

**EIC C-PACE Advisory Committee Meeting  
February 7, 2019**

**Susan Morth/EIC:** Good morning everyone, it's Susan Morth with EnergizeNY and I'm here with Mark Thielking and Alain Pierroz. We are lucky to have our new bond and transaction counsel on the phone today. I'd like to introduce Anna Lee from Norton Rose Fulbright. Anna do we also have Randy or another one of your other colleagues on the line?

**Anna Lee/Norton:** See we have Randy Mayer and Patrick Dolan here.

**Susan:** Wonderful, hello Randy and Patrick and thanks for being on the phone. We have several callers on the line now, maybe we give it one minute. I have ten people on the phone and I normally have twenty. One more minute and then we can get started to discuss the memo that you all wrote about, general municipal law. I'm assuming that most of the folks on the line have had a chance to review that. I think we can go ahead, we have a fairly large quorum here. Anna do you want to go ahead.

**Anna:** I'm not sure if everyone has had a chance to look at this memo of law. We have looked at the law and we've come up with a new way forward for New York municipalities to implement the C-PACE program and it differs from the prior program, the make whole program, in that we are not having the municipality in the first instance collect the benefit assessments on behalf of the lender and we are calling it Open C-PACE to allow any third party approved lender provide the financings for these improvements directly and EIC would act primarily as the program administrator and coordinate with the municipality to put the benefit assessment lien on the tax records and bill directly and collect on behalf of the lender the benefit assessments and that's what we are trying to achieve with the new program, streamlined and less involvement of the municipality to take out that risk of non-payment. I'll turn it over to Randy who is the drafter of this memo and Randy will give an overview of this memo.

**Randy Mayer:** There are a couple of points that we think are important to the structure of the program. One of them, I think Anna has mentioned, is that it will enable the lenders to do the administrator's work of collection and to the extent that there is non-payments and to certify the non-payments to the municipality so that procedures could continue to establish the tax lien is in a position to be collected at some point and represents an unpaid amount and/or that the tax lien can transfer to a lender to enforce in accordance with state law. The state law method for enforcing tax liens takes quite a bit of time and municipalities do it routinely. I guess the normal course is that these liens get paid prior to the properties being sold. That is the by far the most common result and the way

we're looking at it is that we would expect that would be what most PACE lenders would want to see happen and would probably not want to directly take responsibility for enforcing the tax liens in respect of their PACE unpaid amounts. However, what we want to do is give each PACE lender the ability, if they elect to do so, to take over responsibility for enforcing the PACE tax lien and the tax liens that we believe would be created, would be annually created, just like tax liens are created for taxes, and they would be annually satisfied by payment of the PACE loan just like tax liens are satisfied by payment of taxes and to the extent that there was a non-payment of PACE amount that lien would then persist on the property and these liens could conceivably year after year can accumulate and New York law calls for all the existing tax liens and the PACE liens. Once this is set up, to be collected into groups. So based on the time they were created, we would envision that the amount due on a PACE loan each year, if unpaid, would result in the creation of another PACE lien for that year and these would begin to stack up year by year. If you added up all of them, it would be the total unpaid amount to date on the PACE loan because the PACE loan never gets accelerated. So, that is very similar to the way taxes work if you think about it because taxes accumulate on a yearly basis, if you don't pay them for a number of years you will accumulate several years' worth of liens and under State law if there is a partial payment or someone comes in and is unable to pay all the liens, it is the newest liens that get paid first and we would envision that the PACE liens would be swept up in that regiment and the liens for the newest PACE lien years would be paid first and work backwards. But these are really rare events we are talking about because most people either come in and pay all their liens or they don't and so that is what we would expect.

**Anna:** Just to be clear, the PACE lien, the full amount of the lien would be put on the tax record.

**Randy:** We wanted the full amount of the lien on record on the onset because we want to make sure that we've achieved a real subordination of the other liens that were on the property prior and for which we are going to have to receive subordination so in order to do that we needed the full amount stated somewhere so that there has been a subordination of the full amount.

**Michael Yaki:** Where there is a missed payment and the interest rate increases is that default interest rate also tacked on to the assessment?

**Anna:** Yes

**Randy:** We would expect that. That is how tax liens work as well.

**Michael:** Okay

**Randy:** We think this is doable through a local law. What would really be affective would be the ability of the municipality to transfer the tax lien to the lender on an annual basis whenever there's been non-payment and that can be an election on the part of the lender. The lender can elect to just leave it with the municipality and just wait to receive the benefit of it in the normal course or the lender can actively decide to take matters into their own hands and decide they would rather hold the tax lien and prosecute it themselves.

**David Schaefer:** If the lender where to get an assignment of that tax lien and to commence foreclosure proceedings, all of the accrued and unpaid taxes, in addition to the unpaid PACE lien, has to be satisfied out of the proceeds of that foreclosure proceeding?

**Anna:** Right and the subordinates.

**David Schaefer:** PACE would be the subordinates, tax lien would be paid first then the PACE lien. The buyer of the property would take the property subject to the remaining outstanding balance of the tax lien. The foreclosure process doesn't disturb the lien, okay.

**Anna:** Or the PACE lien, yes.

**Michael Yaki:** I have a question about the actual foreclosure process itself and that is are we to follow the process delineated by the County, do they invoke it for us or is this more like a trust deed sale or mortgage foreclosure action that we would be taking?

**Anna:** I think in the first instance we would let the municipality foreclose. We looked at this for a couple of reasons and we think that is probably the better approach because we want this to be considered a municipal lien and in New York the way the taxes are done is every jurisdiction is different so the taxing authority maybe the County in most cases but it could be the City, the Village, or the Town. If the lender is the one that wants to foreclose in the first instance they would have to give notice to all the other parties and would also have a redemption period and would have to wait for that period anyway and then they would have to incur the cost of the foreclosure proceeding but if you let the municipalities do it and they are incurring the cost and the lender can intervene in the foreclosure proceeding to get paid.

**Michael:** So, this isn't really a full assignment, it's just an assignment of the right so if you have, let's extrapolate this since all the counties are different if they were to do a tax lien fail, we would essentially own this tax lien for the PACE assessment. Is that true?

**Anna:** Yes. A PACE lien is not accelerated, right. So it would only be for what is past due not the full amount of the PACE lien.

**Randy:** Again, it's just like taxes.

**Genevieve Sherman:** I was just going to say that this is basically exactly how the program functions in Connecticut which is to say the lender is always assigned the right to enforce the lien so they have taken an assignment of the lien itself, the legal documents that certify the lien. But operationally the contracts between the municipality and the state which is administering the program are such that the municipality still leads the foreclosure proceedings for that delinquent assessment whether the real property taxes are delinquent or not. It sounds like what you are describing here. This was my question on our last group call. I'm curious how you're think about those contractual obligations whereby the municipality would have assigned to a lender the special assessment lien but is still operationally sort of executing on the foreclosure procedures for that special assessment lien that is in a similar manner to the foreclosure proceedings for real property taxes. Would that be part of the municipal agreement with EIC or how would that work?

**Anna:** Yes. In the municipal agreement we will provide that the municipality in the first instance will foreclose. We will have the lender or EIC on its behalf certify to the taxing authority that this PACE assessment has been missed and at that point the municipality will then institute its foreclosure proceedings. As you know, there is a redemption period where they have to give some notices to everyone that has an interest in the property before they can start foreclosing on the property. That is the way we see it working.

**Genevieve:** We had a call many many moons ago with Squire where they sort of described to a lot of folks on the phone here the process for tax sales in New York and I'm sure I'm not remembering this completely accurately, so my apologies for paraphrasing but my recollection was that there is kind of a two-step process. The first is that a certificate is purchased for auction that would be for the full amount of any real property taxes, special assessments, municipal charges then in arrears and there may be some delinquent interest or penalties that have been a part of that, that would be sold to a third party and then the third party who has purchased it now is the beneficiary and would receive any future delinquent interest. It is at that point the municipality and presumably the PACE lender would have been made whole for their assessment for that year and then that quote/unquote right of redemption and now the PACE fund is actually out of it because the third party has purchased the certificate, we have all received the proceeds for that purchase and now it's the third party who is sitting out the two to three year redemption period and would actually attempt to prosecute foreclosure if those remain uncured.

**Anna:** Right, so I think you're describing the tax lien sales in New York City. When we look at the counties in New York State certain counties have tax lien fails but not all do. It is not as uniform and the City is its own taxing authority. Their tax lien sale is very much, I think Patrick can speak to this more, but it's twice a year and its...

**Patrick:** They have been securitizing their tax liens for the last twenty some odd years and it is a pretty smooth process in the City.

**Genevieve:** With the EIC program since there are both municipalities and counties entering into contracts with EIC, would we expect there would be some jurisdictions whereby the first instance lead by whatever that jurisdiction is might be a tax sale rather than going directly to a foreclosure?

**Randy:** I think that could probably happen depending on what their procedure was. It makes sense that both methods would be available.

**Susan:** Genevieve, not to interrupt you, this is Susan from EIC, that's probably going to be pretty rare, and just so the group understands that Randy and Anna and the rest of the folks at Norton's have a draft of the municipal agreement and the local law that will be used for this Open C-PACE program. The agreement will be available for everyone to review and understand and we can reconvene after that time as well. So, if there are any other parties on the phone with questions, we definitely can clarify.

**Genevieve:** Got it. Thank you Susan, that's really helpful. So it sounds like by and large we would not anticipate there being this kind of two-step process if we were to notify a municipality that a payment has been missed they would pursue their process for real property taxes that are delinquent which is to say there would be a notice of delinquency and they would sort of proceed with foreclosure proceeding, sorry not foreclosure proceeding, they would be moving into that redemption period right away? Numbers are accruing until they can be enforced in a foreclosure proceeding.

**Anna:** That's what we perceive, yes. Yes, that's what they are going to agree to in the municipal agreement.

**Randy:** What we were thinking that might have value is that the proceeding that normally results in an auction could have an alternative for the PACE lender so the lender can elect to receive the lien directly without buying it at auction. So that the lender at its option can have the right to enforce that lien as any holder of a tax lien would.

**Genevieve:** As for Greenworks, our concern with this sort of direct assignment to lender has never been ... have the right to enforce. Obviously having the right to enforce the lien is fantastic. It has been more to do with what is the procedure by which that enforcement occurs and is that procedure basically the same as the procedure for a private foreclosure of a mortgage lien? That is very different than the statutory procedures that are in place for the enforcement of a municipal tax lien. Whatever those may be whether there's a certificate posted for auction or whether it goes straight through to foreclosure. So, that's been our primary concern and I think what you are saying here is that contractually the municipality would agree to operationally take this now subordinated special assessment lien, subordinate to the real property taxes but still a special kind of a lien and they will sort of carry it through this process that is, and I'm making air quotes here, in a similar manner to real property taxes? And I think that is an excellent outcome and we would be very supportive of that. Knowing that we basically own the rights to that lien but will have a partner enforcing it for us.

**Susan:** Thank you.

**Patrick:** Right, you could sort of wait for them to take the actions that statute will dictate they need to take.

**Susan:** Do we have any other questions on the line? I have about twenty-five callers here.

**Josh Smith:** I just wanted to ask a favor as the municipal agreements are getting drafted but more when they are getting adopted, is it possible to put together a brief description for each municipality if there is variability in that foreclosure process? I know the folks were saying there is a little bit of variability between cities, counties and townships just exactly how that works. I don't know if there is enough similarities that you can, certain jurisdictions have model a versus model b versus model c and we can get a brief description of each of those and a list of the municipalities that correspond to that? But I think especially those of us that have worked with rating agencies in the past, counselled for rating agencies know that is the kind of detail that is going to be requested and if we could get some brief summaries as to exactly what that foreclosure process looks like in each of the municipalities I think that would be incredibly helpful.

**Randy:** We can certainly do that if asked to by our client, sure.

**Anna:** There's a lot of municipalities.

**Josh:** Yeah, and hopefully they will fit enough into buckets. Certain city and counties all do it one way, and then maybe there are two other alternatives. At

least if we could get a description generally of the different models and a list of municipalities that follow each model.

**Cliff Kellogg :** Would you know if it is possible to obtain data on how the tax sales have worked in the jurisdictions that operate them in terms of whether any of the proceeds from a foreclosure were insufficient to satisfy the outstanding unpaid charges. Do you have any data on that or could we get that data?

**Anna:** We don't have that data. I'm not sure if maybe Susan, if EIC has any data from Nassau County?

**Susan:** We don't have any of that data and we're assuming the process you folks have outlined is going to be sufficient. I think that New York City is the only municipality that we are aware of that operates the way that they do. We're happy to take another look at it if there are any outliers but at this point we don't have any knowledge to understand that what Norton's has outlined is in any way not going to work the same in all these other municipalities. I think we are going down a rabbit hole of something that doesn't exist right now.

**Cliff:** There was a recent publication describing the tax lien sales in New York City and I think there were a couple of hundred that proceeded all the way to tax foreclosure. That is they were not satisfied by the sale of the tax lien in the first step that Genevieve described. So there are some, even in New York City, that have to go all the way to foreclosure and that data would be interesting to know and we may need to put that question to the City of New York or Nassau County.

**Fred Lee/NYCEEC:** I think what your describing is the initial sale and that being sort of insufficient to cover the amount of the lien. Actually, it's by design and so there's actually a whole workout process after the sale and our understanding is the vast majority, if not all the time, you're getting made whole, or New York City is getting made whole.

**Cliff:** Thank you Fred.

**Jormen Tse/BofA:** I just had a question, going back to the way that this is being proposed, would the lender have the right to step into the foreclosure process prior to any tax lien sale?

**Randy:** We are thinking that the transfer to the lender would be at the same time as the tax lien sale would be conducted, but it could be done and we would have to think through how much prior to that time you could transfer the tax lien over to the lender. I would have to think if the lender could act before the municipality.

**Patrick:** Are you talking about the senior lender not the base lender?

**Jormen:** No, I'm talking about as a PACE lender. Would we be able to step in and foreclose prior to this point of a tax lien sale? So, I guess what I'm getting at is could we prevent in some way the PACE assessment from getting a tax lien sale.

**Randy?:** We can't do anything until the redemption period is over so no one can enforce their tax lien until the redemption period passes.

**Anna:** And we're leaving it up to the municipality in the first instance to try to enforce that PACE lien.

**Jormen:** First instance may be a tax lien sale?

**Anna:** The tax lien sale, again, tax lien sales are not in every jurisdiction and every municipality in New York State. When we did a survey of the municipalities it was only in a few. Tax lien sales are in New York City. Is what you're thinking of, I think?

**Jormen:** No, I'm just thinking in general. I guess as a bank we have a couple of regulatory issues in general with PACE and some of it is around not being able to identify a new owner so in a tax lien sale process it's kind of even more out of our hands in terms of who the new owner would be and all of that so I was just curious if we could step in any way prior to first instance, I guess?

**Susan:** I think it's our understanding here at EIC that we are talking about tax lien sales which are just New York City. We are not talking about New York State here. I think what we are trying to get across is that the PACE lender would wait for the municipality to act in its normal fashion in terms of foreclosure, etc. But if the municipality does not act in its normal fashion then the PACE lien holder could step in. They would have the right to step in. That's what we are saying here. We are hoping you are not going to have to be put to step in because our guess is you would prefer not to, but you are going to have the right to do so should the municipality not do their duty. That is my understanding, please correct me if I am wrong.

**Anna:** That's correct. So, it's like a backstop in case there is a problem with the municipality not doing what they are supposed to do.

**Randy:** I also just want to restate something that I think is really important in terms of creating the right incentives for the participants. Each year there will be a collection of liens created for a non-payer and that collection of liens is going to be mainly tax liens and then at the bottom is going to be our PACE lien for year 2019, let's say. But as 2020 rolls around there is going to be another stack of liens created and they are going to have the same order and the same thing is true for

2021. When these liens are paid off it's not really true that the PACE lien is subordinate to all the tax liens, it's subordinate to the tax liens in the same year. When the municipality's incentive to collect is really going to be in our favor because the municipality is going to want to do the work to collect all the tax liens including the PACE liens because they are sort of enmeshed with the tax liens.

**Anna:** And the problem identifying the owner you mentioned, the PACE lien stays with the property. You can't accelerate an entire PACE lien just that year's installments. That is all you can accelerate.

**Randy:** That year's installment ends up as a subordinate lien with the other tax liens for that year.

**Anna:** That is what you can get out of the foreclosure.

**Cliff:** Do you envision for the localities that do not currently have a tax lien sale process that this will introduce tax lien sale process only for the delinquent C-PACE liens or will the locality be authorizing the tax lien sale process in general?

**Randy:** I don't think they will change their procedures that much. But I think assigning the right to enforce the PACE lien to the PACE lender would certainly create a different dynamic for those municipalities because they have the possibility that some other party is going to step in and foreclose on properties.

**Gerry Killilea/BofA:** I'm just trying to get an understanding of the municipal laws. It appears there will be one law in place for an applicable municipality to address PACE 2.0 to say how that is handled and then there will be a new municipality law in place for this Open C-PACE program. Is that correct?

**Anna:** Currently, fifty or so municipalities already have a local law for the old make whole program. We are adopting new municipal agreement as well as a new local law for all those municipalities that want to participate in Open C-PACE. It is a totally different program and loans are going to be made not through the issuances of bonds or through warehouse loans, the loans are going to be made directly from private third party lenders to the property owners and EIC is going to act more like a program administrator than as a lender.

**Gerry:** It sounds like the only difference between the municipality and actions under both programs that for Open C-PACE the lender has the ability to step in if need be and remedy the situation?

**Anna:** No, in the make whole program what happened was the municipality agreed to pay over the C-PACE assessment whether or not it had collected it from the property owner. That created all sort of issues with respect to whether or not that

money was the municipality's money and subject to appropriation or what not. We are avoiding all of those sorts of issues by having the C-PACE assessment paid directly by the property owner to the lender.

*Jerry:* And when it comes to remedies, the big change is in PACE 2.0 you've got that payment from the municipality that the lender is looking at with respect to Open C-PACE what the option is, is that if need be you can step in and exercise remedies if the municipality fails to do so.

*Anna:* Yes, we are going to put that in the local law that each municipality has to adopt.

*Jerry:* Ok, thank you.

*Susan:* Are there any other questions from the audience? If not, we will share with you the local law and municipal agreement when Norton's is finished drafting it. Are there any other questions? Okay, thank you everyone. Thank you so much Anna, Patrick and Randy for your time and thank you very much to the Advisory Committee we will be in touch with you very shortly.