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Action Required

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Local Law 97 Compliance Deadline Looming: 'One Way or Another – This Darkness Got to Give'

August 30, 2022

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Compliance deadlines for Local Law 97 of 2019 are steadily approaching, with the first reporting date being May 1, 2025, at which time owners of buildings covered by the law will be required to report compliance with the prior 2024 fiscal year mandates. Conformity to the carbon emission requirements will require building owners in New York City to undertake immediate action, if not already started.

In May 2019, under Mayor Bill de Blasio, New York City enacted the Climate Mobilization Act as part of the Mayor's New York City Green New Deal, which was a landmark package of new and aggressive mandates to limit greenhouse gas emissions by 2050. One cornerstone of the Climate Mobilization Act is Local Law 97 of 2019, which sets forth limits on permissible greenhouse gas emissions of most New York City buildings over 25,000 square feet. If covered buildings are not in compliance with the strict emissions caps, as required by Local Law 97, property owners will face hefty fines of $268 per metric ton of emissions over the limits imposed, which limits are based on calendar year and occupancy group and are calculated by multiplying emissions intensity limits and corresponding gross floor area in square feet**[1]**. There are different benchmarks to calculate building emissions limits − first, for the calendar years of 2024 through 2029, and second, which will be more stringent than the prior limits, for calendar years 2030 through 2034. Building corresponding gross floor area emission limits for calendar years beyond 2034 will be established by the New York City Department of Buildings through rulemaking, with limits of not more than 0.0014 tCO2e/sf/yr. Some building owners would be facing millions of dollars in penalties in just a few short months.

Local Law 97 is one of the most ambitious plans for reducing emissions in the nation. Lincoln Restler, New York City Councilmember and Environmental Protection committee member, says that "Local Law 97 is the single most consequential piece of legislation in New York City in the last decade, and it has the potential to successfully drive down emissions from our city's largest polluter: big buildings." He adds: "New York City can be a model for how to tackle the climate crisis and create green jobs, and we need everyone in City government to do everything we can to fully implement and enforce LL97." Besides cutting emissions, Local Law 97 is expected to create a significant number of jobs through the construction, design, and renovation of buildings, and the city workers on the Climate Advisory Board and various departments to educate, implement and regulate the requirements of the law. Massachusetts Institute of Technology urban studies professor David Hsu estimates that the law will create 141,000 new jobs by 2030.

Local Law 97 generally covers, with some exceptions: (i) residential and commercial buildings that exceed 25,000 gross square feet; (ii) two or more buildings on the same tax lot that together exceed 50,000 square feet; and (iii) two or more buildings owned by a condo association that are governed by the same board of managers and that together exceed 50,000 square feet. The goal of Local Law 97 is to reduce the emissions produced by the city's largest buildings by 40 percent between the compliance periods of 2025 to 2030 and by 80 percent by 2050.

Now, in 2022, there are looming doubts as to whether Local Law 97 can be as successful as initially predicted by the de Blasio administration and its supporters. In practice, the law requires a momentous upheaval of environmental code regulations on some of the largest skyscrapers and institutionally-owned buildings in Manhattan. One such example is the renowned Bank of America Tower at One Bryant Park, which was developed by The Durst Organization with an eye on using groundbreaking energy-saving features when it was completed in 2010. According to the Durst Organization, "One Bryant Park was the first skyscraper in North America to achieve LEED Platinum certification and ranks among the most environmentally advanced skyscrapers in the world." Under Local Law 97, One Bryant Park no longer seems so green. The Durst Organization believes that it will exceed the Local Law 97 cap by approximately 50% in 2024 and incur an annual fine of $2.4 million dollars unless they find ways to alter the building's energy use.

Sophisticated real estate families and institutional owners are putting immense pressure on New York City to take a practical approach to our global energy crisis and the implication of Local Law 97 on their business and assets.

According to the *Real Deal New York Real Estate News,* the Adams administration has seemed to hint and laid out possible options for building owners who face an "insurmountable barrier" to complying with Local Law 97. Although there are signs of possible discussions, Rit Aggarwala, the city's chief climate officer and commissioner of the Department of Environmental Protection, stresses that Mayor Adams and City departments are all committed to

achieving the law's goals. Aggarwala says: "We have no intention of giving anyone a free pass or letting anyone off the hook…. but we also see no benefit to the environment in punishing someone who is actually doing everything possible."**[2]** With signs of leniency, others fear implementation of the law will not be realized. Pete Sikora, Climate & Inequality Campaigns Director at New York Communities for Change, voices his opinion on Adams, stating: "This isn't complicated. He should ensure developers don't break the law by making clear his administration will penalize them as set by the law and will not let them evade their obligation to clean up their high-polluting properties." Sikora further adds that the law would be "rendered toothless and easily disregarded" without a rigid fine structure.

Further evidence of tension, as the compliance deadline looms, is a lawsuit that was filed in New York Supreme Court on behalf of Glen Oaks Village Owners, 9-11 Maiden LLC, and Bay Terrace Cooperative Section I. The lawsuit marks the first formal legal challenge to Local Law 97 since its enactment and was filed in May 2022. The complaint names New York City and the Department of Buildings as defendants and alleges that the city's Local Law 97 is "ill conceived and unconstitutional" amongst various other allegations. The lead counsel for the plaintiffs has said: "Local Law 97 is simply too harsh….There's a difference between a big stick and a death sentence."

According to the current law, commencing on May 1, 2025, and every subsequent May 1 thereafter, building owners are required to file a report with the Department of Buildings detailing their annual greenhouse gas emissions, and certified by a registered design professional, stating that either the building has complied with the emissions limit or gone over it. The New York City Sustainable Buildings Department provides that: "Starting in 2025, an owner of a covered building who submits a report indicating that their building exceeded its annual building emissions limit will be liable for a civil penalty. The City estimates that about 20-25% of buildings will exceed their emissions limits in 2024, if they take no action to improve their building's performance. In 2030, if owners take no action to make improvements, approximately 75-80% of buildings will not comply with their emission limits." Furthermore, The New York City Sustainable Buildings Department confirms that: "Starting in 2025, building owners that fail to submit their report on their building's energy usage will face stiff penalties and fines."**[3]** Buildings that do not comply with Local Law 97 will face a penalty of $268 per metric ton of emissions over the allotted limit on an annual basis. It is also unlawful for a building owner to fail to file a report by the applicable due date and unlawful to falsify a report. The civil penalty for failure to file a report shall be no greater than an amount equal to the gross floor area of such covered building, multiplied by $0.50, for each month that the violation is not corrected within the 12 months following the reporting deadline (subject to a 60-day grace period to report compliance). The penalty for knowingly making a material false statement in a submission shall be a misdemeanor, and the building owner shall be subject to a fine of not more than $500,000 or imprisonment of not more than 30 days or both such fine and imprisonment and may also be liable for a civil penalty of not more than $500,000.

As the compliance date for Local Law 97 approaches, questions remain if some building owners will receive emissions-cap reprieve and if other leniency measures will be given to those able to evidence that they are diligently pursuing remedies to comply with the law, or if stiff penalties will prevail and slower progress towards global warming progress will be made.

[1] Building Emissions Limits for Calendar Years 2024 through 2029 and limits for calendar years 2030 through 2034 can be found on the following New York City Department of Buildings website: **https://www1.nyc.gov/site/buildings/codes/greenhouse-gas-emission-reporting.page**.

[2] https://therealdeal.com/2022/04/13/city-eyes-emissions-cap-reprieve-for-some-buildings/.

[3] https://www1.nyc.gov/site/sustainablebuildings/requirements/compliance.page#:~:text=The%20buildings%20c

Economic Crime (Transparency and Enforcement) Act 2022 – Register of Entities

August 30, 2022

By **William Lo**
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The Economic Crime (Transparency and Enforcement) Act 2022 (the "ECA") came into force on 1 August 2022 and places new obligations on overseas entities holding real estate in the United Kingdom.

Pursuant to the ECA, all overseas entities owning either freehold property in the UK or leaseholds that are more than seven years at the date of grant must now register on a new register of overseas entities ("ROE") maintained by Companies House and provide further information regarding their beneficial owners.

Further, an overseas entity that acquires property in the UK will need to be registered in the ROE before an application can be made to register the acquisition in any of the UK land registers on or after 5 September 2022.

Where the overseas entity already owns property in the UK, and it acquired that property (i) after 1 January 1999 in England and Wales, (ii) after 8 December 2014 in Scotland, or (iii) after 5 September 2022 in Northern Ireland, it must submit an application to register in the ROE by 31 January 2023. The overseas entity cannot transact with its UK property on or after 1 February 2023 until it is registered in the ROE.

Background

In 2016, the UK introduced a register of beneficial owners of UK companies – this is known as the register of people with significant control ("PSC Register"). The PSC Register is publicly accessible but does not apply to companies that are incorporated outside the UK.

There have long been concerns that UK property assets were being used to facilitate money laundering or the investment of illicit funds. The ECA was fast-tracked partly in response to Russia's invasion of Ukraine and became law on 15 March 2022.

The ECA aims to make public the identities of people who either own a company, or who control the running of a company, that owns a property in the UK. The new requirement to file an ROE at Companies House (including details of an overseas entity's beneficial owners) aims to improve the transparency of overseas entities who invest in property in the UK and to assist in the Government's drive to act against sanctioned individuals and their assets.

Key Features of the New ROE Regime

The key features of the ROE regime implemented under the ECA are as follows:

- What is the obligation on overseas entities? All "overseas entities" that own UK real estate must apply for registration on the new ROE maintained by Companies House.
- What is classified as UK real estate? For the purposes of the ECA, UK real estate includes: commercial and residential freehold transfers; commercial and residential leasehold property (where the lease is granted for a term of more than seven years); and granting a legal charge.
- What is an "overseas entity"? An "overseas entity" is any legal entity that is governed by the law of a country or territory outside the UK (the Isle of Man and the Channel Islands are all classified as outside the UK). The ECA is widely and purposively drafted to capture all types of legal structures, including companies, partnerships, corporations, governments and public authorities. Trusts are excluded from the definition of an overseas legal entity as they do not usually have separate legal personality, but they are caught by a separate regime. Where the beneficial owner of real estate is a trustee, details about the trust will need to be supplied.
- What is a registerable beneficial owner? The test to establish beneficial ownership under the ECA is similar to the People with Significant Control regime (the regime applicable to UK incorporated companies). A person will be a

registrable beneficial owner if they meet any one of the following conditions:

- it holds, directly or indirectly, more than 25 per cent of the shares in the overseas entity;
- it holds, directly or indirectly, more than 25 per cent of the voting rights in the overseas entity;
- it has the right, directly or indirectly, to appoint or remove a majority of the board of directors of the overseas entity;
- it is able to exercise, or actually exercises, significant influence or control over the overseas entity; or
- it is able to exercise, or actually exercises, significant influence or control over the activities of a trust, a partnership, unincorporated association or entity that is not a legal person under the law by which it is governed, and the trustees of that trust or members of that entity meet any of the conditions specified above (in their capacity as such) in relation to the overseas entity.

- Registration at Companies House. Overseas entities must take reasonable steps to ascertain whether they have a registerable beneficial owner and, if so, identify and notify them and provide the requisite details in a statement to Companies House. The overseas entity must also provide certain information about itself to Companies House. The information supplied by the overseas entity will need to be verified by a verification agent. The verification agent can be a UK-based entity that is supervised under the Money Laundering, Terrorist Financing and Transfer of Funds Regulations 2017. Once the information is verified and complete, the overseas entity will then be issued with an overseas entity ID by Companies House.
- Obligation to keep ROE up to date. Overseas entities will be required to update the information provided to Companies House on an annual basis or when a beneficial owner and/or managing officer is required to be removed from the ROE. Failure to do so may result in criminal sanctions. Overseas entities will be able to apply to be removed from the ROE if they no longer hold an interest in UK property (the updating obligation remains even if it no longer owns UK real estate).

Enforcement

Failure to comply with the ECA is a criminal offence on the part of the overseas entity and its officers. The ECA contains a variety of offences for non-compliance, which are punishable by daily fines for the overseas entity itself and imprisonment of up to five years for its officers.

The ECA only applies to registerable property interests. If an overseas entity does not comply with its obligations under the ECA, then it will be unable to deal with its property, and the Land Registry will place a restriction on the title preventing dispositions. This means that the property cannot be sold, charged or have a lease granted out of it. The ECA also allows the Government to impose a charge on the property to secure unpaid fines.

Sustainability-Linked Loans Series, Part 4 – SLLP Core Components in Detail (Continued)

August 30, 2022

By **William Lo**
Associate | Real Estate

By **Carl Hey**
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In our July edition of *REF News and Views* we began our deep dive into the Sustainability-Linked Loan Principles ("SLLP") core components ("Core Components").

As a reminder, the SLLP set out a framework, with the aim to enable all market participants to clearly understand the characteristics of a SLL. The framework is based around the five Core Components, namely:

1. selection of key performance indicators ("KPIs"),
2. calibration of sustainability performance targets ("SPTs"),
3. loan characteristics,
4. reporting progress against SPTs, and
5. verification.

In this next article in our Sustainability-Linked Loans Series, we will continue our examination into the Core Competencies and look at loan characteristics, reporting progress against SPTs, and verification.

Loan Characteristics

A key characteristic of a SLL is that an "economic outcome" is linked to the borrower's performance against its predetermined KPIs/SPTs.

In practice, the economic outcome will usually take the form of a margin ratchet where the pricing of the loan changes according to the borrower's ESG performance. In contrast to other forms of ESG loan products (such as green loans), the focus for a SLL is not based on the purpose for which the loan is made available.

Reporting Progress against SPTs

The SLLPs recommend that borrowers should report at least once per year with up-to-date information sufficient to allow lenders to monitor progress and confirm that targets remain ambitious and relevant to the borrower's business.

Given the value of transparency in the SLLP market, the SLLPs recommend that where possible borrowers should be encouraged to publicly report the underlying calculations and methodologies (such as in a borrower's integrated annual report or sustainability report). To the extent that this is not possible, where appropriate, a borrower may choose to share this information on a private basis only with lenders. Borrowers are also encouraged to provide lenders with details of any underlying methodology of SPT calculations and/or assumptions.

It will be interesting to track evolving market practice in relation to the type of detail and information that lenders expect to receive to enable them to accurately assess the ongoing relevance of the KPIs and SPTs over the duration of the loan.

Verification

The SLLPs encourage borrowers to obtain independent and external verification of their performance level against its SPT for each KPI by a "qualified external reviewer with relevant expertise, such as an auditor, environmental consultant and/or independent ratings agency at least once a year." The SLLPs recommend that verification of the borrower's performance against the SPTs is made publically available where appropriate, which we note is not limited to publicly traded corporates.

It is important to point out that transactions without independent external verification of performance will not meet the requirements of the SLLP to be classified as a SLL.

Once reporting by the borrower has taken place, the lenders will be able to assess the borrower's performance against the agreed SPTs and KPIs.

On March 3, 2022, the Loan Market Association, Asia Pacific Loan Market Association and Loan Syndications and Trading Association published "**Guidance for Green, Social and Sustainability-Linked Loans External Reviews**." This seeks to provide guidance on best practice on the external review process for borrowers, lenders, external reviewers and other stakeholders in the ESG loan market. It is voluntary and aims to provide information and transparency on the external review processes for borrowers, lenders, external reviewers and other stakeholders in the loan market.

Final Words

In the next article in this Sustainability-Linked Loans Series, we will discuss the application of the SLLPs to real estate finance transactions.

The Future of the CRE Market

August 30, 2022

By **Sabah Nawaz**
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Despite the fluctuations in the capital markets this year, European warehouse funding for granular, small and medium balance commercial real estate mortgage loans remains stable.

This topic is addressed in depth in "What is the future of the CRE market?" in *Structured Credit Investor*.

You can read the full article **here**.

Tax Provisions in the Inflation Reduction Act of 2022

August 30, 2022

President Biden signed the Inflation Reduction Act of 2022 into law on August 16. Here is a summary of the tax provisions in the Inflation Reduction Act likely to be of interest to U.S. corporate taxpayers, financial institutions, hedge funds, private equity funds, and their investors − and to the real estate industry. You can read our Tax Group's analysis **here**.

Recent Transactions

August 30, 2022

Here is a rundown of some of Cadwalader's recent work on behalf of clients:

- In two separate financing packages for different clients, advised the administrative agent, joint lead arrangers and lenders on approximately $2 billion in mortgage financing as well as the lead lender and co-lenders on mortgage and mezzanine financing in the aggregate amount of $1.9 billion intended for securitization, both of which were in connection with Blackstone’s acquisition of American Campus Communities, Inc.
- Represented a publicly traded REIT in the $130 million financing of its acquisition of another publicly traded REIT.
- Represented the lenders in a $931 million balance sheet mortgage and mezzanine financing of a 63-building portfolio consisting of approximately nine million square feet of office, R&D and flex space.
- Represented a national bank in a $117.1 million syndicated mortgage financing of the simultaneous acquisition of two apartment complexes located in Austin, Texas, and Greenville, South Carolina.
- Represented the lender in a series of nine loans in the total amount of $135.4 million secured by industrial properties located in three states.