

# Management Alert



## Mandatory Energy Benchmarking Ordinance

By Lawrence Moss and Scott Schonfeld

### I. Introduction

The Chicago City Council recently passed the Building Energy Use Benchmarking Ordinance of the City of Chicago (the “*Ordinance*”).<sup>1</sup> Chicago now joins several other major municipalities which have adopted similar legislation, including New York City, Washington D.C., Philadelphia, Minneapolis, Boston and San Francisco. Subject to limited exceptions, and staggered reporting obligations (as more expansively described below), the Ordinance broadly requires owners of larger commercial and residential buildings (>50,000 sq. ft.) to submit information to “Energy Star Portfolio Manager” (the “*Benchmarking Tool*”) to create a benchmark of energy consumption for buildings covered by the Ordinance. These benchmarks will then be shared with both the City, and, subject to the approval of the Chicago’s commissioner of business affairs and consumer protection (the “*Commissioner*”), the general public.<sup>2</sup> It is estimated that approximately 3,500 buildings city-wide are implicated by the Ordinance.<sup>3</sup>

#### Policy Motivations

The logic of the Ordinance, at least as championed by environmentalist groups, like-minded public officials, and some members from the business community,<sup>4 5</sup> is that there exists sufficient empirical evidence from a 2012 EPA study of a large number of benchmarked buildings to demonstrate that benchmarking *in and of itself* results in energy savings of approximately 7% over three years.<sup>6</sup> The conventional wisdom is that benchmarking allows owners and managers, upon learning of how their buildings perform vis-à-vis comparable units, to take voluntary steps towards energy reduction.

Critics of the Ordinance believe it will disproportionately and “unfairly penalize and marginalize” older structures, including those of historically significant status.<sup>7</sup> Moreover, the looming specter of statutory fines for failure to report arguably presents needless and burdensome regulatory obstacles with which to comply.

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<sup>1</sup>Title 18 of the Municipal Code of Chicago will be amended to add Chapter 18-14, “Building Energy Use Benchmarking”. A copy of the substitute ordinance may be found at <http://www.usgbc-illinois.org/wp-content/uploads/2013/06/Chicago-Energy-Use-Benchmarking-Ordinance-Substitute.pdf> Retrieved October 1, 2013.

<sup>2</sup>See Title 18-14-101.3. Note that there is no official timetable under which the Commissioner must make such information available to the public.

<sup>3</sup>Alderman Michele Smith. “Energy Use Benchmarking Ordinance Summary”. A copy of the summary may be found at [http://ward43.org/wp-content/uploads/2013/07/Benchmarking\\_Ordinance\\_Summary.pdf](http://ward43.org/wp-content/uploads/2013/07/Benchmarking_Ordinance_Summary.pdf) Retrieved October 2, 2013.

<sup>4</sup>J. Wernau. “Chicago moves to require building owners to disclose energy use.” *Chicago Tribune*. September 11, 2013. Retrievable at [http://articles.chicagotribune.com/2013-09-11/business/chi-chicago-building-owners-energy-use-20130911\\_1\\_energy-efficiency-cnt-energy-energy-consumption](http://articles.chicagotribune.com/2013-09-11/business/chi-chicago-building-owners-energy-use-20130911_1_energy-efficiency-cnt-energy-energy-consumption) Retrieved October 2, 2013.

<sup>5</sup>R. Stanfield. “Mayor Emanuel Proposes Ordinance to Drive New Investment to Save Energy in Chicago Buildings.” *Switchboard Natural Resources Defense Council Staff Blog*. June 26, 2013. [http://switchboard.nrdc.org/blogs/rstanfield/yesterday\\_president\\_obama\\_reco\\_1.html](http://switchboard.nrdc.org/blogs/rstanfield/yesterday_president_obama_reco_1.html) Retrieved October 2, 2013.

<sup>6</sup>Energy Star. “Portfolio Manager Data Trends”. Study retrievable at [http://www.energystar.gov/buildings/sites/default/uploads/tools/DataTrends\\_Savings\\_20121002.pdf](http://www.energystar.gov/buildings/sites/default/uploads/tools/DataTrends_Savings_20121002.pdf) Retrieved October 3, 2013 (studying over 35,000 buildings from 2008 through 2011.)

<sup>7</sup>L. Hardesty. “BOMA Opposes Mandatory Energy Benchmarking Disclosure in Chicago.” *Energy Manager Today*. June 15, 2013. <http://www.energymanager-today.com/boma-opposes-mandatory-energy-benchmarking-in-chicago-093624/> Retrieved October 2, 2013.

## II. The Ordinance

The Ordinance provides for staggered reporting, based upon both (i) the square footage of the building and (ii) the use of the building. The proposed benchmarking shall be governed according to the following timeline:

*Large Commercial Buildings:* As of June 1, 2014, any building, or group of buildings with the same PIN, containing 250,000 or more square feet (excluding those with at least 10% residential occupancy) must be compliant with the Ordinance;<sup>8</sup>

*Medium-Sized Commercial Buildings and Large Residential Buildings:* As of June 1, 2015, (1) any building, or group of buildings with the same PIN, containing between 50,000 and 250,000 square feet (excluding those with at least 10% residential occupancy); and (2) any building, or group of buildings with the same PIN, containing 250,000 or more square feet and containing at least 10% residential occupancy must be compliant with the Ordinance.<sup>9</sup>

*Medium-Sized Residential Buildings:* As of June 1, 2016, any building, or group of buildings with the same PIN, containing between 50,000 and 250,000 square feet and containing at least 10% residential occupancy must be compliant with the Ordinance.<sup>10</sup>

### Verification & Enforcement

The Ordinance requires professional data verification every three years.<sup>11</sup> Such verification must be conducted by a licensed architect, registered engineer, or other trained individual designated by the Commissioner.<sup>12</sup> Early estimates suggests the cost of verification will be between \$750 and \$2,500 every three years.<sup>13</sup> It should be noted that the Ordinance provides the Commissioner expansive authority (i) to adopt rules and regulations for the administration of the Ordinance and (ii) provides for fines up to one hundred dollars (\$100.00) for a first-time violation and additional fines of up to twenty five dollars (\$25.00) for each day that a violation continues.<sup>14</sup>

### Exceptions

The Ordinance sets forth a limited number of exceptions from its reporting mandates. Those exempted include: (i) buildings presently experiencing qualifying financial distress,<sup>15</sup> (ii) buildings with less than fifty percent (50%) occupancy throughout the calendar year in which benchmarking is required, and (iii) newly constructed buildings for which the building's certificate of occupancy was issued during the calendar year in which benchmarking is required.<sup>16</sup> Note, additionally, that the Ordinance only covers "Covered Buildings", which, by its terms, expressly excludes buildings with more than ten percent (10%) of their space classified as industrial, storage, hazardous use, open air assembly, or deemed "miscellaneous use" as defined by Chapter 13-56 of the Chicago Municipal Code (the "Code").<sup>17</sup>

### Disclosure & Tenant Obligations

While building benchmarking information will be available to the City of Chicago after reporting, this information will not be available to the public for any particular building in connection with the building's *first* (1st) year of required benchmarking.<sup>18</sup> Thus, the public will only know of specific energy consumption information with respect to the second and subsequent calendar years of a building's required benchmarking.

Moreover, the Ordinance provides that tenants must provide within thirty (30) days all information that "cannot otherwise be acquired by the building owner and that is necessary for the building owner to comply with the [Ordinance's] requirements."<sup>19</sup> The failure of any tenant to provide information required under this section *does not*, however, relieve the owner of the its benchmarking obligations, *unless* that

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<sup>8</sup> 18-14-102.1(a)

<sup>9</sup> 18-14-102.1(b)

<sup>10</sup> 18-14-102.1(b)

<sup>11</sup> 18-14-102.2

<sup>12</sup> *Id.*

<sup>13</sup> See Alderman Michele Smith, *supra*.

<sup>14</sup> 18-14-101.5(a)-(b)

<sup>15</sup> See 18-14-102.1(c)(i). "Financial Distress" is defined by *any* of the following: (1) the building is the subject of a qualified tax lien sale or public auction due to property tax arrearages, (2) the building is controlled by a court appointed receiver, or (3) the building has been acquired by a deed in lieu of foreclosure.

<sup>16</sup> 18-14-102.1(c)(i)-(ii)

<sup>17</sup> 18-14-101.3

<sup>18</sup> 18-14-102.3

<sup>19</sup> 18-14-101.4

owner (1) proves it has requested such information from its tenant and (2) the owner has benchmarked the building as otherwise required under the Ordinance. A question left unclear under the Ordinance is whether the tenant *itself* may be liable for statutory fines in the event that it fails to provide such information as is necessary for Landlord to meet its benchmarking obligations. As a formal matter, the Ordinance provides that “any *person* who violates the chapter may be subject” to those fines as described above, but whether this provision extends to a delinquent tenant is unclear, though clearly plausible.<sup>20</sup>

### III. Conclusion and Client Guidance

This Ordinance establishes new reporting obligations to be borne by our clients. Our clients currently own or are lessees in precisely the types of commercial and/or residential structures targeted by this Ordinance and they need to be apprised: (i) that the Ordinance will require adoption of and continuous, systematic use of the Benchmarking Tool, either individually or, more likely, by property managers; (ii) that compliance with the Ordinance will require tracking and retention of information for at least three (3) years beyond the date on which benchmarking was required;<sup>21</sup> and, finally, (iii) that, should our clients desire to pass through their cost of compliance with these obligations on to their commercial tenants as operating expenses, they will need to ensure that their operating expense provisions in their leases are expansive enough to include these costs; and, in any event, they will want to carefully structure their lease agreements to provide for tenant reporting obligations as needed for the landlord’s compliance with the ordinance, and remedies in the event of default. Likewise, on the tenant side, our clients need to know how realistically to comply with the statutory and contractual mandates reasonably implied by the Ordinance and the financial ramifications thereof. Clients affected by the Ordinance should contact their Seyfarth Shaw LLP Real Estate professional to review and revise their leases and property management agreements regarding compliance with the Ordinance, and for further information.

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<sup>20</sup> 18-14-101.5

<sup>21</sup> 18-14-102.1

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