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Pace Rule comment 1

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**From:** Michael Yaki <myaki@petrospartners.com>  
**Sent:** Monday, July 10, 2023 1:41 PM  
**To:** DOFRules (DOF) <dofrules@finance.nyc.gov>  
**Subject:** [EXTERNAL] Clarification of oral comments 7/10/23

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I wish to clarify comments I made earlier today with respect to proposed Section 4 of the Rules.

Petros PACE Finance wishes to affirm that PACE acts like an assessment on the property, beginning with the recordation at time of closing and an amortization table where interest is calculated at the time of closing. Because of that, we agree that the obligation to fund should be fully realized at closing, whether through immediate disbursement or the establishment of an escrow from which draws are made at the appropriate time and at the request of the property owner. PACE, in short, is not a construction loan.

However, where commercially reasonable deference should extend is to the exact details of an escrow. We have seen in numerous deals that the identity of the trustee in which funds are held may change between approval and closing and funding. For example, a senior lender may prefer that escrow be handled by their preferred trustee, versus the preferred trustee of the PACE capital provider. Or it may be that a third party may be chosen. Because there is often a time gap between approval and closing, the Program should allow flexibility for the nature of the escrow to remain flexible up to the point of close, at which point the trustee will be established. Thus, the Program should not condition approval upon establishment of the trustee, only that closing documents are dependent on the trustee being identified prior to close. This is how it is handled in other programs across the country to the extent that it is required at all.

Best regards,  
Michael

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July 14, 2023

NYC Department of Finance, Legal Affairs Division  
375 Pearl Street, 30th floor  
New York, NY 10038

Dear Mr. Atik:

[RE: Comment on Proposed Rule Amendment for Sustainable Energy Loan Program](#)

Nuveen Green Capital (“NGC”) invests in energy efficiency retrofits, solar, and high performance new commercial buildings through the C-PACE financing structure. We are the leading funder of C-PACE projects nationally with over 600 projects and \$1.5B invested. We are also the leading provider of C-PACE funding in New York State where we have financed the majority of C-PACE transactions (including one of the two transactions completed in New York City).

We are pleased to provide you with the following comments to the proposed rule amendment to Local Law 96. We applaud this proposed rule-making, which prioritizes only new construction of low-carbon buildings and beneficial electrification. Based on over 10 years of experience bringing C-PACE successfully into development projects working with the energy engineers, contractors, and property owners, NGC has unique and practical expertise in what program features are the most attractive for our clients and the most effective for local governments. **There are a few critical components of the proposed rule that must be modified to ensure Local Law 96 can be successfully implemented and drive the full potential of C-PACE in New York City.**

**1. Cost Effectiveness for New Construction**

The proposed amendment to Section 58-06 (3)(c)(6)(ii) would maintain the current cost-benefit ratio or ‘CBR’ analysis used to ensure the “cost-effectiveness” of financed improvements in the Program Guidelines. Currently only lighting and electric HVAC end-use equipment are deemed cost-effective on a prescriptive basis, however all other energy efficiency improvements related to building envelope (i.e. roof, walls, insulation, windows), which comprise the majority of the cost of constructing a Low Carbon Building that is thermally efficient and supports cost-effective use of electricity, categorically do not meet the CBR standard in the Program Guidelines.

The CBR must be adjusted for new construction projects for low-carbon buildings to qualify for C-PACE financing AND in order to motivate a developer to design and implement a low carbon building, C-PACE financing must be allowed to cover 100% of the hard, soft, and ancillary costs related to the energy efficiency equipment and associated infrastructure within the building – not solely what is deemed ‘cost-effective’ through the CBR. Therefore, in order to maximize public benefit and participation in the new construction program one or both of the following solutions should be stipulated in Section 58-06 (3)(c)(6)(ii) per the proposed rule:

- i. All equipment, installation costs, design costs, soft cost, and ancillary costs related to Energy Efficiency Improvements in a low carbon building should be deemed cost effective on a pre-emptive basis.
- ii. The Program Guidelines must be updated for new construction projects to expand the eligible calculated ‘costs’ and ‘benefits’ to include the following:

- a. Cost may be calculated on the basis of “incremental cost”; ‘Benefit’ may be calculated on the basis “incremental energy savings” with the baseline in both cases being a code compliant building.
  - o As an example a low carbon building is being developed where the total of energy related equipment, installation costs, design costs, soft cost, and ancillary costs is \$12,000,000. To build an identical code-compliant building to code those same costs would total \$10,000,000. The incremental cost = \$2,000,000. If the low carbon building yields \$4,000,000 in lifetime energy savings over the code-compliant building design, the CBR should be calculated as follows:  
$$\frac{\$4,000,000}{(12,000,000-10,000,000)} = \text{CBR } 2.0$$
  - o The resulting C-PACE loan would be allowed to be \$12,000,000 + the administrative costs associated with C-PACE + accrued interest during construction.  
This recommendation has been previously implemented by Energy Improvement Corporation in the New York State program and is consistent with NYSERDA guidance.
- b. Benefits may include a calculation of the social cost of carbon and other GHG published by NY state agencies in the past 3 years and not solely the published figures from the 2018 NYSERDA CBR Guidance document
- c. Benefits may include a calculation of non-carbon related public health benefits, resiliency benefits, embedded carbon savings benefits, and utility system benefits not captured in the NYSERDA CBR guidance document;
- d. Benefits may include a calculation of interest rate savings to the building as a result of using C-PACE instead of the alternative financing rate.

## **2. Effective Useful Life for New Construction**

The rule should stipulate that the Program Guidelines will allow for NYSERDA certified energy engineers to determine the effective useful life of proposed energy efficiency and renewable energy improvements based upon based on a wide range of industry-accepted reference data, professional experience, and information related to specific equipment purchased. Currently, the City’s reliance on ‘one-size fits all’ average and outdated figures in the NY State Technical Resource Manual artificially reduces the ‘presumed’ useful life of low carbon building components, thereby forcing building owners to repay C-PACE financing over a shorter term, thereby increasing annual payment requirements which may be borne by tenants, and overall reducing the affordability for developers to build low carbon buildings, which is the stated objective of the City.

As one example NYSERDA guidance is currently silent on the useful life of ground loop material for geothermal systems. As with many energy systems the infrastructure that supports the energy using equipment is both critical to its operation and has a useful life significantly longer than the energy using equipment itself. Applying incorrect useful life data will negatively impact quality selection and installation of that infrastructure. These decisions can greatly increase the likelihood of persistent use of the energy efficient “system” as a whole and should be evaluated properly. Currently, not even the actual warranties, maintenance contracts, and ongoing retro commissioning plans included in low carbon building designs submitted to the City are considered under the current Program Guidelines due to their absence from the NYSERDA TRM.

The City is given broad and direct leeway by the C-PACE enabling statute *and* the underlying NYSERDA Guidelines to utilize factors it deems appropriate to establish technical eligibility of energy efficiency improvements. It would best serve the market, the public, and the program to have a professional engineer licensed by the state of New York and certified by NYSERDA make the determination of useful life based on all available data including but not limited to the NYSERDA TRM.

**Loan Proceeds Held in Escrow**

The proposed rule 'j' requiring loan proceeds to be held in escrow, *if taken literally*, will be prohibitively financially punitive to developers and tenants of low carbon buildings. The costs created by this rule will ultimately be borne by the building owners, tenants, and people of New York City. It is unfeasible to require escrowing of funds and payment of related interest cost for 100% of the principal value of C-PACE loans when such funds are only being drawn over time against actual implementation of eligible building components over as long as a 3-year period. As the proposed rule stipulates "or similar arrangement", NGC advises the rule require that Program Guidelines be issued on this topic developed in concert with commercial building developers and C-PACE funders.

**Related Entities Rule**

The proposed rule b.4 prohibiting an Applicant from being directly or indirectly affiliated with or owned or controlled by the Lender is vague language that should not be included in municipal regulation as it introduces undue risk on property owners and project financiers while doing nothing to achieve the City's objective of driving behavioral change among developers to build low carbon buildings. Such a rule may have the unintended consequence of disqualify technically eligible projects or unfairly increase the cost of financing such projects by limiting the pool of qualified capital providers. If the City wishes to prohibit these types transactions, such a provision should be stipulated for allowance to be included in the Program Guidelines with discretion afforded to City staff or contracted administrators to provide clearer language and to approve affiliated relationships on a case by case basis.

Yours sincerely,

Genevieve Sherman  
Head of Sustainability & Policy

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genevieve.sherman@nuveen.com

cc: Mayor's Office of Climate and Environmental Justice



July 14, 2023

NYC Department of Finance, Legal Affairs Division  
375 Pearl Street, 30<sup>th</sup> floor  
New York, NY 10038

RE: Comments on Proposed Rule Amendment for Sustainable Energy Loan Program

Dear Mr. Atik:

The C-PACE Alliance, Inc. (CPA) hereby submits its comments on the proposed New York City rule amendment regarding the new construction expansion of its Sustainable Energy Loan Program, as published by the New York City Department of Finance (DOF).

CPA is a nonprofit trade association that advocates for best practices in Commercial Property Assessed Clean Energy (C-PACE) programs nationally. CPA's members consist of investment firms and transaction experts that have invested in or professionally advised on the overwhelming majority of C-PACE projects nationwide. More information about CPA is available at [www.c-pacealliance.org](http://www.c-pacealliance.org).

For ease of reference, we will address each proposal in the order that it appears in the rule. The following are our comments on the proposed rule:

**SECTION 1 - Low Carbon Building** - We understand that the City's proposed policy is to restrict C-PACE funding to only those buildings that do not use fossil fuels for their primary source of heat or other energy use. We are excited to work with the developer community to accelerate the movement toward these property types through leveraging C-PACE funding. We are confident the proposed rules would significantly benefit from certain clarifications to ensure C-PACE is successful as a policy tool to motivate the building design and city's desired outcomes as proposed in the rule.

First, under subsection (a), please confirm that this is aimed at items such as emergency generators, since they are necessary in emergencies such as was encountered during Superstorm Sandy and Hurricane Ida.

Second, under subsection (b), please clarify that it is exclusive and separate, and not connected to (a). In other words, a building under (b)(2) will not be disqualified based upon its operational use, including devices that are otherwise disqualified under (a)(3), so long as those devices are used for the building or component of the building where the operations contemplated under (b)(2) occur. For example, a mixed-use building that has one or more ground floor businesses with commercial kitchens that emits more than 25 kg of CO<sub>2</sub> on the ground floor is not disqualified as a Low Carbon Building if the remainder of the building – whether office or residential – does not utilize any of the business' infrastructure and follows the requirement of not having “any device, machinery, equipment . . . [that] emits more than 25 kilograms of carbon dioxide . . . .”

**SECTION 1 - Major Renovation** - Since this definition for the application of Low Carbon Building applying to Major Renovation will take effect later this year, how does this conform with buildings that meet the definition of Major Renovation

**Capital Providers**

- Bayview PACE
- Castle Green Finance
- Greenrock
- Imperial Ridge
- ING
- Inland Green Capital
- Kitsap Bank
- North Bridge
- Nuveen Green Capital
- PACE Equity
- PACE Loan Group
- Petros PACE Finance
- Stonehill Strategic
- Sustainable Equity
- Twain Financial
- White Oak Capital

**Law Firms**

- Bricker & Eckler
- Chapman and Cutler
- Adler & Stachenfeld
- Foley & Lardner
- Haynes Boone
- Hirschler
- Jones Hall
- Kramer Levin
- Stinson
- Winston & Strawn

but were constructed, are under construction, or were permitted prior to the effective date of this Proposed Rule?<sup>1</sup> Property owners who have completed projects but were unaware of this requirement for eligibility for C-PACE financing are essentially disqualified, making retroactive financing a “go forward” rule only for major renovations except for those few buildings that meet this criteria, if any.

**SECTION 1 - New Construction** - See comment for Major Renovation, above.

**SECTION 2** - CPA is pleased that the proposed rule addresses ground-leases as these are common in New York City. We look forward to working with the Program Administrator on the issues related to the billing, collection, and enforcement of C-PACE charges placed on the leasehold interest.

**SECTION 3** - Clarifications in this section are what we believe can have the most impact in C-PACE helping to achieve a low carbon building environment in New York City.

We **strongly** recommend that Section 58-06 (3)(c)(6)(ii) be amended to state that *all* EE Improvements installed in a Low Carbon Building are deemed “cost-effective” on a pre-emptive basis, and that the Program Guidelines will be updated to stipulate this. While lighting and electric HVAC components that meet New York State Stretch Energy Code are already deemed cost-effective on a prescriptive basis under NYSERDA’s C-PACE Guidelines, currently, all energy efficiency improvements related to building envelope (i.e. roof, walls, insulation, windows), which comprise the majority of the cost of constructing a Low Carbon Building that is thermally efficient and supports cost-effective use of electricity, will still not meet the ‘cost-effectiveness’ calculation under the Program Guidelines.

As an alternative to amending the proposed rule subsection (3)(6)(ii) per the recommendation above to deem all energy efficiency components of a Low Carbon Building ‘cost-effective’, which we believe has successful precedent with NYSERDA and can help streamline the process toward the low carbon emission goals, the members of CPA would be pleased to provide suggestions to update the Program Guidelines to allow low carbon buildings to be capable of meeting the Cost Benefit Rule<sup>2</sup>. Such may include:

- Allow for consideration of NY-based calculations of the social cost of carbon and other GHG published by NY state agencies in the past 3 years;
- Allow for consideration of non-carbon related public health benefits, resiliency benefits, embedded carbon savings benefits, and utility system benefits not captured in the NYSERDA guidance-based Cost Benefit Ratio analysis;
- Apply a 1% discount rate for determining the present value of all benefits<sup>3</sup>; and
- Allow for consideration of differential of proposed C-PACE interest rate and alternative financing based upon receipt of alternate financing term sheet.

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<sup>1</sup> The Guidelines state that a “completed project may receive PACE financing . . . 3 years prior to the date on which the PACE financing agreement . . . is signed.”

<sup>2</sup> Under the present Program Guidelines, this is found under the title “Savings-to-Investment Ratio (SIR)”

<sup>3</sup> See NYS DEC “Establishing a Value of Carbon Guidelines for Use by State Agencies, 2021” published under direction of Governor Hochul wherein NYS agencies are advised to use 2% discount rate on social cost of carbon for decision making.

Further, in determining the eligible cost, we recommend following the leads of jurisdictions with similar savings requirements. Below are some examples to consider:

- Only the incremental cost of installing the proposed energy efficiency improvements compared with cost of installing 'like' components that meet the minimum NYC Code requirements will be counted as 'cost' under the Cost Benefit Ratio.
- 100% of the full cost of energy efficiency improvements that meet the 'incremental' Cost Benefit Ratio >1.0 in a Low Carbon Building are eligible to be financed with C-PACE, inclusive of hard, soft, and ancillary costs.
- Hard costs are defined as all material and labor costs directly related to the installation of the energy efficiency component.
- Ancillary costs are defined as all labor and material related to the piping, wiring, switchgear, ductwork, and the proportional amount of construction general conditions and finishes for the impacted space.
- Soft costs should be defined as a proportional amount of building design costs, project contingency, legal costs, developer fee, legal costs, financing costs and other similar costs incurred at a project level.
- The certified energy engineer completing the energy audit may stipulate the effective useful life of proposed energy efficiency measures based on a wide range of industry-accepted reference data, professional experience, and information related to specific equipment purchased.

Finally, we respectfully request that the Proposed Rule should include the following addition as new 58-06(3)(c)(6)(iii): "The Program Guidelines will be amended to stipulate that the certified energy engineer completing the energy audit may come to a determination of the effective useful life of proposed energy efficiency and renewable energy measures based on a wide range of industry-accepted reference data, professional experience, and information related to specific equipment purchased."

The purpose of this amendment above, which is allowed under municipal discretion rule, is to account for the current inability of NYSERDA certified engineers to determine the effective useful life of actual proposed building/equipment. Instead, they are required to revert to average and outdated figures in the NY State Technical Resource Manual, which has a cascade effect on the efficacy of the New York City Sustainable Energy Loan Program. Average and outdated data artificially reduces the calculation of Expected Useful Life for improvements. This in turn results in artificially reducing the length of term available for financing, which in turn increases the annual PACE charge to the property owner and potentially to tenants.

We appreciate the opportunity to provide you with our comments on the proposed rulemaking. The members of CPA would be pleased to engage in a dialogue to discuss how we can be helpful in achieving the low carbon building goals of the city. If we can help or if you have any questions, please contact Cliff Kellogg by email ([ckellogg@c-pacealliance.org](mailto:ckellogg@c-pacealliance.org)) or phone (202-744-1984).

Sincerely,



Clifton G. Kellogg  
Executive Director

CC: Nicholas Zuba, Deputy Director, CPA