

# NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

## Resolution 2017-02

### URGING THE ADOPTION OF STATE LAWS AND REGULATIONS TO PROTECT CONSUMERS FROM ABUSES IN THE MARKETING AND TERMS OF RESIDENTIAL PROPERTY ASSESSED CLEAN ENERGY (PACE) LOANS FOR ENERGY EFFICIENCY UPGRADES

*Whereas*, NASUCA has had a long-standing interest in the integrity and cost-effectiveness of energy efficiency upgrades as a means of keeping gas and electric service affordable; and

*Whereas*, NASUCA has adopted several resolutions intended to protect the interests of residential households regarding energy efficiency investments, including Resolution 2007-01, “Energy Conservation and Decoupling,” Resolution 2009-08, “Resolution on the U.S. Department of Energy Weatherization Assistance Program,” Resolution 2011-04, “Urging An Equitable Expenditure of Energy Efficiency Funds on Affordable Multifamily Housing Units,” and Resolution 2011-05, “Supporting a National Public Education Campaign to Transition to More Efficient Lighting”; and

*Whereas*, twenty states<sup>1</sup> have enacted legislation related to the creation of residential Property Assessed Clean Energy (PACE) loan programs at the municipal level, which may be used to fund energy efficiency improvements, renewable energy installations, and related services; and

*Whereas*, California, Florida and Missouri have active residential PACE programs<sup>2</sup> which are operated by private companies, and this industry is seeking to expand into more states and municipalities; and

*Whereas*, PACE loans, which are repaid through property tax assessments and are secured by a priority lien on the borrower’s home, may not contain adequate protections<sup>3</sup> for consumers; and

*Whereas*, homeowners who borrow through PACE loan programs may not be covered by the consumer protections that apply to other lending products, particularly the Truth In Lending Act<sup>4</sup> (TILA) or Real Estate Settlement Procedures Act<sup>5</sup> (RESPA), which provide the following consumer protections:

- Ability-to-repay requirements
- 3-day advance review of documents with the right to cancel
- FTC Holder Rule that gives remedies for defective repairs against loan holders
- Ban on kickbacks
- Rules for broker compensation to avoid conflicts of interest
- Extra protections for high-cost loans
- Enforceable remedies for violations
- A ban on forced arbitration clauses

*Whereas*, PACE loans generally require only a weak form of underwriting which does not include a check on whether borrowers have sufficient income to repay the loan; and

*Whereas*, PACE programs may not be required to conduct energy audits to ensure that energy-efficiency and renewable energy improvements will be cost-effective, in contrast to other existing programs such as the U.S. Department of Energy Weatherization Assistance Program; and

*Whereas*, PACE loans may be marketed or offered to low-income homeowners who are eligible for free energy efficiency improvements through the federal Weatherization Assistance Program or other lower cost options, thereby prompting low-income homeowners to take on unnecessary debt; and

*Whereas*, PACE loans may be marketed through door-to-door sales and telemarketing, posing a risk of deceptive sales tactics and other home-improvement contractor abuses, including misrepresentation of expected savings, misrepresentation of contract terms, misrepresentation of payment terms, upselling, poor quality of equipment or labor, or other problems; and

*Whereas*, PACE programs may offer financing for a wide range of products, including some which may not significantly improve energy efficiency<sup>6</sup> in the home and which are therefore unlikely to produce cost savings for homeowners; and

*Whereas*, PACE loans may be deceptively marketed to homeowners as money-saving programs, government programs, or “free” money,<sup>7</sup> but do not carry any assurance of energy savings or a viable remedy for homeowners if savings are not realized; and

*Whereas*, PACE loans put consumers at risk of foreclosure, since PACE assessments are recorded as a lien on the home, and nonpayment puts the homeowner at risk for tax foreclosure and default on the homeowner’s traditional mortgage;

*Whereas*, PACE programs may not be required to provide clear remedies for injured homeowners;

*Now, therefore, be it resolved*, that state legislatures and state utility commissions should preserve the integrity of energy efficiency upgrade programs and should ensure that PACE-funded energy efficiency upgrades are cost-effective for consumers;

*Be it further resolved*, that state legislatures and state utility commissions should develop and adopt laws and regulations to protect consumers from unfair and unaffordable loan contracts, while also protecting low-income households from unnecessary debt;

*Be it further resolved*, that such laws and regulations should incorporate the following specific consumer protections:

1. Mandate that PACE loans include an assessment of the homeowner's ability to repay consistent with the requirements under TILA, rather than basing eligibility on the amount of equity in the home.
2. Require that, prior to entering into a PACE loan, low-income households or other income-eligible households must be screened for eligibility for the free low-income Weatherization Assistance Program and other no- or low-cost programs, and must be informed of their ability to take advantage of such programs.
3. Ban deceptive tactics<sup>8</sup> (e.g., claims that energy efficiency or renewable energy improvements will "pay for themselves" unless that is guaranteed,<sup>9</sup> failure to disclose that future energy savings are estimates due to potential changes to utility rates, claiming that PACE is a government program, etc.), and designate unfair practices by an auditor or contractor to be automatic violations of state laws prohibiting unfair and deceptive acts and practices.<sup>10</sup>
4. Require borrower signatures on paper copies of contracts and documents for PACE loans, instead of electronic signatures. A paper copy of all PACE loan documents must be provided to the homeowner, in addition to any documents or information provided to homeowners in electronic form. Failure to provide such paper copy(ies) shall be grounds for rescission of the loan without penalty(ies) or fee(s) to the borrower.<sup>11</sup>
5. Require recorded oral verification that the homeowner understands the terms of the tax assessment and is aware of the risks of the program, including difficulties refinancing an existing mortgage or selling the home.<sup>12</sup>
6. Mandate that, before work on a home begins, the PACE loan program must obtain independent verification that the consumer signed the contract, understands the costs and risks, and was offered financial counseling.
7. Require that the consumer be given a three-day right to cancel the contract and that work may not begin until after this three-day period has expired, with a limited exception for emergency repairs which directly address the emergency.
8. Require an independent energy audit to identify cost-effective improvements and to reduce the risk of unnecessary work, with a limited exception for emergency repairs if the unaudited measures are restricted to those which directly address the emergency.
9. Mandate that, before the PACE program pays a contractor, the program must independently verify that the work was properly completed.
10. Establish guidelines to identify which energy efficiency and renewable energy measures are cost-effective and will be eligible for PACE financing, rather than delegating this responsibility to companies or third parties that administer PACE programs. Limit PACE loans to these cost-effective measures.

11. Establish strong licensing requirements and insurance requirements for contractors.<sup>13</sup>
12. Give consumers enforceable protections. Governmental bodies adopting PACE should not allow forced arbitration clauses or class action bans to be included in contracts with consumers, and should hold programs and contractors accountable if they violate the law or defraud homeowners. States should also ensure that homeowners have a right of action under state laws that prohibit unfair, deceptive, or abusive acts or practices. Further, include remedies against the holder of the PACE loan so that consumers will not be required to pay for defective repairs, defective equipment or scams (these protections could incorporate or mirror the FTC's Preservation of Consumers' Claims and Defenses Notice, referred to as the "Holder Rule"<sup>14</sup>).
13. Incorporate other applicable protections as set forth by the U.S. Department of Energy in its Best Practice Guidelines for Residential PACE Financing Programs (Nov. 18, 2016).<sup>15</sup>

***Be it further resolved***, that NASUCA authorizes its Executive Committee to develop specific positions and to take appropriate actions consistent with the terms of this resolution. The Executive Committee shall advise the membership of any proposed action prior to taking such action, if possible. In any event, the Executive Committee shall notify the membership of any action taken pursuant to the resolution.

Submitted by Consumer Protection Committee

Approved by the Membership June 5, 2017  
Denver, Colorado

Abstained:  
Tennessee

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<sup>1</sup> According to the PACE industry association, California, Florida, Georgia, Illinois, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Rhode Island, Vermont and Wisconsin have passed PACE-enabling legislation, and California, Florida and Missouri currently operate residential PACE programs. See <http://pacenation.us/pace-programs/residential/>. Additionally, a residential PACE program operates in some Vermont municipalities, though the Vermont program is run by the non-profit Efficiency Vermont. See <https://www.encyvermont.com/services/financing/homes>.

<sup>2</sup> <http://pacenation.us/pace-programs/>

<sup>3</sup> California enacted the PACE Preservation and Consumer Protections Act during 2016, but the new law is limited in scope and does not provide an adequate range of consumer protections. Ch. 618, Cal. Stat. of 2016.

<sup>4</sup> 15 U.S.C. §§ 1601–1666j.

<sup>5</sup> Pub. L. No. 93-533, § 2(a), 88 Stat. 1724 (1974) (codified at 12 U.S.C. § 2601(a)).

<sup>6</sup> For instance, California PACE programs will fund new roofs and swimming pool equipment, which may meet Energy Star standards but may not result in reduced costs for the homeowner. *See, e.g.* <https://ygreneworks.com/improvements/>; <https://www.heroprogram.com/products>.

<sup>7</sup> *See, e.g.* Wall Street Journal, "America's Fastest-Growing Loan Category Has Eerie Echoes of Subprime Crisis" (Jan. 10, 2017); Elder Law & Advocacy, "Overview of PACE/HERO Issues in San Diego County," [https://www.nclc.org/images/pdf/energy\\_utility\\_telecom/pace/overview-pace-hero-issues-san-diego.pdf](https://www.nclc.org/images/pdf/energy_utility_telecom/pace/overview-pace-hero-issues-san-diego.pdf).

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<sup>8</sup> The PACE industry itself appears to recognize that unfair, deceptive and abusive marketing practices are problematic and should be prohibited. *See* PACENation, PACE Consumer Protection Policies, Version 2.0 (Feb. 2017).

<sup>9</sup> Misrepresentations regarding energy savings have been held to be violations of state laws prohibiting unfair and deceptive acts and practices in a number of jurisdictions. *See* National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (9<sup>th</sup> Ed. 2016), § 8.8.4 (“Energy Savings Claims for Household Products”); *see also* § 8.5.2.2 (“Retail Energy Market Abuses by Unregulated Suppliers”).

<sup>10</sup> A number of states already provide that violations of other laws meant to protect the public are automatically violations of the state’s unfair and deceptive acts and practices statute. *See* National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (9<sup>th</sup> Ed. 2016), § 3.2.7.

<sup>11</sup> San Diego’s Elder Law & Advocacy Program has received complaints that elderly individuals with dementia, or who were on medication, were entered into electronic PACE loan contracts they never saw, on terms they did not understand, and were later told by private corporate PACE lenders that the loan was nevertheless binding. Several have reported that sales were made on cell phones or tablets. *See*, Elder Law & Advocacy, *So How Did You End Up With a Huge Property Tax Bill After You “Went Solar”?*, available at <http://seniorlaw-sd.org/dont-become-a-victim-of-a-solar-panel-installation-scam/>; Elder Law & Advocacy, *Overview of PACE/HERO Issues in San Diego County*, available at [https://www.nclc.org/images/pdf/energy\\_utility\\_telecom/pace/overview-pace-hero-issues-san-diego.pdf](https://www.nclc.org/images/pdf/energy_utility_telecom/pace/overview-pace-hero-issues-san-diego.pdf).

<sup>12</sup> This requirement is not expected to be burdensome, since voluntary industry guidelines require live telephone confirmation of the PACE loan terms, and require the call to be recorded. PACENation, PACE Consumer Protection Policies, Version 2.0 (Feb. 2017).

<sup>13</sup> The PACE industry association agrees that contractors must be trained, follow a code of conduct, be insured and bonded, and comply with licensing requirements in their states. *See* PACENation, PACE Consumer Protection Policies, Version 2.0 (Feb. 2017).

<sup>14</sup> *See*, 16 CFR Part 433; *and see*, <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/holder-due-course-rule>, last visited April 24, 2017.

<sup>15</sup> <https://energy.gov/sites/prod/files/2016/11/f34/best-practice-guidelines-RPACE.pdf>.