

Local Law 97: Q&A for Property Owners, Including Commercial Landlords, on NYC's Groundbreaking Climate Change Law

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Property owners in New York City are increasingly focused on the January 1, 2024 start date for compliance with New York City's Local Law 97 of 2019. This advisory addresses some of the questions our clients are asking attorneys most frequently. With just over a year to go before compliance is required, the Department of Buildings has now issued long-awaited draft rules to provide important technical details on the law's operation. Time is of the essence for covered property owners to understand their compliance options.

What does LL97 require?

LL97 requires covered buildings to meet specified limits for greenhouse gas emissions per square foot for their building category (residential, commercial, institutional, etc.) Emissions will mostly be related to electrical usage (including tenant usage) and onsite heating and cooling systems. Certain industrial users may also have emissions related to their manufacturing and operations. Owners may be required to pay a penalty of \$268 per ton of greenhouse gas emissions above their buildings' limits, though DOB is expected to issue regulations detailing the criteria for making penalty determinations.

Who does it apply to?

Most buildings greater than 25,000 square feet must comply with the emission limits. For most covered buildings, Local Law 84 of 2009 already requires annual reporting of energy and water usage. So covered buildings should be accustomed to assessing their energy usage and some may have professionals engaged already. Anyone can easily look up a building's expected status compliance and potential penalties for LL97 by visiting www.accelerator.nyc.

When do compliance periods begin?

Covered buildings must file reports with DOB by May 1, 2025 detailing their annual greenhouse gas emissions for calendar year 2024, and then by May 1 of every year after. The annual report must be certified by a registered architect or professional engineer. Most buildings are already in compliance with the benchmark emissions limits for calendar years 2024 through 2029, but the benchmarks will become substantially more stringent for calendar years 2030 through 2034.

What's in DOB's Proposed Rules?

On October 6, 2022, DOB released draft Proposed Rules for Local Law 97 that fill a number of important gaps in the legislation. The proposed rules are quite technical and address a variety of topics, including methods for calculating buildings' emissions limits and energy usage, a method for factoring time of use into emissions calculations, and expansion of the number of property type categories to better capture variation in energy use among buildings. There are several key elements worth noting here:

- The proposed rule would set a greenhouse gas “coefficient” for 2030 to 2034 for electricity consumption that anticipates a successful effort by New York state to decarbonize the electricity grid and meet the goals set by the state Climate Leadership and Community Protection Act. (“CLCPA”). Under CLCPA, the State aims to achieve zero emission electricity by 2040 and 70 percent renewable generation by 2030. The rules propose reducing the carbon emissions associated with electricity consumption for the 2030 to 2034 period by 50 percent. That is, a building’s consumption of a kWh of electricity from the grid will be assigned half as much greenhouse gas emissions as in the previous period. This would be very meaningful assistance to buildings trying to meet the more stringent emissions limits that will apply in 2030 to 2034.
- The proposed rules would allow buildings to offset their electricity associated emissions through the purchase of renewable energy credits (“RECs”), without any cap on the amount that may be offset. Buildings would not be allowed to offset fossil fuels burned on site. This remains a highly controversial issue and was the subject of significant comment at the November 14 hearing. DOB has promised to revisit the issue and consider limits on the use of RECs.
- The proposed rules would set strict emissions limits for an expanded number of building types for 2030 to 2049, and for 2050 and beyond the rule would set a zero emissions limit for all building types. The unstated assumption is clearly that buildings will electrify their HVAC, that owners will upgrade windows and other building systems; and that the State will successfully green its electrical grid in line with the goals of CLCPA.

How can building owners pay for necessary upgrades?

Financing for necessary upgrades will largely depend on the form of ownership for a building. Co-op properties will have access to traditional co-op mortgages and special assessments. Due to the nature of condominium ownership, traditional mortgages are not an option; however, condominiums may also impose a special assessment, and can obtain financing through more creative means. These include Common Interest Realty Association (CIRA) loans, which are made available by a small number of lenders. A condominium may also mortgage a resident manager’s unit, if one exists in the building, or take out a revolving line of credit for small projects.

Property Assessed Clean Energy (PACE) loans may also be an option for both cooperatives and condominiums. PACE loans programs are being organized by the Mayor’s office with private lenders. Owners can use these loans for energy efficiency upgrades and pay them back as an assessment on a property tax bill. Since the loan repayment is charged as a tax assessment, PACE loans typically have priority over other loans; this has caused many lenders to expressly prohibit PACE financing, but the hope is that lenders will become more comfortable with PACE as energy efficiency becomes more and more of a priority in the future. More information is available at www.accelerator.nyc, explained below.

Who can advise building owner about compliance?

The Mayor’s Office of Climate and Environmental Justice has established “NYC Accelerator”, a program that provides free consultation services to building owners about compliance. See www.accelerator.nyc. While the program is remarkably useful, larger buildings will inevitably find themselves seeking outside advice—particularly heating, ventilation and cooling engineers; solar energy installers; and other professionals who can advise on building upgrades to reduce energy usage and greenhouse gas emissions.

Since tenant energy use and emissions are included in the building limits, how will the law impact commercial tenants?

Any new lease negotiations should take into account LL 97 and clearly allocate the costs of compliance and non-compliance between landlord and tenant. As for existing leases, these should be reviewed to determine whether they contain a mechanism to pass on increases in operating costs, such as building improvements or fees imposed for exceeding LL97 limits. Existing leases should also be reviewed to determine whether the landlord can regulate the electrical capacity delivered to a tenant’s premises.

How will LL 97 apply to cooperative apartment buildings and condominiums?

If they have not already, cooperatives and condominiums that fall within the criteria for LL 97 emissions standards must begin having conversations about what this law means for their buildings. Boards must have frank discussions about what capital improvements may be needed in order to comply with LL 97 and prioritize projects that have a high return on investment, such as lighting upgrades and improved insulation in common areas. Buildings should hire a consultant to determine the priority of needs and ensure compliance with LL 97. That consultant should also be made available at meetings with shareholders/unit owners, to educate stakeholders and impress upon them the importance of energy efficiency upgrades. Co-op and condominium boards likely have considerable latitude to require upgrades to building systems and common spaces. Controlling tenant/unit owner spaces (like electric usage and individual HVAC systems) may be harder without updates to governing documents (e.g., proprietary leases, condo declaration, bylaws, etc.). The earlier a building begins these conversations, the easier it will be to make any necessary changes and reduce the financial impact LL 97 may pose.

Under the proposed rules, owners can purchase renewable energy credits to offset GHG emissions related to electric usage. However, the final rules very well may limit the extent to which RECs can be used as an offset. RECs are a certified, market-based instrument that represent the environmental benefits attributable to renewable electricity generation, issued on a per-megawatt-hour (MWh) of electricity basis. More information is available from the U.S. Environmental Protection Agency and New York State Energy Research & Development Authority. See <https://www.epa.gov/green-power-markets/renewable-energy-certificates-recs>.

What is New York State's role?

Covered buildings facing daunting emissions reduction targets will get a substantial assist from New York State. A building's emissions, at least the portion resulting from electricity use, are directly tied to the emissions of its power sources, and New York City's generation facilities now rely almost exclusively on fossil fuel. However, several state-sponsored projects aim to green New York's grid via a combination of new transmission lines and offshore wind. After a competitive solicitation, the State has signed contracts for two major transmission projects that will bring hydropower from Quebec (the Champlain Hudson Power Express) and a mix of solar, wind and hydropower from upstate New York (Clean Path) to New York City. These new sources of clean power for the metro area are expected to come online in 2026 and 2027, respectively. In addition, the State's Climate Leadership and Community Protection Act has mandated the development of 9000 MWs of offshore wind by 2035. Over 4000 MWs are already in the pipeline as a result of 2018 and 2020 solicitations by the New York State Energy Research and Development Authority, and more on the way. As these renewable resources come online, the coefficient used to calculate a building's emissions per kilowatt will drop, as the draft rules discussed above propose to do for the 2030 to 2034 period. All buildings will see a benefit, but especially those embracing electrification.

Litigation Update

A collection of cooperative building owners and others have sued the City alleging that LL97 is unlawful as preempted by New York State's climate law; unconstitutionally vague; and an illegal tax not authorized by the State. The City has moved to dismiss the lawsuit and the proceedings are continuing. Regardless of the outcome, real estate interests are pressuring the Mayor to tailor the law's penalties and compliance periods.

With only a year left to begin compliance, however, building owners should not count on changes to the law just yet, and should seek legal, architectural and engineering guidance where needed.

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related professionals

Karen E. Meara / Partner

D 212-238-8757

meara@clm.com

Christopher Rizzo / Partner

D 212-238-8677

rizzo@clm.com

Rocco M. Sainato / Counsel

D 212-238-8868

sainato@clm.com

Nicholas W. Tapert / Associate

D 212-238-8703

tapert@clm.com