

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/SB 228

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

SUBJECT: Resiliency Energy Environment Florida Programs

DATE: January 13, 2022

REVISED: _____

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

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 228 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 enhances protections for consumers entering into PACE contracts. The bill further allows governmental leased property to qualify for the program.

The bill does not affect state or local revenues.

The bill takes effect July 1, 2022.

II. Present Situation:

PACE in Florida

In 2010, local governments¹ were authorized to offer financing to property owners who enhance their property's energy efficiency or wind resistance by making qualifying improvements. The loan is repaid through annual non-ad valorem property tax assessments. Although Florida's law

¹ Section 163.08, F.S. "Local government" means a county, municipality, a dependent special district as defined in s. 189.012, F.S., or a separate legal entity created pursuant to s. 163.01(7), F.S.

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. 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.⁶

Qualifying Improvements

The types of projects PACE financing may fund are referred to as “qualifying improvements.” A local government may only offer PACE financing for projects included in the statutory definition of qualifying improvements. As provided in current law, qualifying improvements include the following:

- Energy conservation and efficiency improvements,⁷ including, but not limited to:
 - 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.

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 Dec. 07, 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(2)(b)1., F.S.

- Renewable energy improvements,⁸ 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,⁹ 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.¹⁰

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.¹¹

Further, any work requiring a license to make a qualifying improvement must be performed by a properly certified or registered contractor.¹² The total amount of PACE assessments for any property may not exceed 20 percent of the property's market value, unless an energy audit determines that the savings from the qualifying improvement equals or exceeds the repayment amount of the non-ad valorem assessment.¹³

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.

⁸ Section 163.08(2)(b)2., F.S.

⁹ Section 163.08(2)(b)3., F.S.

¹⁰ Section 163.08(10), F.S.

¹¹ Section 163.08(9), F.S.

¹² Section 163.08(11), F.S.

¹³ Section 163.08(12), F.S.

Additionally, the tax liens for PACE financing take priority over other lien-holders, including the property's mortgage holder.¹⁴ Such priority has influenced Fannie Mae and Freddie Mac to refuse the purchase of loans with existing PACE-based tax assessments,¹⁵ and properties encumbered with PACE obligations are not eligible for Federal Housing Administration insured financing.¹⁶ However, priority lien position protects local governments, who are authorized to take on debt for the financing they provide.¹⁷ Advocates also state that the priority lien position enables local governments to offer competitive interest rates, ranging from approximately 6 to 9 percent.¹⁸

Consumer Financial Protection Bureau Steps

In 2018, the United States Congress directed the Consumer Financial Protection Bureau (CFPB) to promulgate regulations regarding PACE financing.¹⁹ 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.²⁰

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.²¹ In making such a determination, the creditor must verify and consider specific factors including the consumer's income, assets, and existing debt obligations.²² 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."²³

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

¹⁴ 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 Dec. 07, 2021).

¹⁵ *Statement of the Federal Housing Finance Agency on Certain Super-Priority Liens*, Federal Housing Finance Agency, Dec. 22, 2014, available at <https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-the-Federal-Housing-Finance-Agency-on-Certain-Super-Priority-Liens.aspx> (last visited Dec. 07, 2021).

¹⁶ *ML 2017-18: Property Assessed Clean Energy (PACE)*, Dec. 07, 2017, U.S. Department of Housing and Urban Development, available at <https://www.hud.gov/sites/dfiles/OCHCO/documents/17-18ml.pdf> (last accessed Dec. 07, 2021).

¹⁷ Section 163.08(7), F.S.

¹⁸ *AboutPACE*, Florida PACE Funding Agency, available at <https://floridapace.gov/about-pace/> (last visited Dec. 07, 2021).

¹⁹ Section 307, Economic Growth, Regulatory Relief, and Consumer Protection Act, Public Law No 115-174 (May 24, 2018).

²⁰ 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 Dec. 07, 2021).

²¹ *Id.*, citing TILA section 129C(a), 15 U.S.C. 1639c(a).

²² *Id.*

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

California's Consumer Protection Measures

California, one of the three states currently offering residential PACE financing,²⁴ 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.²⁵

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.²⁶ In 2021, California took further action specifically to protect senior citizens being solicited at home, criminalizing transactions that are part of a pattern in violation of specific PACE consumer protections.²⁷

III. Effect of Proposed Changes:

The bill substantially amends Florida's Property Assessed Clean Energy (PACE) program in s. 163.08, F.S. 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 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.
- "Government-leased property" means real property owned by a local government which has become subject to taxation due to lease of the property to a nongovernmental lessee.
- "Non-ad valorem assessment" or "assessment" means the same as defined in s. 197.3632(1), F.S., to mean only those assessments which are not based upon millage and which can become a lien against a homestead as permitted in s. 4, Art. X of the State Constitution.
- "Nongovernmental lessee" means a person or an entity, other than a local government, which is the lessee of government-leased property.
- "Nonresidential real property" means any property not defined as residential real property and which will be or has been improved by a qualifying improvement. This term includes,

²⁴ California, Florida, and Missouri are the only three states offering PACE financing on residential property. See, Sijia Qiu and Jocelyn Durkay, *PACE Financing*, National Conference of State Legislatures, Jan. 26, 2016, available at <https://www.ncsl.org/research/energy/pace-financing.aspx> (last visited Dec. 07, 2021).

²⁵ 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 Dec. 07, 2021).

²⁶ Assembly Bill 1284 (Dababneh, Chap 475, Stats. 2017) – California Financing Law: Property Assessed Clean Energy program: program administrators.

²⁷ Assembly Bill 790 (Quirk-Silva, Chap 589, Stats. 2021) – Consumer Legal Remedies Act.

but is not limited to, multifamily residential property composed of five or more dwelling units, and office, commercial, industrial, agricultural, or government-leased property.

- “Program administrator” means an entity, including, but not limited to, a for-profit or-not-for-profit entity, with which a local government contracts to administer a REEF program.
- “Residential real property” means a residential property composed 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.

Consumer Protection Measures

To account for recent consumer protection concerns regarding PACE financing, the bill provides regulations to mitigate these concerns and ensure 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 not been delinquent for more than 30 days 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 on the property.
- The property owner is current on all mortgage debt on the property.
- The property, if residential real property, is not subject to an existing home equity conversion mortgage or reverse mortgage product, or is not currently a residential property gifted for free to a homeowner by a nonprofit entity. However, the agreement may not be invalidated solely on the basis that the homeowner failed to disclose that the property was a gift.
- The property owner is not currently in bankruptcy.
- The total estimated annual payment amount for all assessment financing agreements funded under the REEF program 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 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 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 be 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 the program administrator does not 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 lesser of:

- Thirty years; or
- The greater of the weighted average useful life of all the qualifying improvement being financed or the useful life of the qualifying improvement to which the greatest portion of funds is disbursed.

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. Capitalized interest included in the original balance of an agreement is not considered negative amortization.

REEF 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.

Program administrators may pay or reimburse contractors for any expense allowable under state law including, but not limited to, marketing, training, and promotions.

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.

A program administrator may not provide a contractor with any payment, fee, or kickback in exchange for referring business relating to a specific assessment financing agreement on residential real property.

A program administrator must develop and implement policies and procedures for responding, tracking, and resolving questions and complaints. It must also have a process for monitoring contractors with regard to performance and compliance with program policies, and implement policies for suspending, terminating, and reinstating contractors based on violations of program policies or unscrupulous behavior. Further, a program administrator must submit an annual report to a dependent special district or separate legal entity²⁸ created pursuant to an interlocal agreement showing the number of property owner complaints and into what category the complaints fall.

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

²⁸ See s. 163.01(7), F.S.

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.

Protections applying specifically to residential real property do not apply if the program administrator determines that the residential real property is owned by a business entity that owns more than four such properties, and the business entity's owners do not reside on the property.

Government Leased Property

The bill allows REEF financing to be utilized on 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 on the real property but will constitute a debt and is recoverable by legal action or tax executions that lien other property of the lessee's that may be located in any county in Florida. In addition, the occupational license or corporate charter of the lessee will be revoked.²⁹

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

- Thirty years;
- The remaining term of the lease on the government leased property; or
- The greater of the weighted average useful life of all qualifying improvements or the useful life of the qualifying improvement to which the greatest portion of funds are disbursed.

The bill takes effect July 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, section 18 of the Florida Constitution requires a two-thirds vote of the membership of each house of the Legislature to pass legislation requiring counties and municipalities to spend funds, limiting their ability to raise revenue, or reducing the percentage of a state tax shared with them. 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. Therefore, the provisions of Article VII, section 18 of the Florida Constitution do not apply.

²⁹ Section 196.199(8), F.S.

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 a state tax or fee. 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 will see the benefit of increased consumer protections.

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 Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Finance and Tax on January 13, 2022:

The CS:

- Clarifies the term lengths of REEF loans for both residential real property and government-leased property.
- Allows the use of third parties to determine the fair market value of real property for the purpose of establishing REEF loan limits.
- Authorizes a program administrator to pay or reimburse contractors for certain expenses, such as marketing, training, and promotions.
- Removes the definition of “contractor.”
- Prohibits the invalidation of an agreement or obligation solely on the basis that the property owner failed to disclose that they have been gifted the home for free.
- Removes the requirement that program administrators use plain language when conducting a telephone call with the residential property owner before a notice to proceed is issued.
- Removes a program administrator’s option to rely on a criminal background check conducted by the Construction Industry Licensing Board.
- Excludes capitalized interest from constituting negative amortization when it is included in the original balance of an agreement.
- Expressly states that the provision requiring a program administrator to determine if residential property is subject to an existing home equity conversion mortgage or reverse mortgage does not apply to nonresidential real property.
- The amendment makes additional technical and clarifying changes.

- B. **Amendments:**

None.