

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Finance and Tax

BILL: CS/CS/SB 1208

INTRODUCER: Finance and Tax Committee; Community Affairs Committee; and Senator Rodriguez and others

SUBJECT: Property Assessed Clean Energy Program

DATE: March 18, 2021

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------------|----------------|-----------|---------------|
| 1. | <u>Hackett</u> | <u>Ryon</u> | <u>CA</u> | <u>Fav/CS</u> |
| 2. | <u>Gross</u> | <u>Babin</u> | <u>FT</u> | <u>Fav/CS</u> |
| 3. | _____ | _____ | <u>AP</u> | _____ |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 1208 substantially amends the Property Assessed Clean Energy program, which allows property owners to make qualifying improvements to real property and finance the cost through annual non-ad valorem tax assessments. Qualifying improvements are those that enhance energy efficiency, renewable energy, and wind resistance. The bill names the program the Resiliency Energy Environment Florida program and expands qualifying improvements to include wastewater treatment, flood and water damage mitigation, health and environmental hazards mitigation, and water conservation and efficiency projects.

The bill allows governmental leased property to qualify for the program.

The bill also enhances protections for consumers entering into PACE contracts.

The bill does not affect state or local revenues.

The bill takes effect July 1, 2021.

II. Present Situation:

PACE in Florida

In 2010, the Legislature authorized local governments¹ funding of property owner's qualifying improvements and to establish a financing agreement for the repayment of such costs through annual non-ad valorem property tax assessments. Although Florida's law does not use the terms "PACE" or "Property Assessed Clean Energy," it is generally understood that s. 163.08, F.S., is Florida's PACE program.²

Through a PACE program, a property owner may apply to a local government for funding to enhance energy conservation and efficiency improvements, such as energy-efficient HVAC systems, replacement of windows, electric vehicle charging equipment, and efficient lighting equipment; renewable energy improvements utilizing hydrogen, solar, geothermal, and wind energy; and wind resistance improvements such as wind-resistant shingles, gable-end bracing, storm shutters, and opening protections.³

PACE programs in Florida are formed by local governments and operate typically in partnership with several localities pursuant to an interlocal agreement. Additionally, PACE programs in Florida can be operated by a third-party PACE administrator, which is either a for-profit or not-for-profit entity acting on behalf of the local government.⁴ However, it is the local government that enters into a financing agreement directly with the property owner.⁵

At least 30 days before entering into the financing agreement, the property owner must provide notice to any mortgage holder or loan servicer of the intent to enter into the agreement, the maximum amount to be financed, and the maximum annual assessment.⁶ The law provides that an acceleration clause for "payment of the mortgage, note, or lien or other unilateral modification solely as a result of entering into a financing agreement ... is not enforceable." However, the mortgage holder or loan servicer may increase the required monthly escrow by an amount necessary to pay for the qualifying improvement.⁷

Qualifying Improvements

The types of projects PACE financing may fund are referred to as "qualifying improvements." A local government may not offer PACE financing for any project not included in the statutory definition of qualifying improvements. As provided in current law, qualifying improvements include the following:

¹ "Local government" means a county, municipality, a dependent special district as defined in s. 189.012, or a separate legal entity created pursuant to s. 163.01(7).

² See generally Erin Deady, *Property Assessed Clean Energy: Is There Finally a Clear Path to Success?* Florida Bar Journal Vol. 90, No. 6, June 2016, pg 114, available at <https://www.floridabar.org/the-florida-bar-journal/property-assessed-clean-energy-is-there-finally-a-clear-path-to-success/> (last accessed March 14, 2021).

³ Section 163.08(2)(b), F.S.

⁴ Section 163.08(6), F.S.

⁵ Section 163.08(8), F.S.

⁶ Section 163.08(13), F.S.

⁷ Section 163.08(15), F.S.

- Energy conservation and efficiency improvements,⁸ to include:
 - Air sealing;
 - Installation of insulation;
 - Installation of energy efficient HVAC systems;
 - Building modifications which increase the use of daylight;
 - Replacement of windows;
 - Installation of energy controls or energy recovery systems;
 - Installation of electric vehicle charging equipment; and
 - Installation of efficient lighting equipment.
- Renewable energy improvements,⁹ which means installation of any system in which the electrical, mechanical, or thermal energy is produced from a method utilizing hydrogen, solar energy, geothermal energy, bioenergy, or wind energy.
- Wind resistance improvements,¹⁰ to include
 - Improving the strength of the roof deck attachment;
 - Creating a secondary water barrier to prevent water intrusion;
 - Installing wind-resistant shingles;
 - Installing gable-end bracing;
 - Reinforcing roof-to-wall connections;
 - Installing storm shutters; and
 - Installing opening protections.

Wind resistance improvements applied to buildings under new construction do not qualify for PACE financing.¹¹

Florida PACE Consumer Protections

Current law provides that, before entering into a financing agreement, the local government must reasonably determine that:

- All property taxes and other assessments are current and have been paid for the preceding 3 years;
- There are no involuntary liens including construction liens;
- There are no notices of default or other evidence of property-based debt delinquency recorded and not released in the preceding 3 years; and
- The property owner is current on all mortgage debt on the property.¹²

Further, any work requiring a license to make a qualifying improvement must be performed by a properly certified or registered contractor.¹³ The total amount of PACE assessments for any property may not exceed 20 percent of the property's market value, in most cases.¹⁴

⁸ Section 163.08(2)(b)1., F.S.

⁹ Section 163.08(2)(b)2., F.S.

¹⁰ Section 163.08(2)(b)3., F.S.

¹¹ Section 163.08(10), F.S.

¹² Section 163.08(9), F.S.

¹³ Section 163.08(11), F.S.

¹⁴ Section 163.08(12), F.S.

Consumer Protections for Residential PACE Financing Generally

Concerns have arisen about issues consumers may face regarding residential PACE financing. Because the PACE financing is structured as a tax assessment instead of a loan, PACE programs historically have not been required to provide homeowners with the same disclosures about the financing costs that traditional lenders must provide.

Additionally, the tax liens for PACE financing take priority over other lien-holders, including the property's mortgage holder.¹⁵ Such priority has influenced Fannie Mae and Freddie Mac to refuse the purchase of loans with existing PACE-based tax assessments,¹⁶ and properties encumbered with PACE obligations are not eligible for Federal Housing Administration insured financing.¹⁷ However, priority lien position protects local governments, who are authorized to take on debt for the financing they provide.¹⁸ Advocates also state that the priority lien position enables local governments to offer competitive interest rates, ranging from approximately 6 to 9 percent.¹⁹

Consumer Financial Protection Bureau Steps

In 2018, the United States Congress directed the Consumer Financial Protection Bureau (CFPB) to promulgate regulations regarding PACE financing.²⁰ The CFPB has issued advance notices of proposed rulemaking in order to apply the Truth in Lending Act's ability-to-repay requirements, currently in place for residential mortgage loans, to PACE financing.²¹

The existing federal ability-to-repay requirements prohibit creditors from making a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan according to its terms, and all applicable taxes, insurance, and assessments.²² In making such a determination, the creditor must verify and consider specific factors including the consumer's income, assets, and existing debt obligations.²³ The Truth in Lending Act's stated purpose is "to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive, or abusive."²⁴

¹⁵ Debra Gruszecki, INLAND: Realtors Offer Word of Warning About Solar Financing Program," Jan. 19, 2015, The Press-Enterprise, available at <https://www.pe.com/2015/01/19/inland-realtors-offer-word-of-warning-about-solar-financing-program/> (last accessed March 14, 2021).

¹⁶ FHFA, *Statement of the Federal Housing Finance Agency on Certain Super-Priority Liens* (Dec. 22, 2014) (last visited March 14, 2021).

¹⁷ "ML 2017-18: Property Assessed Clean Energy (PACE)," December 7, 2017, U.S. Department of Housing and Urban Development, available at <https://www.hud.gov/sites/dfiles/OCHCO/documents/17-18ml.pdf> (last accessed March 14, 2021).

¹⁸ Section 163.08(7), F.S.

¹⁹ *AboutPACE*, Florida PACE Funding Agency, available at <https://floridapace.gov/about-pace/> (last visited March 14, 2021).

²⁰ Section 307, Economic Growth, Regulatory Relief, and Consumer Protection Act, Public Law No 115-174 (May 24, 2018).

²¹ Advance Notice of Proposed Rulemaking on Residential Property Assessed Clean Energy Financing, Docket No. CFPB-2019-0011, available at https://files.consumerfinance.gov/f/documents/cfpb_anpr_residential-property-assessed-clean-energy-financing.pdf (last accessed March 14, 2021).

²² *Id.*, citing TILA section 129C(a), 15 U.S.C. 1639c(a).

²³ *Id.*

²⁴ 7 TILA section 129B(a)(2), 15 U.S.C. 1639b(a)(2).

The CFPB's regulations on residential PACE financing are still in development and have not been finalized at this time.

California's Consumer Protection Measures

California, one of the three states currently offering residential PACE financing,²⁵ has taken measures to protect consumers independent of federal regulation. In 2016, California's law changed to require PACE programs to provide mortgage-level disclosures and to conduct live recorded calls with homeowners to confirm financing terms and obligations.²⁶

In 2017, California legislation required that PACE program administrators be licensed by the California Department of Financial Protection and Innovation, provided oversight for contractors and third party solicitors, and authorized the same department to bring enforcement actions against PACE administrators and contractors. The law also required that a PACE administrator thoroughly determine the property owner's ability to repay the loan before approving a financing contract.²⁷

Wastewater Treatment Improvements

The Florida Department of Health provides "[o]n-site sewage treatment and disposal systems, commonly referred to as septic systems, are a safe and effective means of wastewater disposal for 30 percent of Florida's population. With an estimated 2.6 million systems in operation, Florida represents 12 percent of the United States' septic systems. Properly designed, constructed, and maintained systems protect Florida's ground water which provides 90 percent of Florida's drinking water."²⁸

There are estimated, however, to be thousands of septic tanks that are old and at risk of failing.²⁹ These systems risk leaking phosphorus and nitrogen into the water system, which can promote harmful algal blooms, aquatic weeds, and the alteration of the natural fauna and flora. Serious algal blooms can also cause human health issues.

For this reason, there has been a push over time to move from individual septic systems to community sewage treatment. Such a transition can cost in the range of \$15,000 to \$20,000.³⁰

²⁵ California, Florida, and Missouri are the only three states offering PACE financing on residential property.

²⁶ James Reed, "Consumer Protections for PACE Now Written into State Law," Orange County Register, October 7, 2016, available at <https://www.ocregister.com/2016/10/07/consumer-protections-for-pace-now-written-into-state-law/> (last visited March 14, 2021).

²⁷ Assembly Bill 1284 (Dababneh, Chap 475, Stats. 2017) – California Financing Law: Property Assessed Clean Energy program: program administrators.

²⁸ Onsite Sewage, Florida Department of Health, last modified Oct 20, 2020, available at <http://www.floridahealth.gov/environmental-health/onsite-sewage/index.html> (last accessed March 14, 2021).

²⁹ Benita Goldstein, "Failing septic tanks damaging state's environment; will cost billions of dollars to replace," Apr. 22, 2019, South Florida Sun Sentinel, available at <https://www.sun-sentinel.com/opinion/commentary/fl-op-com-septic-tanks-20190422-story.html> (last accessed March 14, 2021).

³⁰ Terri Lowery, "Cities, Counties Need Plan to Switch Septic to Sewer," May 14, 2016, Florida Today, available at <https://www.floridatoday.com/story/opinion/columnists/guest-columns/2016/05/14/cities-counties-need-plan-switch-septic-sewer/84295648/> (last accessed March 14, 2021).

III. Effect of Proposed Changes:

The bill substantially amends Florida's Property Assessed Clean Energy (PACE) program. It names the program the Resiliency Energy Environment Florida (REEF) program, defines key terms, expands the types of qualifying improvements, imposes new consumer protections, extends participation in the program to lessees of government property, and enacts new REEF contractor oversight and accountability provisions.

Definitions

The bill defines the following terms:

- "Assessment" means the non-ad valorem assessment securing the annual repayment of financing obtained by an owner of commercial real property or residential real property for a qualifying improvement.
- "Assessment financing agreement" means the financing agreement, under a REEF program, between a local government and a property owner for the acquisition or installation of qualifying improvements.
- "Commercial real property" means any property not defined as residential real property that is or will be improved by a qualifying improvement, including, but not limited to, multifamily residential property comprised of five or more units, commercial real property, industrial property, agricultural property, and government leased property.
- "Contractor" means an independent contractor who contracts with a property owner to install qualifying improvements not to the owner of such property.
- "Government leased property" means real property owned by any local government which has become subject to taxation due to lease of the property to a nongovernmental lessee.
- "Nongovernmental lessee" means a person or entity other than a local government which is the lessee of government leased real property.
- "Program administrator" means an entity, including, but not limited to, for-profit or-not-for-profit entities, with whom a local government contracts to administer a REEF program.
- "Residential real property" means a residential property of four or fewer dwelling units which is or will be improved by a qualifying improvement.
- "Resiliency Energy Environment Florida (REEF) program" means a program established by a local government, alone or in partnership with other local governments or a program administrator, to finance qualifying improvements on commercial real property or residential real property.

Qualifying Improvements

The bill amends the definition of "qualifying improvements" to expand the types of projects a local government's REEF program may finance. Significantly, the bill adds the following four new categories of qualifying improvements to the program:

- Wastewater treatment improvements.
- Flood and water damage mitigation and resiliency improvements.
- Health and environmental hazards measure or improvements.
- Water conservation or efficiency improvements.

The “wastewater treatment improvement” category includes the removal, replacement, or improvement of an onsite sewage treatment and disposal system with a secondary or advanced system of the same type, or replacement with a central sewage system. The term includes removal, repairs, or modifications made to an onsite sewage treatment and disposal system regulated by the Department of Health under s. 381.0065, F.S.

The “flood and water damage mitigation and resiliency improvement” category includes projects and installations to:

- Raise a structure above the base flood elevation to reduce flood damage;
- Build or repair a flood diversion apparatus or seawall improvement;
- Utilize flood damage resistant building materials;
- Mitigate or eliminate the potential for microbial growth;
- Use electrical, mechanical, plumbing, or other system improvements to reduce flood damage; and
- Qualify for reductions in flood insurance premiums or reduce repetitive loss such as those recognized by the National Flood Insurance Program, the Community Rating System, the Federal Emergency Management Agency, or other programs related to disaster recovery.

The “health and environmental hazards measures or improvements” category includes measures mitigating or removing:

- The presence of lead, heavy metals, polyfluoroalkyl substance contamination, saltwater intrusion, or other harmful contaminants in potable water systems, to include conversion of well water to municipal water systems, replacement of lead water service lines, and installation of water filters;
- Asbestos;
- Lead paint contamination in housing built before 1978; and
- Indoor air pollution or contaminants, including particulate matter, viruses, bacteria, and mold.

The “water conservation or efficiency improvements” category includes measures or improvements to reduce the usage of water or increase the efficiency of water usage.

Additionally, the bill alters existing qualifying improvement categories to some extent. Within the context of energy conservation and efficiency improvements, the bill adds “installation of battery storage systems” as an allowable improvement, and renames the “wind resistance improvement” category to “wind, storm, and flood resistance improvement” to expand the purpose of already qualifying improvements.

The bill also provides that a REEF contract can cover any qualifying improvements on buildings under new construction, and that REEF financing may be used for refinancing existing loans on qualifying improvements.

Consumer Protection Measures

To account for recent consumer protection concerns regarding PACE financing, the bill provides regulations aimed at mitigating these concerns and ensuring consumers are well-informed of their obligations before entering into a REEF financing agreement.

Specifically, the bill provides that, before entering into a residential REEF financing agreement, a REEF administrator must reasonably determine that the property owner has the ability to pay the annual REEF assessment. This determination should be based on observations that:

- All property taxes and other assessments are current and have been paid for the preceding 3 years;
- There are no involuntary liens greater than \$1,000 including construction liens;
- There are no notices of default or other evidence of property-based debt delinquency recorded and not released in the preceding 3 years;
- The property owner has recorded all other PACE assessments or all PACE assessments have been funded and not yet recorded;
- The property owner is current on all mortgage debt on the property; and
- The property owner is not currently in bankruptcy.

In addition to those measures outlined above, program administrators must comply with the following requirements aimed at enhancing consumer protections for owners of residential real property.

Contracts where the annual assessment is greater than \$4,800 (plus inflation) require the administrator to determine that the total estimated annual payment amount for all REEF assessments on the property does not exceed 10 percent of the property owner's annual household income. Such income should be confirmed by a reputable third party and may not be confirmed solely by the property owner.

Before entering into a residential REEF financing agreement, the REEF administrator must provide a financing estimate and disclosure to the property owner that includes:

- The total amount estimated to be funded including program fees and capitalized interest;
- The estimated annual REEF assessment;
- The term of the REEF assessment;
- The fixed interest charged and estimated annual percentage rate;
- A description of the qualifying improvement;
- A disclosure that if the property owner sells or refinances the property, the property owner may be required to pay off the full amount owed under each REEF financing agreement;
- A disclosure that the REEF assessment will be collected alongside other property taxes, and will result in a lien on the property a lien on the property during the term of the agreement; and
- A disclosure that failure to pay the REEF assessment may result in penalties and fees, along with the issuance of a tax certificate that could result in the property owner losing the real property.

The program administrator must also conduct a recorded telephone call with the property owner to confirm the following:

- That the property owner has access to the contract and financing estimates and disclosures;
- The qualifying improvement that is being financed;
- The total estimated annual costs, including fees;
- The total estimated average monthly equivalent amount required to pay such annual costs;
- The estimated date the property owner's first tax payment including the REEF assessment will come due;
- The term of the REEF financing agreement;
- That payments will cause the owner's annual tax bill to increase, that payments will be made through additional annual assessments, and that such payments will be made either directly to the county tax collector's office or through the owner's mortgage escrow account;
- That the owner has disclosed whether the property has received or is seeking additional REEF assessments and has disclosed all other REEF assessments or special taxes about to be placed on the property;
- That the property will be subject to a lien during the term of the REEF financing agreement which may require the contract to be paid in full before selling or refinancing the property;
- That any potential utility or insurance savings are not guaranteed and will not reduce the REEF or total assessment amount; and
- That neither the program administrator nor contractor provide tax advice and that the owner should seek professional tax advice with questions regarding tax credits, deductibility, or other impacts of the qualifying improvement or REEF financing agreement.

A property owner may cancel the REEF financing agreement within three business days after signing the contract, without financial penalty.

The term of a REEF financing agreement may not exceed the useful life of the qualifying improvement being installed or the weighted average useful life of all qualifying improvements being financed, if multiple improvements exist. The financing term may not exceed 30 years. Additionally, a program administrator may not offer a REEF financing agreement on any residential real property that includes a negative amortization schedule, a balloon payment, or prepayment fees other than nominal administrative costs.

PACE Contractor Oversight

The bill provides that for residential real property, a program administrator may not enroll a contractor unless the administrator makes a reasonable effort to review the contractor's professional standing. This includes reviewing the appropriate licensure, permits, and registrations required for its business operations. Additionally, the administrator must obtain the contractor's written agreement that the contractor will act in accordance with all applicable laws to include advertising and marketing laws and regulations.

Further, the bill requires a program administrator to maintain a process to enroll new contractors that includes reasonable review of each contractor's relevant work or project history, financial and reputational background, criminal background, and status on Better Business Bureau or other online platform tracking contractor reviews. A program administrator may rely on a background

check conducted by the Florida Department of Business and Professional Regulation Construction Industry Licensing Board to comply with the criminal background check.

Before disbursing funds to a contractor for a qualifying improvement on residential real property, a program administrator must confirm that the applicable work or service has been completed. This is accomplished through either written or telephonic certification with the property owner, or through a third-party site inspection.

A program administrator may not disclose to a contractor or third party solicitor the maximum financing amount for which a residential real property owner is eligible.

A contractor should not present a higher price for a qualifying improvement on residential real property financed by a REEF financing agreement than the contractor would otherwise present were the improvement not financed by REEF.

Finally, the bill imposes certain marketing and communications guidelines for program administrators and contractors to follow. Under these provisions, program administrators and contractors may not suggest that REEF financing is a government assistance program, that qualifying improvements are free or that REEF is a free program, or that utilizing REEF financing does not require the homeowner to repay the financial obligation. A program administrator or contractor may not make representations as to the tax deductibility of a REEF financing agreement on residential real property. They may only encourage a property owner to seek the advice of a tax professional.

Residential property owned by a business entity is exempt from the enhanced consumer protection measures if the business owns two or more residential properties and the properties are not used as a residence of the businesses owners.

Government Leased Property

REEF financing agreements must be executed by either the local government and the lessee or if only by the lessee, the local government must provide written consent to the program administrator.

The financing agreement must state that the lessee is the only party obligated to pay the assessment. A delinquent assessment will not become a lien but will constitute a debt due and is recoverable by legal action or tax executions that lien other property of the lessees that may be located in any county in Florida. In addition, the occupational license or corporate charter of the lessee will be revoked.³¹

The assessment financing agreement's term may not exceed the lesser of:

- The useful life of the qualifying improvement, the weighted average life of multiple qualifying improvements, or the useful life of the qualifying improvements to which the greatest portion of funds are disbursed;
- The remaining term of the lease on the government leased property; or

³¹ Section 196.199(8), F.S.

- Thirty years.

The bill takes effect July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. This bill does not require counties or municipalities to spend funds, limit their authority to raise revenue, or reduce the percentage of a state tax shared with them as specified in Article VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

The bill does not create or raise state taxes or fees. Therefore, the requirements of Article VII, s. 19 of the Florida Constitution do not apply.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The bill does not affect state or local revenue.

B. Private Sector Impact:

Property owners who live within a jurisdiction that offers REEF financing may apply for additional types of qualifying improvements under the program.

C. Government Sector Impact:

REEF programs are designed to be budget-neutral for local governments. As such, no government sector impact is expected for this bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 163.08 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Finance and Tax on March 18, 2021:

The CS:

- Renames the program from the Property Assessed Clean Energy (PACE) program to the Resiliency Energy Environment Florida (REEF) program and makes conforming changes throughout.
- Adds provisions to administer the program to lessees of government property, including definitions for government leased property and nongovernmental lessees.
- Exempts residential property owned by business entities from the protections afforded to residential properties if the business owns two or more properties and the properties are not residences for the businesses owners.
- Allows a property owner with existing involuntary liens on the property to receive REEF financing if the existing liens total is no greater than \$1,000.
- Makes other technical changes.

CS by Community Affairs on March 10, 2021:

The committee substitute removes an incorrect reference to the Florida Construction and makes other minor grammatical changes.

B. Amendments:

None.