Council of Development Finance Agencies

C-PACE Program Design:
How Statutes, Programs, and Markets Come Together

Thank you for joining the conversation today. Send us your questions and comments!

Welcome

The Broadcast will begin at 11:00 AM (Eastern)

C-PACE Program Design:
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Thank you

for joining the conversation today. Send us your questions and comments!

Stephanie Brewer
Coordinator, Programming
Council of Development Finance Agencies

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Legal Disclaimer

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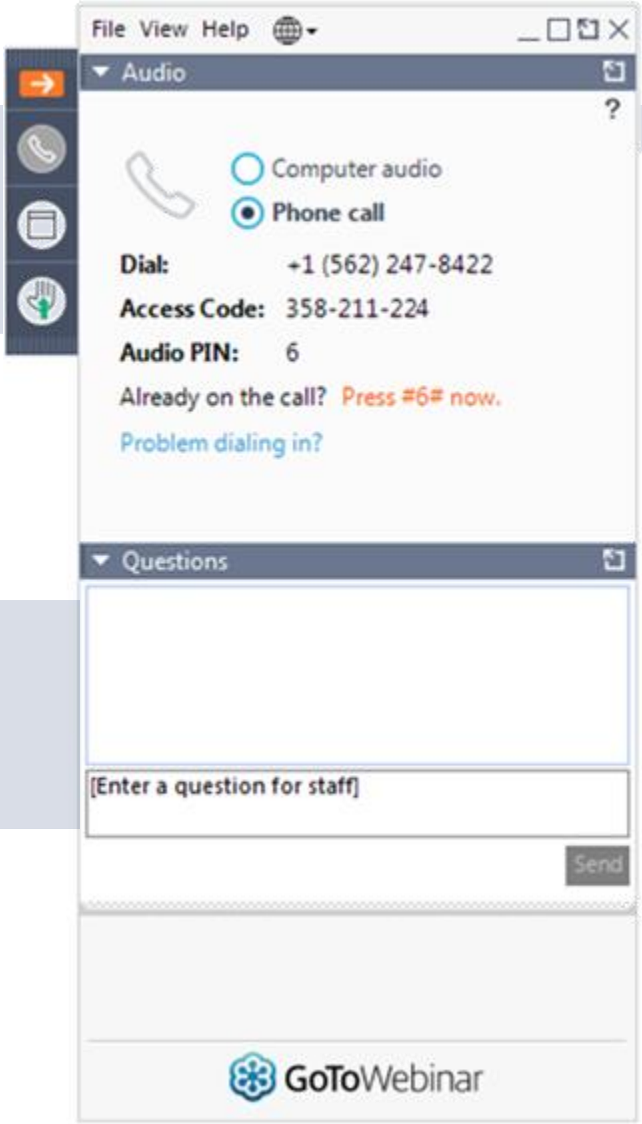
Using your telephone will give you better audio quality.

Submit your questions to the panelists here.



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C-PACE Program Design:
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Moderator

Chris Jones
PACE Financing Consultant
Bricker &Eckler LLP

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C-PACE Program Design:
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Panelists

Chris Jones
PACE Financing Consultant
Bricker & Eckler LLP

Josh Smith
Vice President, Legal and Policy
Petros PACE Finance, LLC

Clifton Kellogg
Executive Director
C-PACE Alliance

Michael Yaki
Vice President and Senior Counsel, Policy and Programs
CleanFund Commercial PACE Capital, Inc.

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Josh Smith
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Petros PACE Finance, LLC

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CDFA-Bricker PACE Webinar Series

C-PACE Program Design:

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Regulatory Framework of C-PACE

Federal, State, Local, & Program

Regulatory Structure of PACE

Federal & State

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Federal Government

- Generally, Commercial PACE (“C-PACE”) is not regulated at the federal level.
- Residential PACE (“R-PACE”) is regulated by the Consumer Financial Protection Bureau; final regulations are still pending.

State Government

- PACE is primarily established at the State level, based on laws enacted by State governments.
- This is a function of PACE’s origins in tax and assessment law, which expanding existing laws like California’s Improvement Act of 1915 to cover PACE financing.
- State legislation is designed to legally enable the levying of voluntary assessments, sets rules for local governments to follow in establishing PACE programs, and outlines legal framework for rights and remedies.

Regulatory Structure of PACE

Local & Programmatic

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Local Government

- PACE programs can be facilitated by either city or county governments, or both, depending on how municipal law works in a given state.
- In some circumstances (California and Florida), "joint powers authorities", or collections of cities and states working together, can enable PACE programs.
- Local governments usually select program administrators, set some (but not all program requirements), and delegate authority to the Program Administrator.

Program Administrator

- Most of the nuanced program rules are established by the Program Administrator.
- This can include specific eligibility criteria, fee structures, draft documents, and process for imposing the lien and collecting payments.

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Elements of a C-PACE State Statute

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Origins of PACE Legislation

- At the State level, PACE legislation is either:
  - Enacted by expanding an existing law permitting voluntary tax assessments; or
  - Enacted by adopting new legislation not built on existing laws
- Which option a state might select is dependent on the State's history with voluntary special assessments, comfort of local government partners (especially municipal tax collectors), and confidence of lawyers and capital providers in the strength of any existing legislation.
- Some legislation takes the concept of "special districts" and expands them to include PACE (such as Colorado and Ohio).

Public Purpose

- Because many state constitutions prohibit the provision of public resources to private enterprise, most C-PACE legislation includes a specific "public purpose" provision:
  - "The Legislature declares that a public purpose will be served by a voluntary contractual assessment program that provides the legislative body of any public agency with the authority to finance the installation of distributed generation renewable energy sources and energy or water efficiency improvements that are permanently fixed to residential, commercial, industrial, agricultural, or other real property." Cal. Streets & Highways Code §5898.14(b).

Establishment of a Program

- PACE legislation almost always defines the municipal entity who can establish a PACE program – usually, a City or a County (occasionally both).
- Legislation also usually allows the municipal government to retain a third-party Program Administrator to operate and maintain the Program.
- Often, PACE legislation requires the local government to consider a number of enumerated factors, such as the issuance of municipal bonds, qualification of specific measures, and how assessments will be recorded in the land records.
- In some circumstances, legislation will call for Districts to be established by one or more municipalities; in some cases, Districts may be even be statewide.
- Legislation often encourages municipalities to establish PACE programs by giving them legal protections and allowing them to offset cost of establishing the Program.

Reference to Tax/Assessment Law

- A key element of any PACE legislation is to establish the basis upon which assessment liens are imposed, treated, collected, and foreclosed upon.
- This is often accomplished by a reference to other statutes:
  - "Assessments levied pursuant to this chapter, and the interest and any penalties thereon shall constitute a lien against the lots and parcels of land on which they are made, until they are paid. Division 10 (commencing with Section 8500), insofar as those provisions are not in conflict with this chapter, Article 13 (commencing with Section 53930) of, and Article 13.5 (commencing with Section 53938) of, Chapter 4 of Part 1 of Division 2 of Title 5 of the Government Code apply to the imposition and collection of assessments contracted for pursuant to this chapter, including, but not limited to, provisions related to lien priority, the collection of assessments in the same manner and at the same time as the general taxes of the city or county on real property, unless another procedure has been authorized by the legislative body or by statute, and any penalties and remedies in the event of delinquency and default." Cal. Streets & Highways Code §5898.30.
- In some circumstances, existing law is inadequate or insufficient, and this information is restated wholesale in the PACE legislation.

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Lien Priority

- PACE financing is characterized by "super-priority" lien status. This means that PACE liens are always superior to traditional mortgage liens, and thus would be repaid in full after a foreclosure ***before*** the senior mortgage lender.
- Without this concept, PACE would be unlikely to exist, at least in its current form (and cost of capital).
- A PACE lien's priority with respect to other taxes, assessments, and charges can either be junior (meaning those taxes would be paid before PACE) or *pari passu* (meaning that if there were insufficient funds, both the tax collector and the capital provider would receive less than what was owed to it).
- PACE legislation should clearly and unequivocally state the relative priority of liens, including mechanisms for dealing with partial payments (i.e. when a Property Owner pays less than the total sum of their tax bill plus PACE payments).

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Billing & Collection

- PACE payments can be billed and collected in one of two ways: on-bill or off-bill.
- On-bill collection means that the PACE payment is added as a lien item to the Property Owner's regular tax bill. This means it is generally due and payable at the same time as regular taxes, and subject to the same penalties and collection mechanisms as delinquent taxes.
- In some circumstances, tax collectors may charge a fee for this service, but past experience has demonstrated that a high collection fee is an impediment to scaling a PACE program.
- Off-bill collection means that a third-party (often a Program Administrator, contractor, or the Capital Provider) is responsible for sending out a billing notice and following up on collections.
- Depending on the circumstances, an off-bill method may become an on-bill method after a delinquency to facilitate a municipal tax lien foreclosure.

Foreclosure

- One of the most important elements of a PACE statute is the provisions governing resolution of delinquencies.
- Generally, resolution of delinquencies can follow one of three paths:
  - Tax Lien Certificate Sale
  - Tax Lien Foreclosure
  - Private Foreclosure
- A tax lien certificate sale (used in Colorado and Florida) involves the sale of tax lien certificates, which are purchased by private investors. This allows the local government to quickly recoup its delinquent revenue, and shifts the burden, risk, and delay of foreclosure onto the Certificateholder.
- A tax lien foreclosure allows a Court to order the sale of property (usually after a mandatory redemption period) subject to a delinquent tax lien. The property is sold free and clear of all encumbrances, ***except*** for the future PACE assessments.
- A private foreclosure allows a Capital Provider to sue to order the sale of the Property, similar to a mortgage or other private loan.

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Lender Consent

- Because of the super-priority lien status of a PACE assessment, nearly all states have enacted rules requiring the Property Owner to obtain the written consent of any entity holding a mortgage on the Property prior to closing a PACE financing.
- A blanket policy of Lender Consent has been net-beneficial for the C-PACE industry.
- Generally, well-designed C-PACE projects which are reviewed by open-minded mortgage lenders have demonstrated a strong track record of obtaining consent.
- Mortgage lenders serve as a natural “check and balance”, ensuring that a property is not overlevered with debt, as well as providing a “backstop”
- Historically, credit rating agencies have viewed Lender Consent as a positive to C-PACE assessments.

Basic Eligibility Requirements

- At a statutory level, a balance must be struck between being overly prescriptive about eligibility requirements (such as trying to specify specific technology) and being so vague as to be unfinanceable.
- Usually, eligibility requirements will include:
  - The type of property (commercial, industrial, multifamily)
  - The type of improvements (renewable energy, energy efficiency, seismic)
  - Setting the maximum financing term
  - Permitting PACE to be used for a variety of both hard and soft costs
  - Permitting PACE for single-measure projects, retrofits, and new construction
  - Permitting PACE for ongoing construction and reimbursement of completed projects
  - Permitting direct ownership as well as third-party ownership (leases/PPAs)
  - Permitting assessments to be levied on long-term ground leases
- Generally, these requirements should serve to broaden the scope and enable as many projects as possible. Historically, the Capital Providers have served as a natural check on elements such as credit quality, as they have the most financially at stake.

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Program Guidelines/Design

Basic Program Establishment

- The first task for any new Program would be to publish a
- They key principle for any Program Handbook is to properly determine the roles and responsibilities of all parties involved in the transaction. This includes:
  - Local Government
  - Program Administrator
  - Capital Provider
  - Property Owner
  - Third-Party Service Providers (billing/collection, legal, technical)
- Other topics to be included should be:

Application process	**Program Certification**
Fees/expenses	**Participation requirements**
Required transaction docs	**Post Closing Requirements**
Billing/collection/remittance	**Template program docs**

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Council of Development Finance Agencies

C-PACE Program Design: How Statutes, Programs, and Markets Come Together

Panelist

Clifton Kellogg
Executive Director
C-PACE Alliance

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C-PACE Program Design:
How Statutes, Programs, and Markets Come Together

October 16, 2019

Cliff Kellogg, Executive Director
C-PACE Alliance

www.c-pacealliance.com

A coalition of capital providers and transaction experts committed to achieving the public benefits of C-PACE by increasing the volume of quality C-PACE financings.

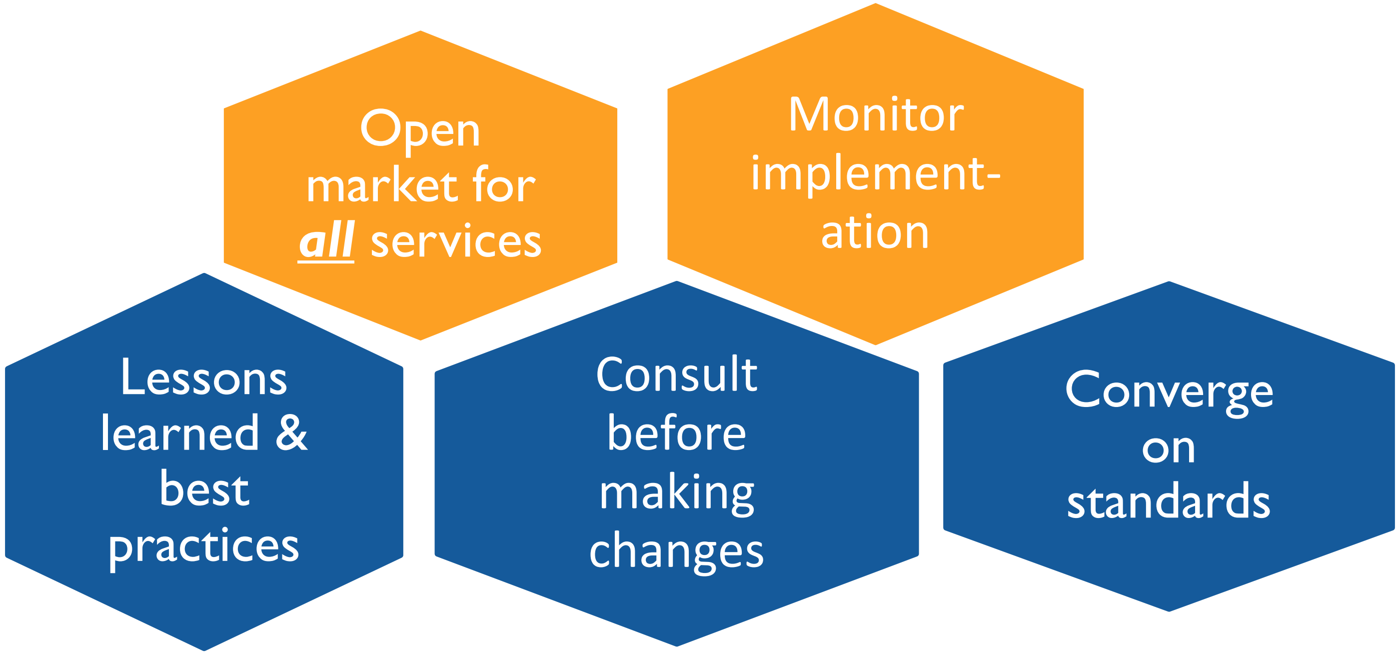
1. Technical assistance to programs
2. Thought leadership (best practices, white papers)
3. Develop / support Program Administration models

Steps in Implementing a C-PACE Program

1. State Authorizing Statute
2. Local Government Ordinance
3. Selection of Program Administrator
4. Program Handbook & Rules

See white paper at www.c-pacealliance.com

Core Principles in Designing a C-PACE Program



Consistency & Checks-and-Balance

Statewide Consistency

Recognize the benefits of a statewide program that local government may opt into. Possibilities:

- Formal joint powers agreement.
- Critical mass of local governments w/ model ordinances and documents.
- Multiple PAs using common guidelines.

Focus on Certification

Checks to avoid bureaucracy and regulation of deal terms unrelated to certification.

- Competition among multiple PAs.
- Regular stakeholder feedback and RFPs.

Elements in the Statute or Local Ordinance

Strong Credit Security

First and prior lien on the real property

Effective *as of the funding of a project*, prior to any construction period.

May be enforced by the local government in the same manner as a tax lien against real property

Consent by Mortgage Holder

Terms in the consent

- a description of the financing
- a certification that C-PACE financing is not an event of default.

Simply giving notice of the financing to senior mortgage holders is not advisable.

Purpose?

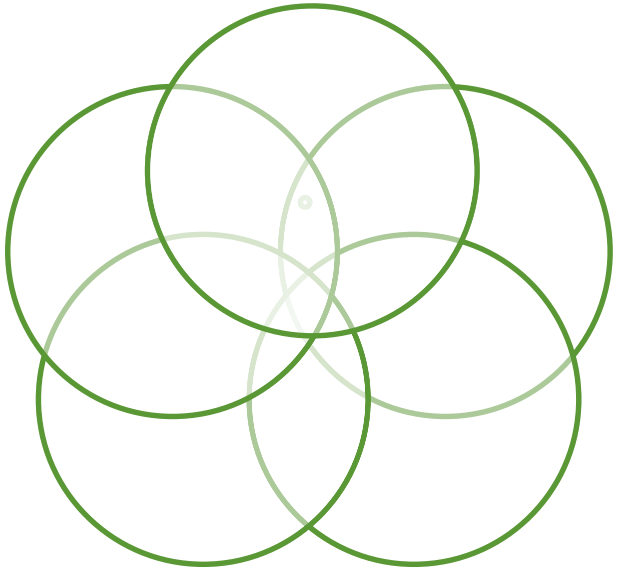
- Protects owner.
- Validates creditworthiness.
- Respects banks and avoids opposition.
- Lower cost of funds ultimately.

Public Benefit: A Policy Determination

Alternatives Savings-to-Investment (SIR) Test

Avoiding carbon pollution is a public benefit

Overlooks benefits of code compliance, healthier work environments, strategic benefits and tenant retention.



For new construction, the energy savings over may not cover the cost of improvements.

When energy prices are low, an SIR test becomes more difficult.

<u>If required</u>, "savings" should be a comprehensive and inclusive.

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Flexibility in Financing Terms

- Term should match the life of the equipment, up to 30 years.
- Include the cost of materials and labor, fees, interest reserves, and all other costs pursuant to the financing and the project.
- Refrain from specifying *financial underwriting* parameters.
- Include renewable energy power purchase agreements or leases as eligible.

Best Practices in *Program Administration*

Clarity of Roles

Program Administrator	Capital Providers
Coordinate the process of designing program rules	Cultivate financing opportunities and provide capital at competitive rates
Certify projects predictably and efficiently	Underwrite projects consistently and efficiently
Manage and promote the program	Coordinate with PAs in the approval, closing and collection process

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Billing, Collection & Remittance

Taxing authority performs the billing/collecting along with ordinary property taxes. Enforcement by county pursuant to clear rules.

Remittance period: The time from receipt of tax payments to payment of CP should be minimized (<30 days) and reliable.

Billing/servicing not performed by CP or county should involve **strong institution with full disclosure of contracts** including clear rules of default and remedies.

Procedures for Enforcement

Capital providers always prefer clarity on:

- curing delinquencies;
- the foreclosure (or tax certificate sale) process to enforce the assessment.

Allows the right to pursue remedies to be assigned to the Capital Provider.

Publish a program handbook describing the collection and foreclosure processes and timelines

Program Administration Fees

- Should be reasonable considering the size and maturity of the market.
- High fees are never popular with property owners.
- Successful programs operate with low administration fees, capped per-transaction (One percent or less, with per-transaction caps of <$75,000).
- Annual service charges should reflect actual costs..
- PAs typically need financial support to cover staff costs until the transaction volume is sufficient to offset these expenses.

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Marketing, Education & Training

A modest marketing budget keeps fees low.

Message: C-PACE is a financing tool that promotes the adoption of renewable energy and enerfyefficiency projects

MARKETING: General Awareness of C-PACE

EDUCATION: Seminars, panels and public speaking

TRAINING: energy savings analysts or project developers who attended a session

Cliff Kellogg, Executive Director
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How Statutes, Programs, and Markets Come Together
The Practical Approach to PACE Implementation

CDFA-Bricker Webinar Series

MICHAEL YAKI, Vice President and Sr. Counsel

CLEANFUND
Commercial PACE Capital

CleanFund Overview

CleanFund is a nationwide financing platform that solves big challenges for the $60 billion energy efficiency and solar market for U.S. commercial properties

We make renewable energy, water conservation, energy efficiency, seismic and other building improvements easy and affordable for commercial property owners.

Michael Yaki has opened 3 state markets, written state and local statutes, and assisted and advised on the opening of over a dozen state and local programs across the country, including programs in FL, MO, NE, NV, NY, and most recently OK.

The PRACTICAL approach to PACE Implementation

The "touchstones" for Program Implementation/Design

What does your state statute say regarding the structure of a PACE Program?

How do your state laws govern collection/enforcement of special assessment?

BUILDING A PROGRAM -1

- State program vs. Local programs
  - Ex: CO, CT vs. CA vs OH
  - Key Interest: Speed of adoption
- Single vs. Multiple Administrators
  - Ex: CO vs. CA vs. TX
  - Key Interest: Create an open marketplace

BUILDING A PROGRAM -2

- In-house or Program Admin
  - Ex: OH, NE vs. everyone else
  - Key Interest: Administrative burden and efficiency
- Scope of Improvements
  - Ex: Newcon, “lookback,”
  - Key Interest: Making PACE widely available to owners/developers

BUILDING A PROGRAM -3

- Energy Audit / SIR / Code compliance
  - Ex: CA vs. NY vs. TX
  - Key Interest: Enviro policy vs. PACE "Penalty"
- On-Bill vs. Off-Bill
  - Ex: CA, OH, FL vs. NY vs. TX, MD
  - Key Interest: State statute and local Collectors

Questions? We're Here to Help!

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415-601-4008

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Commercial PACE Capital

Council of Development Finance Agencies

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Questions?

Upcoming Events

Council of Development Finance Agencies

Bricker & Eckler ATTORNEYS AT LAW

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CDFA-Bricker PACE Webinar Series:

Monday, November 18, 2019 | 11:00 AM Eastern

Register online at www.cdfa.net

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Upcoming Events

CDFA National Development Finance Summit
November 6-8, 2019 | Tampa, Florida

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