michigan receives and potentially with other parts of state statute that the bills fail to amend. In short we find this to be a poor use of state revolving loan funds and question the validity of the program under current law.

The state revolving loan fund program has not been updated since the mid-1990s. Water experts and organizations are in wide agreement that the statute should be overhauled and modernized. We expect this stakeholder work to kick off in earnest next year. We would suggest to the proponents of these bills that they work with Michigan groups and work within that process to see if their ideas align with the other demands and needs of that loan funding.

MEC does support the concept of a residential PACE program. However, we believe that despite the complexity of the issues involved and the high stakes for Michigan residents the proponents of the bills have not done the necessary work to fully vet them with Michigan stakeholders. We think the proposals should be significantly scaled back- removing provisions that allow the use of SRF dollars and removing projects that don't have associated savings. We also believe that the consumer protections in the bills, while a good start, don't go far enough.

We look forward to working with the sponsors and others on the bills, but at this time oppose House Bill 6036, 6037, and 6038 as currently written.

Sincerely,
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**National
Consumer Law
Center**

Property Assessed Clean Energy (PACE) Loans: State and Local Consumer Protection Recommendations

November 2019

Introduction

Property Assessed Clean Energy (PACE) loans have taken root in several states and programs are developing in others. Investors have provided over \$5 billion in capital for the residential PACE market. However, recent trends raise alarming questions about the potential for scams and abuse, especially against older consumers and in communities already devastated by disinvestment, redlining, and unaffordable lending.

PACE programs offer loans for home improvements that may improve energy efficiency, such as solar panels, HVAC systems, and new windows, and also for other purposes, such as hurricane hardening. PACE loans are offered through home improvement contractors often going door to door with contracts on tablets that commit people on the spot to property tax liens that can increase taxes by thousands of dollars a year. That property tax lien is collected through a property tax assessment, paid on the property tax schedule, not necessarily monthly, and the lien takes priority over any existing mortgage. PACE programs must be authorized by state and local governments, but PACE programs are privately run, often with little or no government oversight.

Over the last several years, increasing numbers of homeowners have sought legal assistance for PACE-related problems and foreclosures, often due to fraud, abusive contractor practices, and unsustainable loans.¹ PACE lending abuse cases at legal services offices in California primarily relate to loans made to seniors and Latinx homeowners (especially borrowers with limited English proficiency). Moreover, PACE-related products often have not provided for meaningful energy savings, and even when they do, borrowers have been falsely told that PACE is a free government program or that the projects will pay for themselves (or through tax breaks for which the homeowner is not eligible).

1. For examples of early California PACE abuses, see National Consumer Law Center, Issue Brief: Residential Property Assessed Clean Energy (PACE) Loans: The Perils of Easy Money for Clean Energy Improvements, (Sept. 2017).

Recommendations to Strengthen Consumer Protections on PACE Loans

Following are key recommendations to ensure that states create safeguards to better protect homeowners and to help avoid loss of a home.

1. PACE Administrators Should Ensure Each Homeowner's Ability to Repay is Properly Assessed Based Upon Verified Debt and Income.

Property owners should be reviewed for their ability to repay the PACE loan while meeting other expenses prior to signing the PACE contract and the commencement of any work. This analysis should be done based on a debt-to-income ratio or a combination of debt to-income ratio with residual income/cash flow analysis. Where residual income or "cash flow analysis" is used, the methodology should be validated and approved by a state or local regulator, should be sensitive

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to local cost-of-living variation, and should be regularly updated and transparent. Debt and income verification must be based on reliable third-party records, such as tax, employer or bank documents. All other mortgage liens (see #2) should be incorporated in the debt review. Any narrow emergency exception should be limited to true emergencies relating only to HVAC systems for temperature regulation (see #6). Consumers eligible for free grant programs should be referred to those programs (see #12). There should be no presumption of affordability. Depending upon whether the PACE loan is paid directly or through a mortgage escrow account, the ability-to-repay determination should consider any potential payment problems caused by the homeowner's need to make large, lump-sum annual or bi-annual payments, additional escrow deposits, or large catch-up payments due to processing delays. All documents should clearly state that the PACE administrator is the sole disburser

of payments to contractors and only can do so if the borrower's ability to repay was established based on verified debts and income and the borrower has certified in writing that the work completed in a good and workmanlike manner.

2. Multiple Assessments and Other Loans Should Be Included in the Ability-to-Repay and Loan-to-Value Analyses.

All approved assessments, whether or not recorded, must be included in the evaluation of ability-to-repay and loan-to-value (LTV) analysis. Programs must have access to a database or other similar plan to identify approved, unrecorded assessments, even those originated by other programs or program administrators. To enable identification of existing PACE loans, PACE administrators should be required to participate in a state-run, publicly available database that tracks PACE assessments. PACE administrators and contractors should not be permitted to tell the homeowner that non-PACE products offered by the same party contain the same structure and benefits.

3. Property Valuations Must Be Reasonably Reliable.

Any use of automated valuation models (AVMs) must be based on reasonably reliable methodologies approved by a federal regulator. Where an AVM does not meet this test or the AVM brings the LTV above a set threshold, a full appraisal should be used. Broker Price Opinions (BPOs) that take into account market trends should be permissible only where a state regulator sets independent standards.

4. Three-Business Day Advance Written Disclosures Should Be Provided.

Truth in Lending Act (TILA)-type "Know Before You Owe" disclosures, with additional PACE-tailored disclosures, must be provided in writing free of charge three business days prior to the homeowner signing the assessment contract. The closing disclosure should be complete and reflect the terms of the contract prior to signing. The specific initial and closing disclosure requirements should be determined by the state legislature or a state or local regulator, subject to any final rule issued by the CFPB. Viewing the disclosures for the first time on an electronic tablet concurrently with signing the contract should not be permitted. Waiver of disclosure waiting period only should be available in case of a bona fide emergency (see #6) with a hand-written request from the homeowner.

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5. Paper Disclosures and Contracts Should Be Required Unless the Transaction is E-Sign Compliant, and E-Sign Evasions Should Be Monitored and Prohibited.

Disclosures, the completed contract, and all other documents and information required may be provided by email *only* if the consumer voluntarily chooses that option, with a clear, understandable and easy to select right to receive paper documents, and *only* with full compliance with the E-Sign Act, including demonstration by the consumer that they can access records electronically. Providers should be prohibited from assisting the consumer in creating an email account, from demonstrating ability to access electronic records, or from dissuading the consumer from electing paper records. PACE providers should mail copies of the disclosures and contract to homeowners who state during the confirmation call that they did not see or receive the electronic copy (see # 15), and should be encouraged to send back-up copies to all homeowners. Regardless of the method of delivery, all relevant transaction documents should be retained for a specified time.

6. Emergency Exceptions Should Be Extremely Limited.

Any emergency exception should be limited to bona fide emergencies relating only to HVAC systems for temperature regulation where the assessment amount falls below a designated "small loan" cap; there is a handwritten request from the homeowner describing the emergency; and the work is limited to HVAC replacement. The emergency exception would create an exemption from the ability-to-repay analysis and provide for waiver of the disclosure waiting period and right to cancel.

Older California Homeowner with Reverse Mortgage with Four Unaffordable PACE Assessments

An older homeowner in San Diego with a reverse mortgage was repeatedly solicited in his home for home improvement repairs. Each time, he was offered PACE financing to cover a variety of home improvements, including solar panels, kitchen renovations, and green improvements on his home. For the 2014 and 2015 property assessments, his property taxes in 2016 increased from around \$310 annually to over \$5,476. In 2016, the reverse mortgage lender paid the tax assessment when the homeowner could not, initiated foreclosure proceedings, and filed a notice of default. The homeowner exhausted all of his savings to pay the bill. In 2017, his annual assessment was over \$17,000 due to two new PACE loans made in 2016, one shortly before the notice of default and one shortly after. His annual income is around \$10,000 per year. On his fixed income, he will not be able to pay the additional property tax and again faces foreclosure. The loans were made with knowledge of his inability to pay.

The transactions were also wrought with fraud. The written advertisement for the solar panels states, "The Government will pay 30% of your Solar" and "Investing in Solar WILL NOT RAISE your property taxes." Both statements are false. The homeowner had no understanding of how the PACE program worked; he assumed it was a government program that would pay for the improvements.

7. PACE Contracts Should Include a Three-Business-Day Right to Cancel.

Homeowners should have a three business day right to cancel. No contractor work, whether under the PACE contract or ancillary work, should be allowed to begin until this period expires. Waiver *only* should be available in case of bona fide emergency with a hand-written request from the homeowner.

8. PACE Programs Must Maintain Rigorous Protections against Contractor Abuse.

Comprehensive contractor standards and requirements must be established to ensure that homeowners are protected from high-pressure sales tactics, deception, upselling, and inadequate work. Programs must implement a process for enrolling licensed contractors who meet established qualifications and removing them for noncompliance with program requirements. PACE providers should be responsible for the misconduct of the contractors they supervise (see #9). State reserve funds or similar mechanisms should be established and paid for by PACE administrators to provide redress to homeowners for contractor misconduct. Information regarding contractors subject to disciplinary action or removal should be publicly available in a database or similar resource. Contractors should be prohibited from placing a mechanic's lien on the consumer's home if the PACE loan is not funded because the contractor has failed to properly install the improvements or violated any program requirements.

9. PACE Contracts Should Contain Meaningful Remedies.

Homeowners should have the right to pursue injunctive relief, to seek damages for contractor and program administrator misconduct, and to obtain relief from tax assessments obtained through misconduct. Homeowners should be protected from liability on PACE loans when there are contractor-related claims and defenses in a similar fashion as for other home improvement financing. PACE administrators should indemnify government entities for any liability. If a foreclosure on a property with a PACE lien or collection of a PACE assessment is initiated, homeowners should be permitted to assert any claims they have against the program administrator, contractor, or tax assessor as a matter of defense by recoupment or set off without regard for any time limit on a private action for damages. Such claims should provide the basis for protecting the homeowner from

foreclosure during determination of the claim or challenge to the assessment and should, if successful, provide the basis to reduce or eliminate the alleged delinquency and assessment. These rights should be clearly and conspicuously included in the loan contract.

10. PACE Contracts Should Contain Hardship Protections.

PACE rules and loan contracts should include provisions ensuring that borrowers facing hardship will have access to loss mitigation and tax foreclosure avoidance options. The tax collector or other government authority should be required to forbear on any foreclosure while a request for loss mitigation, such as a loan modification, or any dispute between the consumer and the PACE provider is pending.

11. Additional Contract Protections Addressing Escrows and Loss Mitigation Should Be Established.

Contracts must provide for full amortization at a fixed rate of interest. The payment schedule should establish monthly payments if the assessment is not repaid through a mortgage escrow (either through the PACE administrator or the government authority). Contracts must not include prepayment penalties, forced arbitration clauses, class action waivers, or releases or waivers of rights or claims.

Before signing a PACE loan contract for energy efficiency improvements, low-income households must be screened for eligibility for the free low-income federal Weatherization Assistance Program and other no- or low-cost energy efficiency programs available in the locality.

12. Homeowners Should Be Screened for Eligibility for Free or Low-Cost Programs.

Before signing a PACE loan contract for energy efficiency improvements, low-income households must be screened for eligibility for the free low-income federal Weatherization Assistance Program and other no- or low-cost energy efficiency programs available in the locality. Homeowners should be clearly informed of these programs' availability and applicability to the proposed work.

13. Independent Energy Efficiency Reviews Should Be Done Three Business Days Prior to Contract Signing.

Except for emergency loans (see #6), a free or low-cost energy audit to quantify the project costs and estimated energy savings of the proposed energy improvements must be completed by an independent third party in locations where reasonably available at least three business days before an assessment contract is signed. The audit should be performed by a properly accredited Energy Professional or Building Analyst. The energy audit should include information regarding the energy savings, stated in (1) kilowatt hours or therms, as applicable and (2) annual dollar savings amount, comparing the homeowner's current utility bills to expected bills based on energy-savings or renewable energy measures that the owner is considering financing with PACE borrowing.

14. Project Lifespan Should Be Limited by The Useful Life of the Project.

The period of the contractual assessment should not exceed the useful life of the qualified project.

15. Homeowners Should Receive Independent Confirmation Calls.

After a Closing Disclosure is provided and before a property owner signs an assessment contract, the homeowner should receive a call to confirm that the homeowner has a copy of the fully completed but unsigned written assessment contract and advance disclosures, and that the homeowner understands the key terms of the transaction, including the right to cancel. An independent third party (*not* the contractor) should place the recorded call before the start of the three-business-day right to cancel period in non-emergency cases. If an electronic signature is used, a call should be made after signature to confirm (see #16). If the homeowner did not consent to electronic delivery or has not been able to access the disclosures but wishes to proceed with the contract, the consumer should be given paper disclosures and the three-business-day waiting period should begin again.

16. Electronic Record and Signature Procedures Should Ensure Consent and Receipt.

If the advance disclosures and assessment contract were provided electronically, or if the homeowner has signed the contract electronically, additional steps must be taken to ensure that the homeowner actually consented to electronic delivery, was able to access the electronic records, and understood the full document that she was signing. For example, the homeowner should be emailed a PIN to activate E-sign and should receive a call after signature to confirm.

17. Maximum Assessment Value Should Be Established.

PACE legislation or program guidelines should specify the maximum assessment amount that a homeowner may incur on the property in relation to the property's assessed value. For example, the total amount of assessments should not exceed more than 15 percent of the assessed value of the property, and the combined amount of the assessments plus any outstanding mortgage obligations for the property should not exceed 90 percent of the assessed value of the property.

18. PACE Loans Should Not Have Superpriority Status.

PACE assessments should have subordinate lien status or, where unavailable under state law, measures to result in a similar outcome. First-lien holders must be protected and held harmless, including having no reduction in their proceeds (either directly or indirectly through a reduced sale price in the event of foreclosure because of the senior lien).

Tax Assessment More than Quadruples for Disabled California Homeowner

In 2017, an elderly, disabled Los Angeles County resident living on a fixed income was pressured by a contractor to sign multiple home improvement and financing contracts for two separate housing units without disclosing the true nature and terms of the financing agreements. The contractor led the homeowner to believe that he was entering into a government program that forgave the debt after a certain period of time. Instead, the home improvements were financed through the PACE Program and private loans. They signed the client up for \$130,000 in loans, even though they knew he could not afford to pay (he told them repeatedly). His tax assessment has jumped from a bit over \$2,500 to \$10,700. He is in jeopardy of losing his home because he cannot afford to pay the PACE tax bill.

19. Data Collection Should Be Required.

In order to assess and monitor the nature of the PACE market and the impact of PACE loans on consumers, including low-income homeowners and homeowners in communities of color, PACE programs should mandate data collection of key loan terms, borrower demographic characteristics and loan performance. PACE lending abuse cases at legal services offices in California primarily relate to loans made to seniors and Latinx homeowners (especially borrowers with limited English proficiency). More information is needed to better understand the nature of these problems. As discussed (see # 2), to enable identification of existing PACE loans, PACE administrators should be required to participate in a state-run, publicly available database that tracks PACE assessments.

20. PACE Programs Should Provide for Language Access.

Many PACE loans are made to borrowers with limited English proficiency. PACE loan borrowers who prefer to communicate in a language other than English should, where available, have access to accurate written and oral information in their preferred language. As with other mortgage products, the stakes are high when a consumer borrows money with the home as collateral. PACE loan documents should be available in Spanish and localities should determine if there are other languages where translation would be beneficial. State or federal regulators should supply official Spanish translation of the loan disclosures, which can be based on existing federal regulatory Spanish translations of Truth and Lending Act (TILA) disclosures. Oral interpretation also should be available, especially for confirmation calls, and can be provided by the PACE administrators through a language line. A disclaimer can be provided on the translated disclosures or during the oral interpretation clarifying that other documents or services may not be available in the borrower's preferred language.

For more information, contact National Consumer Law Center Staff Attorney John Rao at jrao@nclc.org or 617-542-8010.



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