New York City's Climate Mobilization Act

November 8, 2019

Overview

On May 19, 2019, New York City enacted a set of laws known as the "Climate Mobilization Act"[1] (the "Act") aimed at reducing greenhouse gas ("GHG") emissions from New York City buildings. The Act is currently the most ambitious GHG emissions reduction effort by any city nationwide and is designed to advance New York City's "80 percent by 2050" and "40 percent by 2030" GHG emissions reduction goals that are in line with emissions targets set by the Paris Climate Agreement. Once fully implemented, it will apply to over half of the commercial and residential buildings in New York City.

The Act promises to have a significant impact on New York City building owners, lessees, developers and investors. The Act calls for an enormous investment in capital improvements in New York City buildings it covers – over $20 billion through 2035, according to one estimate. Owners of buildings will need to determine what sort of investments they need to make (if any) to meet the GHG limits and figure out how to fund them (including how much of the costs can be allocated to lessees) and what other compliance mechanisms might be available under the Act. Potential buyers will need to be sure to account for the impact of the emissions limits in negotiating purchase price and contract terms. And developers will need to consider their projects' energy consumption in the planning stages to ensure they are in compliance. Finally, all stakeholders will need to pay close attention to regulatory developments over the next several years, as the Act defers key issues to future rulemaking.

Key Elements of the Climate Mobilization Act

Reducing GHG Emissions from NYC Buildings (Local Law 97)[2]

The cornerstone of the Act is Local Law 97 of 2019. Local Law 97 establishes emissions limits for most commercial and residential buildings that are 25,000 gross square feet of floor area or larger, including condominiums and co-ops (or two or more buildings that aggregate to more than 50,000 gross square feet under certain circumstances), which account for nearly one-third of total GHG emissions in New York City. Approximately 50,000 of New York City's buildings will be required to cut GHG emissions by 40 percent by 2030, and 80 percent by 2050, based on emissions for the 2005 calendar year, or approximately 26 percent compared to current emissions. The GHG emissions limits will go into effect beginning in calendar year 2024 and will become more stringent in five-year intervals after 2029.

Buildings exempt from emissions limits or subject to less stringent standards

There are a number of buildings exempt from the emissions limits, including certain religious houses of worship, buildings owned by the City of New York and the New York City Housing Authority, certain residential buildings of three stories or less, power plants, buildings that participate in project-based federal housing programs and rent-controlled housing. Instead of being held to emissions limits, certain religious houses of worship, buildings that participate in project-based federal housing programs and

[1] See **here**.

[2] See **here**.

rent-controlled housing are required to take other prescriptive energy conservation measures.[3] Hospitals, in particular, lobbied to be exempt entirely, but instead, they are being held to the lowest standard under the Act. While not excluded from the scope of the Act, not-for-profit hospitals and healthcare facilities that apply for relief from the otherwise mandatory GHG limits by July 21, 2021 will be subject to less stringent targets than other covered buildings.

How the emissions limits work

Under the Act, each covered building will be subject to a GHG emissions limit that caps the amount of GHGs it is permitted to emit each year. This limit is calculated by multiplying the building's square footage by an "emissions intensity limit" that varies depending on a building's occupancy group under the New York City Building Code (buildings with multiple uses will be subject to a blended limit based on the mix of applicable occupancy groups). A building's GHG emissions are calculated by applying a "greenhouse gas coefficient" to the electricity and fuels the building consumes. The Act establishes specific emissions intensity limits for the periods 2024-2029 and 2030-2035 and greenhouse gas coefficients for electricity and different types of fossil fuel for the period 2024-2029. Emissions intensity limits for periods after 2035 and greenhouse gas coefficients for periods after 2029 are to be set by regulations promulgated by the New York City Department of Buildings by January 1, 2023.

Compliance options

To meet the required targets, building owners will need to retrofit their buildings to become more energy-efficient by taking measures such as fuel switching, installing insulation, installing new windows or upgrading boilers. The Act provides owners with the option of purchasing renewable energy credits; however, credits only qualify if the renewable energy is generated in the reporting year by a resource "located in or directly deliverable into" New York City, a limitation which would appear to severely restrict the availability of such credits. In addition, deductions of up to 10 percent of a building's emissions can be taken in the form of "greenhouse gas offsets," which are defined as credits representing a reduction in emissions by another project that has been verified by a third party that "exhibit environmental integrity principles, including additionality," purchased by or on behalf of the building owner between 2024 and 2029. Other deductions are permitted from annual emissions for the "output of a clean distributed energy resource located at, on, in, or directly connected to the building." The New York City Department of Buildings will promulgate rules to establish what will qualify as deductions and how deductions will be calculated. The Act does not currently allow for emissions trading; however, it requires that a city-wide trading scheme feasibility study, report and implementation plan be submitted to the New York City Council and Mayor by January 1, 2021.

Temporary relief from emissions limits

The Act also provides for temporary emissions limits adjustments under limited circumstances such as financial hardship or legal or landmark restrictions that make retrofits not reasonably possible, or where a building's 2018 emissions are over 40 percent greater than the 2024 through 2029 emissions limits and the building owner illustrates that excess emissions are "attributable to special circumstances related to

[3] The Act permits these types of buildings to either comply with the emissions limits of non-exempt covered buildings, or alternatively, comply with "prescriptive energy conservation measures," including adjusting temperature set points for heat and hot water, maintaining and repairing all heating systems, installing individual temperature controls or insulated radiator enclosures, insulating pipes for heating and/or hot water, insulating water tanks or steam system condensate tanks, installing heating system sensors and boiler controls, repairing all steam traps, installing or upgrading steam system venting, upgrading lighting, weatherizing and air sealing, installing timers on exhaust fans, and installing radiant barriers behind radiators. Buildings are also required to submit a compliance report to the New York City Department of Housing. Certain three-story residential buildings, power plants, and buildings owned by the City of New York and the New York City Housing Authority are exempt from complying with both the emissions limits and from complying with the foregoing "prescriptive energy conservation measures."

the use of the building." Applications for adjustments where a building's 2018 emissions are over 40 percent greater than the 2024 through 2029 emissions limits must be submitted by July 1, 2021. To qualify for adjustments, a building must be in existence, or be the subject of a construction permit, on or by November 15, 2019, the effective date of the Act.

Annual reporting

Starting in 2025, the owner of a building covered by the Act will be required to file a report on May 1st of each year regarding the building's GHG emissions during the prior calendar year as determined by the Act and whether or not the emissions exceeded the applicable limits. The report must be certified by a registered design professional.

Penalties for non-compliance

Starting in 2024, buildings that do not comply will incur fines equal to their emissions in excess of the limit for the year multiplied by $268. Further, there will be criminal penalties for knowingly making materially false statements in emissions reports, along with a maximum fine of $500,000, and civil penalties for failure to file. However, the administrative body responsible for imposing the penalties has discretion to consider aggravating and mitigating factors under the Act. Such aggravating and mitigating factors include good-faith efforts to comply, considering unforeseeable events outside of the building owner's control and history of compliance efforts.

Sustainable Energy Loan Program (Local Law 96)[4]

To help building owners reduce emissions and make necessary building improvements, the Act includes Local Law 96 of 2019, which creates a low-interest voluntary energy loan program, titled the Property Assessed Clean Energy ("PACE") program. The PACE program will allow building owners to obtain fixed rate financing for up to 100 percent of the improvement costs necessary to meet the required emissions targets. The loans are repaid through a building's property tax bill. PACE is sponsored by the New York City Mayor's Office of Sustainability and administered by the New York City Department of Finance and the New York City Energy Efficiency Corporation. However, it is unclear what the lending market for PACE will look like, as there has been some PACE resistance by the lending community.

Impact of the Climate Mobilization Act

The Act is broad in scope, with 50,000 New York City buildings constituting 60 percent of New York City's aggregate building area subject to emissions limits that become increasingly stringent over time. However, the brunt of the impact of the Act won't be felt until 2030, when the second five-year compliance period begins. During the first compliance period (2024-2029), the impact of the Act will be limited to the 20 percent most carbon-intensive buildings in New York City, with compliance costs estimated to range between $1.75 and $2.7 billion. The impact of the Act is expected to reach 75 percent of covered buildings by 2030, with estimated aggregate compliance costs ranging between $14.8 and $21.6 billion.[5]

On balance, the greatest impact will be felt by older, less energy-efficient buildings or buildings with more energy-intensive uses such as server farms or other around-the-clock operations. As a general matter, New York City residential buildings emit the most GHG, followed by businesses and institutional buildings, in buildings greater than 50,000 square feet.[6] GHG emissions intensity also varies by building

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[4] See **here**.

[5] See **here**.

[6] See **here**.

use. In New York City buildings greater than 25,000 square feet, hospitals emit the most GHG per square foot, followed by senior care facilities and mercantile buildings. Those buildings with greater GHG emissions per square foot will generally need to invest the most in retrofitting or look into alternative compliance options, such as obtaining credits or offsets. Because the Act sets emissions limits based on a building's occupancy group under the building code rather than its type of operations, the Act does not fully account for instances in which buildings are more energy-intensive than the average building within an occupancy group.

Key Takeaways

Next steps for owners, buyers and investors. Although the initial compliance period does not begin until 2024, New York City building owners are advised to begin assessing when and to what extent the emissions limits under the Act will impact their buildings by calculating annual GHG emissions of their buildings under the Act's methodology and comparing them to the emissions limits set forth in the Act. The New York City Council's website provides an interactive residential building map that depicts GHG emissions intensity per square foot in residential buildings more than 25,000 square feet, based on 2017 emissions.[7] Owners with buildings that will be subject to the initial compliance period should begin thinking about compliance strategies, including retrofitting their buildings (and seeking out any financing necessary to do so), acquiring emissions credits or offsets, or if available, applying for temporary relief from the emissions limits by July 1, 2021. Those looking to acquire existing buildings in New York City will need to incorporate the impact of the Act into their due diligence process and include compliance costs into their financial models and purchase price. Developers planning new projects will also need to consider the GHG emissions limits in their planning. In addition, the Act calls for the development of regulations and recommendations relevant to key elements of the Act over the next several years, including greenhouse gas coefficients for the 2030 compliance period and later, which will be critical for assessing buildings' compliance obligations. All stakeholders should pay close attention to these developments.

Landlord-tenant issues. While the compliance obligations under the Act fall to building owners, energy consumption in tenant spaces is typically controlled by tenants. In addition, building owners often have limited ability to recoup investments in energy efficiency projects from tenants, who typically reap much of the benefit of those projects in the form of lower energy bills. This misalignment of incentives between landlords and tenants presents a significant challenge to building owners seeking to comply with the Act. Where possible, landlords should seek to include "green lease" clauses upon renewal or renegotiation of their leases that allow them to recoup some of the cost of energy efficiency projects from tenants or incentivize more efficient energy use by tenants. Regardless of what the lease calls for, landlords should consider using the approach of the 2024 emissions limits to begin a dialogue with tenants regarding working cooperatively towards greater energy efficiency. Other New York City laws, such as Local Law 88, which will require "sub-metering" and energy reporting for certain tenant spaces starting in 2025, should foster such a dialogue as well. For their part, tenants, particularly those that are part of larger corporate organizations, should look to the Act as an opportunity to help further any broader ESG-related policies that they may have in place.

Availability of renewable energy credits and offsets. Those seeking to utilize renewable energy credits should be aware of their limitations. In order to qualify, the renewable energy must be generated by a resource "located in or directly deliverable into" New York City. Further, the renewable energy must not also be used to comply with other mandates in order to be used as a renewable energy credit under

[7] See **here**.

the Act. While the renewable energy credits will be limited, alternative compliance options, including the greenhouse gas offsets, should be considered. Additionally, stakeholders should be on the lookout for the city-wide trading scheme feasibility plan, which will be submitted by January 1, 2021 and could lead to alternative offset opportunities.

Interaction with the Climate Leadership and Community Protection Act. Shortly after the passage of the Climate Mobilization Act, New York State passed the Climate Leadership and Community Protection Act ("CLCP Act"), which calls for statewide GHG emissions reductions of 40 percent in 2030 and 85 percent by 2050, based on 1990 levels. The CLCP Act sets a timetable for the development of emissions reduction targets for various sectors of the economy, including buildings. Stakeholders should track regulatory developments under the CLCP Act and be mindful of the interplay, and any potential conflicts, between the CLCP Act and the Act.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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