

CLIENT ADVISORY

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DEPARTMENT OF BUILDINGS ISSUES DRAFT RULES FOR LOCAL LAW 97 CARBON EMISSION REDUCTIONS GOALS

The Climate Mobilization Act, enacted in 2019, established a general framework through which New York City would seek to reduce its carbon emissions by 40% by 2030 and 80% by 2050, but left open important technical and substantive questions to be answered by future rulemaking. The Department of Buildings (DOB) has now issued a proposed implementing rule for public comment. A copy of the proposed rule is available at https://www1.nyc.gov/assets/buildings/pdf/proposed_greenhouse_gas.pdf.

Some highlights of the DOB's proposed rule include:

- Local Law 97 of the CMA contains a bare-bones mechanism for calculating a building's emissions limits based on the building's classification within one of ten possible use-and-occupancy groups. This provision attracted criticism, because within any of those ten use-and-occupancy groups there is a huge variation in actual building uses. A mixed-use building with, for example, a library and parking garage on the ground floor will have a very different emissions potential from a building with a supermarket and restaurant on the ground floor, and the emissions factors should be set accordingly. The new rule does just this, incorporating 61 different use-and-occupancy subgroups with different emissions factors for each. This fine-tuning should lead to more equitable and realistic targets for covered buildings.
- Broadly speaking, a building's emissions limit is calculated by multiplying the applicable one of those 61 emissions factors by the gross floor area of the building. The new DOB rule contains guidance on how to calculate gross floor area for these purposes.
- Calculating a building's emissions limit requires multiplying a building's energy use times a factor assigned to the building's energy source. "Dirtier" fuels are assigned a higher factor because those fuels contain a higher carbon intensity (for example, burning fuel oil emits more greenhouse gases than running solar power). One very complex issue tackled by the DOB rule is what coefficient to assign to utility electricity, which is the energy source used by most buildings. Lawmakers want to encourage buildings to switch to utility electricity, in conjunction with large-scale statewide and nationwide efforts to "green the grid." The problem is that, as of now, the electrical grid remains relatively dirty, which would otherwise result in a higher coefficient; but, in anticipation of a greener grid in the near future, the DOB assigned a lower coefficient to encourage more buildings to move to utility electricity.
- The new rule sets new coefficient targets for the periods 2035-2039 and 2040-2049, which will enable buildings to begin performing longer-term modeling of potential emissions limits and fines.
- The DOB issued, for the first time, a comprehensive list of "covered buildings" that are required to comply with LL97's emissions targets. This is useful for buildings that, for various reasons, were unsure whether they would need to comply.

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- One aspect of the proposed DOB rule that may result in significant comment is its provision on the availability of Renewable Energy Credits (RECs) that could be purchased as an alternative to undertaking (often disruptive and expensive) retrofit projects. Real estate industry groups have sought greater availability of RECs, while climate advocacy groups have feared that a glut of RECs could create a huge compliance loophole and undermine LL97's emissions targets. The DOB rule limits the use of RECs to offsetting only emissions generated through electrical use, but that is not as much of a restriction as advocates sought. The Mayor's Office has indicated that it may tighten this rule later.
- The preface to the DOB proposal includes an assurance to building owners that there will be a hardship-relief process under the law for buildings unable to meet their emissions targets. The preface states that in order to qualify for some relief, "[a]n owner's demonstration of good faith efforts or other mitigating factors will be considered." In other words, the City wants every covered building to make a good-faith effort to comply with their emissions targets, and will be open to potentially reducing penalties if a building, despite such efforts, falls short of full compliance. But buildings that make no effort to reduce emissions should not expect to receive hardship relief from any penalties assessed.

The DOB proposed rule has been issued for public comments. The comment period expires on November 14, 2022, and we anticipate that the final rule will be issued by the end of the year.

DOB ALSO ISSUES NEW PACE RULES

The Climate Mobilization Act also set up a brand-new financing program, known as Property Assessed Clean Energy (PACE). This program is designed to allow building owners to take out long-term, fixed-rate loans to pay for energy efficiency upgrades. These loans will be paid back through an assessment on the property's tax bill assessed over the life of the improvement.

As long-time readers of this *Client Advisory* will know, the PACE program has suffered multiple delays and false starts in the three years since it was introduced. The latest reboot occurred last month. It includes new guidance for borrower and site eligibility and other aspects of the process, as well as approved forms of loan documents. There is hope that the program will finally take off and provide a new source of financing to NYC buildings as they strive to meet their CMA targets.

There remain serious limitations on the PACE program, in that it is not available for new construction and is not a feasible option for most condominiums. The loans also require consent by existing mortgage lenders, which consent will not necessarily be forthcoming. We will continue monitoring to see if the program is able to address some of these issues.

UPCOMING WEBINARS ON BOARD GOVERNANCE AND GREEN FINANCING ISSUES

Two of our partners are participating in online programs this month that may be of interest to readers of the *Client Advisory*. On November 15, 2022, Margery Weinstein will be presenting on confidentiality and disclosure issues for co-op and condo boards as a panelist on the "Hot Topics Affecting Cooperatives & Condominiums" program organized through the New York City Bar Association. Attorneys can register for the program here: https://services.nycbar.org/EventDetail?EventKey=_WEB111522. On November 17, 2022, William D. McCracken will be moderating a panel on "Challenges and Opportunities in Financing Energy Improvements in Multifamily Buildings," which will address some of the topics discussed above. Attorneys can register for the program here: <https://nysba.org/events/challenges-and-opportunities-in-financing-energy-improvements-in-multifamily-buildings/>. If any non-attorneys would be interested in the materials from these programs, please reach out to your contact at the firm.