

The American Clean Energy and Security Act – Proposed Law Mandates Greater Energy Efficiency in Building Codes; Provides Incentives for Green Building Renovation

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Congress is considering "The American Clean Energy and Security Act of 2009" ("ACES") to restructure US energy creation and consumption. Commentators have focused on the proposed emissions "cap and trade" system and other impacts of ACES on utilities and energy production. What have received little attention, however, are novel rules for energy efficiency in building construction and renovation which are buried in the text of the bill. If ACES becomes law, these rules may have a profound effect on the real estate market for years to come.

The bill mandates new federal, state, and local building codes to achieve energy reduction for construction of new buildings. It also provides national standards and unspecified financial incentives for energy-efficient retrofitting of existing buildings. The new building rules are requirements, whereas the retrofit program is at the owner's election – a combination of financial "carrots" and "sticks" for the nation's building owners.

The green revolution, now accelerating exponentially, is already influencing energy use in US real estate. Voluntary energy efficiency programs such as Leadership in Energy and Environmental Design ("LEED"), the leading system of United States Green Building Council ("USGBC"), and other rating programs, have been widely adopted. However, while a number of state and local governments have required building code changes keyed to LEED or equivalents (which do have an energy-reduction emphasis), to date only a few state and local governments have mandated comprehensive energy efficiency standards and technologies in building codes, and most laws focus only on new construction or new alterations to existing buildings. If enacted, ACES will represent the first comprehensive uniform national energy efficiency laws for new construction and renovation in the US.

ACES establishes national energy efficiency targets, including a 30 percent reduction in energy use for all new residential and commercial buildings constructed in 2009, a 50 percent reduction by 2014 (for new residential buildings) and 2015 (for new commercial buildings), and additional reductions thereafter. These targets are subject to reduction or increase by the Secretary of Energy based upon a determination that greater or lower standards are life cycle cost justified and technically

feasible. ACES requires these targets to be reflected in a national energy efficiency building code, and state and local governments must adopt this code, or alternate codes which meet or exceed these targets.

For retrofits to existing buildings, ACES contemplates financial awards (the form of which is not specified) by state and local governments, to be funded by emission allowances. For commercial buildings, ACES contemplates financial awards of up to \$0.15 per square foot of retrofit area for demonstrated energy use reductions from 20 percent to 30 percent, \$0.75 per square foot for reductions from 30 percent to 40 percent, and \$2.50 per square foot for reductions exceeding 50 percent, not to exceed 50 percent of the total retrofit costs.

For residential buildings, the contemplated incentives are much lower – \$1,000 for measures, prescribed by audit, which are designed to reduce energy consumption by more than 10 percent, and \$2,000 for measures designed to reduce energy consumption by more than 20 percent, or \$3,000 for demonstrated savings of 20 percent, and \$1,000 for each additional 5 percent of savings, not to exceed 50 percent of total retrofit costs. There are additional awards for potable water savings, enhanced awards for buildings in or eligible for listing in the National Register of Historic Places, and, for commercial buildings, additional awards for "other environmental attributes" of retrofits, such as use of recycled materials.

While all can agree with the goal of these new building code mandates and incentives – saving energy – ACES creates numerous legal and technical issues which, if not addressed, could have the unintended effect of stalling the financing and construction of real estate, which would not make our buildings more energy efficient, and could further weaken a struggling real estate market. A few examples follow.

- Penalties for Non-Compliance. Sanctions should be appropriate to the legislative goal. They should not be grossly unfair or adversely impact the sale or financing of real estate. A prior draft of ACES made it unlawful to occupy or sell a non-compliant building (in addition to imposing fines and penalties). Under the current draft, sanctions for non-compliance will be determined by states and localities under new energy-saving building codes (or by the federal government if states or localities do not adopt such codes). Leaving these decisions to states and cities means, of course, that rules of non-compliance will vary across the land, with possibly differing results for the same violation. And the consequences might be extreme. For example, if such penalties include denial of a certificate of occupancy or unlimited per diem penalties, the effect will be to chill new construction. Denying a certificate of occupancy (the right to occupy a building) has always

been a sanction for fire, health and other safety violations – it would not be a fair sanction just for failing to achieve energy reduction. If ACES is enacted, an owner's plans and specifications would have to reflect the new code requirements in order to be approved by the local building department, so presumably the failure to achieve mandated efficiency standards would be unintended in most cases. Congress should consider adding uniform but fair sanctions for non-compliance to ACES, which will not chill mortgage markets and create a risk for lenders, owners and purchasers that a new building is unmarketable in the event of non-compliance.

- Professional and Contractor Liability Issues; Insurance Issues. Achieving major reductions in a building's energy use requires new technology and new designs. Architects, engineers, contractors (and their insurers) are already struggling with issues of professional and construction liability arising from the green revolution. For example, if a building must comply with government green requirements (including achieving a LEED or other green rating), who is responsible if the completed project fails to comply? The architect or engineer who designed a novel system? The contractor who had trouble interpreting novel specifications? ACES could add to these questions, especially if the consequence of a mistake is the loss of valuable tax credits or the owner's inability to occupy, mortgage, or sell a building. While professional groups are working to define appropriate standards of responsibility for green buildings, Congress might consider special limits on consequential damages – perhaps for an interim period while architects and contractors deal with novel concepts, systems, equipment, and techniques – to allow freedom to work with the new technologies that will be required by, and will emerge as a result of, ACES.
- Appeals, Variances, Rulings, Interpretations. The bill should create uniform mechanisms for variance, appeal, and dispute resolution – for example, by allowing owners of non-complying buildings to make curative changes. Also, the bill should require each state and local building code to have a mechanism for rulings and interpretations, whether before, during, or after construction. These should be published and have a weight similar to common law. While a local government in State A would not be bound by a decision of State B, State A would be able to take into account rulings and interpretations of State B where the reasoning was persuasive in similar cases.
- Incentives for Retrofit; Enforcement Issues. ACES will create a national performance-based retrofit program for existing buildings, calculating energy efficiency based on actual measured savings after

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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the retrofit is complete. It is contemplated that this program will be administered by for-profit companies, non-profit organizations and others who will be trained and designated to certify that retrofits meet required performance standards. But what about rulings, interpretations, variances, and appeals? Involving non-governmental parties in the enforcement of government programs can lead to difficult legal issues. Similar problems are becoming apparent where newly-drafted green rules in building codes, zoning ordinances, property tax statutes, and other laws are keyed to non-governmental standards such as LEED, compliance with which is administered by the non-profit USGBC. For example, if a developer fails to achieve a LEED rating which is a condition of a zoning bonus, and if the developer believes the result incorrect, what happens if there is not an appeal mechanism in the zoning ordinance? Was there an appropriate delegation of legislative and judicial power to USGBC? These gaps in drafting, and failure to think through classic issues of administrative procedure, should not be repeated in ACES.

- Increase the Retrofit Awards for Large Residential Buildings. The financial incentives for energy efficient retrofits of large residential buildings are a fraction of the incentives for commercial retrofits. However, the cost of energy efficient retrofits for a large residential building and a commercial building of equal size may be comparable. Accordingly, residential buildings of a certain size should be entitled to the same awards as commercial buildings, so that owners of residential buildings – rental buildings as well as condominiums and cooperatives – have the necessary incentives to invest in energy-saving renovations.

Construction and operation of commercial and residential buildings account for nearly half of all greenhouse gas emissions and energy consumption in the US.¹ It follows that effective energy efficiency laws for buildings have the potential to dramatically decrease our carbon footprint. However, laws that create administrative uncertainty and the threat of sanctions that will impair the financing and marketability of real property are not the solution. Congress must make these laws more transparent and uniform in their application, craft appropriate sanctions for non-compliance, and provide the safeguards of appropriate administrative procedures to provide the right incentives for green construction.

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¹ United States Green Building Council,
<http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1718>.