

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 Fiscal Policy

BILL: CS/SB 950

INTRODUCER: Community Affairs Committee and Senator Rodriguez

SUBJECT: Resiliency Energy Environment Florida Programs

DATE: April 24, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hackett</u>	<u>Ryon</u>	<u>CA</u>	<u>Fav/CS</u>
2.	<u>Hackett</u>	<u>Yeatman</u>	<u>FP</u>	<u>Pre-meeting</u>
3.	_____	_____	_____	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 950 substantially amends a program authorized in current law, commonly known as the “Property Assessed Clean Energy” or “PACE” 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, wind resistance, and newly added by the bill wastewater treatment, flood and water damage mitigation, and health and environmental hazards mitigation.

The bill names the program the Resiliency Energy Environment Florida program and enhances certain protections for consumers entering into PACE contracts. The bill updates the legislative intent of the PACE statute to reflect the expanded scope of the program, and introduces definitions used to clarify the language of the statute.

The bill does not affect state or local revenues.

The bill takes effect July 1, 2023.

II. Present Situation:

PACE in Florida

In 2010, the Legislature authorized local governments¹ to fund property owners making 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 owner³ 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.⁴

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.⁵ However, it is the local government that enters into a financing agreement directly with the property owner.⁶ In 2012, the Legislature expanded the definition of "local government" to allow a partnership of local governments formed pursuant to the Florida Interlocal Cooperation Act⁷ to enter into a financing agreement wherein the partnership, as a separate legal entity, imposes the PACE assessment.⁸

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.⁹ 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.¹⁰

¹ "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.

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 Mar. 16, 2023).

³ While nationally it is common to separate PACE programs into residential and commercial programs, Florida Statutes do not differentiate based on the nature of the property. See United States Office of State and Community Energy Programs, *Property Assessed Clean Energy Programs*, available at <https://www.energy.gov/scep/slsc/property-assessed-clean-energy-programs> (last visited Mar. 19, 2023).

⁴ Section 163.08(2)(b), F.S.

⁵ Section 163.08(6), F.S.

⁶ Section 163.08(8), F.S.

⁷ Section 163.01(7), F.S.

⁸ Chapter 2012-117, L.O.F.

⁹ Section 163.08(13), F.S.

¹⁰ Section 163.08(15), F.S.

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:

- Energy conservation and efficiency improvements,¹¹ 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,¹² 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,¹³ 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.¹⁴

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.¹⁵

¹¹ Section 163.08(2)(b)1., F.S.

¹² Section 163.08(2)(b)2., F.S.

¹³ Section 163.08(2)(b)3., F.S.

¹⁴ Section 163.08(10), F.S.

¹⁵ Section 163.08(9), F.S.

Further, any work requiring a license to make a qualifying improvement must be performed by a properly certified or registered contractor.¹⁶ 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.¹⁷

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.¹⁸ Such priority has influenced Fannie Mae and Freddie Mac to refuse the purchase of loans with existing PACE-based tax assessments,¹⁹ and properties encumbered with PACE obligations are not eligible for Federal Housing Administration insured financing.²⁰ However, priority lien position protects local governments, who are authorized to take on debt for the financing they provide.²¹ Advocates also state that the priority lien position enables local governments to offer competitive interest rates, ranging from approximately 6 to 9 percent.²²

Consumer Financial Protection Bureau Steps

In 2018, the United States Congress directed the Consumer Financial Protection Bureau (CFPB) to promulgate regulations regarding PACE financing.²³ 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.²⁴

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.²⁵ In making such a determination, the creditor must verify and consider specific

¹⁶ Section 163.08(11), F.S.

¹⁷ Section 163.08(12), F.S.

¹⁸ 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 Mar. 16, 2023).

¹⁹ FHFA, *Statement of the Federal Housing Finance Agency on Certain Super-Priority Liens* (Dec. 22, 2014) (last visited Oct. 27, 2021).

²⁰ "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 Mar. 16, 2023).

²¹ Section 163.08(7), F.S.

²² *AboutPACE*, Florida PACE Funding Agency, available at <https://floridapace.gov/about-pace/> (last visited Mar. 16, 2023).

²³ Section 307, Economic Growth, Regulatory Relief, and Consumer Protection Act, Public Law No 115-174 (May 24, 2018).

²⁴ 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 Mar. 16, 2023).

²⁵ *Id.*, citing TILA section 129C(a), 15 U.S.C. 1639c(a).

factors including the consumer's income, assets, and existing debt obligations.²⁶ 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."²⁷

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,²⁸ 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.²⁹

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.³⁰ 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.³¹

III. Effect of Proposed Changes:

The bill substantially amends Florida's 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.

²⁶ *Id.*

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

²⁸ California, Florida, and Missouri are the only three states offering PACE financing on residential property.

²⁹ 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 Mar. 16, 2023).

³⁰ Assembly Bill 1284 (Dababneh, Chap 475, Stats. 2017) – California Financing Law: Property Assessed Clean Energy program: program administrators.

³¹ Assembly Bill 790 (Quirk-Silva, Chap 589, Stats. 2021) – Consumer Legal Remedies Act.

- “Financing agreement” means an agreement, under a qualifying improvement program, between a local government and a property owner to finance the acquisition or installation of qualifying improvement through a non-ad valorem assessment.
- “Non-ad valorem assessment” or “assessment” means the same as defined in s. 197.3632(1)(d), 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.
- “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 multifamily residential property composed of five or more units, and agricultural, commercial, industrial, and office 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.

Expansion of Qualified Improvements

The bill amends the definition of “qualifying improvements” to expand the universe of the types of projects a local government’s REEF program may finance. Significantly, the bill adds the following three new categories of qualifying improvements:

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

The “wastewater treatment improvement” category includes the replacement or improvement of an onsite sewage treatment and disposal system with an advanced system of the same type, or replacement with a central sewage system. The term includes 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:

- Raising a structure above the base flood elevation to reduce flood damage;
- Building or repairing a flood diversion apparatus;
- Utilizing flood damage resistant building materials;
- Mitigating or eliminating the potential for microbial growth;
- Using electrical, mechanical, plumbing, or other system improvements to reduce flood damage; and
- Qualifying for reductions in flood insurance premiums.

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

- The presence of lead, heavy metals, polyfluoroalkyl substance contamination, 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 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 nationwide, 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 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 non-ad valorem 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 to a homeowner by a nonprofit entity;
- The property owner is not currently in bankruptcy; and
- 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 or concurrent with 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 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 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 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 also 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.

The bill also amends the disclosure given to a purchaser of improved property subject to an assessment under a REEF program to include a statement that the assessment uses a program formerly referred to as Property Assessed Clean Energy, or PACE.

Maximum Assessments on Property

Current law provides that the total amount of any non-ad valorem assessments for a property may not exceed 20 percent of the just value of the property, as determined by the property appraiser. The bill amends this requirement to read that total assessments may not exceed 20 percent of the fair market value as determined by a reputable third party.

The bill also newly provides that the combined mortgage-related debt and total amount of non-ad valorem assessments may not exceed 100 percent of the fair market value of the property.

Judicial Remedies for Failure to Establish Ability to Pay

The bill provides that, in the event that a court or tribunal determines by clear and convincing evidence that the program administrator's determination of the property owner's ability to pay was not objectively reasonable based on the information provided by the property owner, the yearly assessment payment shall be reduced in the amount which is within the property owner's ability to pay. This provision does not require or authorize the administrator to reduce the total amount owed on the assessment.

This provision requires reduction of the monthly payments to meet the buyer's ability to pay, which without reducing the total amount due will extend the term of the assessment. Notwithstanding, the term of a REEF financing agreement may not exceed the lesser of 30 years or the useful life of the improvement. The provision is silent on a court's ability to reduce the total amount due under an assessment or void the agreement entirely.

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. 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 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.

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 a report annually showing the number of property owner complaints and what category the complaints fall into.

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.

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 ownership does not reside on the property.

The bill takes effect July 1, 2023.

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 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 Community Affairs on March 22, 2023:

The CS:

- Expands the universe of what types of projects PACE can finance to include wastewater treatment, flood and water damage mitigation, and health and environmental hazards mitigation;
- Alters judicial remedies for situations where a program administrator failed to reasonably assess a property owner's ability to pay;

- Removes a provision forbidding an administrator from disclosing to a contractor or third party the maximum financing amount available;
- Includes a reference to Property Assessed Clean Energy in disclosures to property owners;
- Updates the legislative intent of the PACE statute to reflect the expanded scope of the program; and
- Introduces further definitions used to clarify the language of the statute.

B. Amendments:

None.