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BY ELECTRONIC TRANSMISSION

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1200 First Street, NE
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RE: Public Comments – Energy Performance Benchmarking

**COMMENTS OF
THE APARTMENT AND OFFICE BUILDING
ASSOCIATION OF METROPOLITAN WASHINGTON**

The Apartment and Office Building Association of Metropolitan Washington (“AOBA”), pursuant to the “Notice of Proposed Rulemaking,” issued by the District of Columbia Office of Energy and Environment (“DOEE”) on December 4, 2021, hereby respectfully submits these “Comments” on proposed amendments to regulations governing the “benchmarking” of energy performance for privately-owned buildings in the District of Columbia. AOBA applauds both the DOEE and the Building Energy Performance Standards (“BEPS”) Task Force for their patient collaboration and relentless commitment to the issuance of fair and balanced regulations.

AOBA generally supports the benchmarking regulations and, with one substantive exception, offers minor revisions to the regulations as proposed. The one substantive exception is time: AOBA respectfully requests that DOEE delay the adoption of both the benchmarking regulations and the separate BEPS regulations to give building owners, regulatory agencies and the public time to assess and adapt to the new building performance paradigm created by the

COVID-19 pandemic. Specifically, because the pandemic has changed the focus and obligations of building owners from the installation of energy efficient measures *to* the protection of the health and safety of each individual entering a building – implementation of the regulations should be delayed to enable building owners to recalibrate the new and still evolving energy consumption and building performance patterns caused by combating the impact of the pandemic. Stated differently, the COVID-19 pandemic has rendered the prior measures of both energy consumption and building efficiency obsolete and, for this reason, adoption of the benchmarking regulations should be delayed until new and accurate performance data can be assessed and recorded.

The request for a delay notwithstanding, AOBA also offers several revisions to the regulations as proposed. Specifically, and as detailed below, the regulations should be revised to:

- (i) authorize licensed, credentialed or certified employees of a building owner or an owner's designee to act as an Approved District Data Verifier;
- (ii) exempt buildings with an ENERGY STAR certification from the data verification requirements; and
- (iii) extend the verification submission period to five (5) years in order to be consistent with the five (5) year certification period required by ENERGY STAR Certification rules.

If adopted, the AOBA recommended revisions would further streamline the data verification process and eliminate verification redundancies without compromising the submission and confirmation of building performance data.

I. SUMMARY

The impact of the COVID-19 pandemic on the consumption and conversation of energy in general and on the benchmarking of building performance in particular cannot be overstated.

The adoption of the proposed benchmarking regulations, accordingly, should be delayed pending an informed assessment of the changing building remediation priorities and the changed building performance measures caused by the pandemic. The proposed benchmarking regulations should also be revised to eliminate redundancies created by building owner compliance with ENERGY STAR Certification requirements and rules. Adequate safeguards, lastly, already exist for the elimination of the “employee-data verifier” prohibition set out in the proposed regulations.

II. BACKGROUND AND INTRODUCTION

Performance benchmarking is the monitoring of energy or water usage of a building, using a standard metric(s) to compare the building’s current and past performance and energy consumption. Benchmarking scores can then be used to compare the building’s energy performance to similarly sized buildings. The proposed benchmarking amendments seek to clarify and streamline the benchmarking process by incorporating changes in the Sustainable DC Omnibus Amendment Act of 2014 and the CleanEnergy DC Omnibus Act of 2018. The amendments also seek to update changes in the ENERGY STAR Portfolio Manager benchmarking tool by further clarifying “benchmarking scores” and exempting certain spaces from benchmarking.

AOBA is a non-profit entity chartered to represent the interests of commercial and multifamily building and property owners in the District of Columbia, Maryland and Virginia. AOBA members own or manage approximately 82,630,528 square feet of commercial office space and approximately 87,487 apartment units in the District of Columbia. Hundreds of AOBA member employees work in the District of Columbia, managing and maintaining commercial and multifamily buildings. In addition to their full-time employment, several AOBA members also serve on the DOEE Task Force.

III. DISCUSSION

A. Adoption Of The Benchmarking Regulations Should Be Delayed.

AOBA will detail the specific changes and unprecedented challenges wrought by the COVID-19 pandemic on building owners in its separate “Comments” on the proposed BEPS regulations to be submitted on February 2, 2021. Here, AOBA simply observes that the pandemic has forced a dramatic and immediate shift in the priorities of building owners. Specifically, given the extraordinary scope and uncharted breath of the pandemic, building owners have been forced to prioritize the health and safety of building occupants over the installation of measures designed to increase building efficiency.

The very measurement of building efficiency and energy consumption has also changed, as the pandemic, to cite just one example, has forced building owners not only to install new and expensive filtration and ventilation systems, but to run these systems on new and almost-continuous cycles. Due to the new requirements for ventilation, buildings now use more energy to aerate less occupied space. At first blush, this new pandemic paradigm would appear to be counterintuitive, as one would reasonably expect a reduction in building occupancy (caused by the pandemic) to decrease the building’s energy consumption. This expectation is false; the prioritization of health and safety considerations caused by the pandemic has lead to an increase in energy consumption. The COVID-19 pandemic, thus, has rendered prior approaches to building efficiency and the benchmarking of building performance outdated.

And it is this application of outdated and obsolete building performance metrics that drive the AOBA request to delay adoption of the benchmarking regulations. More particularly, if 2018 and 2019 measurements and estimates are used as benchmarks to determine compliance with specific regulations, the data for energy consumption and building performance will be

necessarily skewed in 2020, because the pandemic has already prejudiced the data that will be collected in 2021, as buildings owners shift their focus to providing a safe and healthy work and residential space. Accordingly, absent a delay in the adoption of the benchmarking regulations to reflect the immediate and long-term impact of the COVID-19 pandemic, the regulations will be ineffective in guiding building owner compliance with the objectives and standards set out in the omnibus legislation.

It is only well after a post-pandemic reassessment, AOBA respectfully submits, that DOEE and other regulatory agencies will be able to make an informed determination of the benchmarking requirements. After the full impact of the pandemic on building performance has been recorded and verified with actual, current data, AOBA will fully support the benchmarking efforts at each of the proposed new building size levels.

B. Building Owner Employees, Who Are Properly Licensed, Credentialed Or Certified, Should Be Permitted To Act As A District Data Verifier.

Section 3515.6 of the proposed benchmarking regulations provides:

An Approved District Data Verifier shall not be an employee of the building owner . . . who prepares or submits benchmarking information in Portfolio Manager.

An “Approved District Data Verifier,” in turn, is defined as an “individual” who is in “good standing” and possesses one of the following licenses, credentials or certifications:

- (i) Professional Engineer;
- (ii) Licensed Architect;
- (iii) Certified Energy Manager; or
- (iv) Building Energy Assessment Professional.

An individual may also qualify as an Approved District Data Verifier if she/he possesses a “license or training program credentials” recognized by DOEE.

AOBA respectfully recommends revision of Section 3515.6 of the proposed regulations to eliminate the “employee-data verifier” prohibition. The prohibition is unnecessary: the licenses, credentials or certifications earned and maintained by the above-referenced professionals provide a sufficient safeguard against improper verification of or untoward conduct in the verification of benchmark results and the preparation of compliance reports on behalf of building owners. Specifically, professional engineers, licensed architects and the like are generally subject to a code of ethics or code of conduct that require each member of the profession to perform their tasks, duties and obligations in accurate and truthful manner and to engage in conduct that is at all times ethical, responsible and lawful.¹ These codes – of ethics or of conduct – impose an independent and effective discipline on the work (or verifications) performed by the professionals and this discipline is present whether the professional is an employee of a building owner or an independent third-party. Thus, the risk of the loss of the professional licensure or certification – and with it, the possible of loss of employment and damage to professional reputation – occasioned by improper verification of data entries and supporting documentation provides an effective check against improper or untoward conduct by an employee of a building owner.

Likewise, termination of the employee-data verifier prohibition would eliminate the additional cost of hiring a third-party District Data Verifier. As noted and with respect to data verification and the submission of benchmarking reports, there is no substantive distinction between a District Data Verifier *employed* by a building owner and a third-party District Data Verifier *hired* by a building owner. In both instances, the work or verification performed by the

¹ See e.g., American Institute of Architects “Code of Ethics and Professional Conduct”; National Society of Professional Engineers “Code of Ethics”; Association of Energy Engineers “Code of Ethics for Certified Energy Managers.”

professional is the same; the third-party or building employee is required to verify benchmark results and compliance reports. In both instances, the license or certification will also act as a safeguard against improper conduct by the employee or third-party. In sum, if a building owner employs a licensed or certified professional that is otherwise capable of performing data verification and report submission duties under the regulations – there is no need or reason for the owner to hire a third-party to do so.

C. Buildings Receiving An ENERGY STAR Certification Should Be Exempt From The Verification Requirements.

Section 3515.5 of the proposed regulations designates the “U.S. Environmental Protection Agency” as an “Approved District Data Verifier” when “it preforms data verification . . . that uses data including at least six (6) months of the calendar year.” AOBA respectfully recommends that the proposed regulation be revised to exempt ENERGY STAR certified buildings from the verification process. Specifically, because the ENERGY STAR Certification will contain the same data and information required by the benchmarking regulations, building owners should not be required to submit the same information and data twice. Adding an additional data verification will be both burdensome and duplicitous to the efforts of owners whose buildings receive an ENERGY STAR Certification. AOBA, accordingly, respectfully recommends that all buildings that receive an Energy Star Certification be exempt from the proposed three year cycle of verification and, instead, be permitted to rely on the U.S. Environmental Protection Agency five year verification cycle for compliance with specific verification requirements.

D. Data Verification Should Be Performed Every Five (5) Years.

Pursuant to Section 3515.1 of the proposed regulations, third-party verifications “shall” be performed every three (3) years. For reasons similar to those discussed above, AOBA

respectfully recommends that that the proposed regulations be revised to require data verification every five (5) years. Specifically, a five (5) year verification period would be consistent with the ENERGY STAR Certification rules, which require certification every five (5) years. Consistency of the verification and certification periods, in turn, would eliminate a redundancy created by verifying building data every three (3) years pursuant to the benchmarking regulations and then submitting a report or certification verifying the same building data pursuant to the ENERGY STAR certification rules two (2) years later.

The timing (three or five years) of the submission of the verified data, moreover, is not outcome determinative; instead, it is the accuracy or veracity of the data when submitted that determines compliance with the benchmarking regulations. A five (5) year verification cycle, lastly, would also lessen the time, expense and resource commitment imposed on building owners by verifying essentially the same data over two, overlapping periods.

IV. CONCLUSION

In closing, AOBA again thanks DOEE and the BEPS Task Force for the time and effort committed to the issuance of the benchmarking regulations. This time and effort, however, must give way – temporarily – to a delay in the adoption of the benchmarking regulations. Specifically, because the COVID-19 pandemic has rendered data and performance measurements taken in 2018, 2019 and even 2020 inaccurate proxies for the establishment of baseline benchmarking regulations, adoption of the regulations must be delayed until accurate and current building performance data is available and recorded. In addition, the elimination of verification redundancies as well as the accompanying cost savings strongly militate in favor of: (i) allowing building owner employees to act as Approved District Data Verifiers, (ii) the

exemption of buildings with an ENERGY STAR Certification from the verification requirements and (iii) performance of the verifications on a five (5) year cycle.

Respectfully submitted,

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