Moritt Hock & Hamroff LLP
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# MHH Condo/Co-op Digest

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*This newsletter explores the emerging legal topics and issues affecting the condominium and cooperative services industry. Thought-leading attorneys from Moritt Hock & Hamroff's Condominium and Cooperative Services Practice Group share their legal insight, experience and best practices on this rapidly evolving area of law.*

*As always, if you have any questions regarding the matters raised in this Digest, please feel free to contact Bill McCracken of our New York City office at **wmccracken@moritthock.com,** or your regular contact at the firm.*

## About The Group

Moritt Hock & Hamroff's Condominium and Cooperative Services Practice Group represents clients in all aspects of condominium and cooperative law.

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### It Is Time To Focus On Compliance With The Corporate Transparency Act

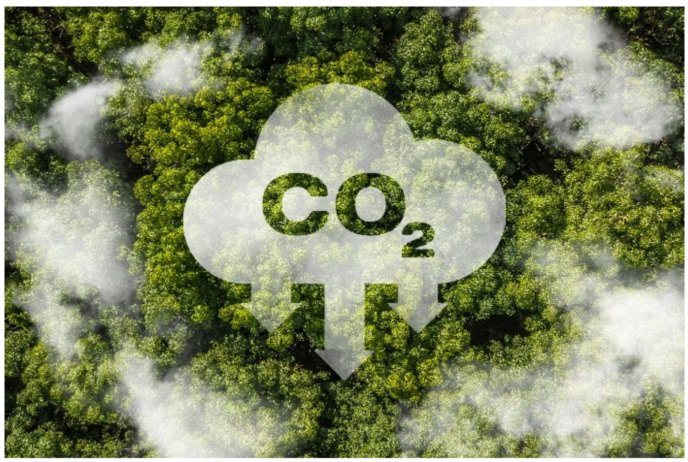
We have reported on the Corporate Transparency Act in **multiple prior editions** of this Digest and in dedicated **Client Alerts**. To date, cooperative apartment corporations and condominium associations largely have taken a "wait and see" attitude in light of the CTA's onerous compliance obligations and the real possibility that some legislative or judicial action might obviate the need for action.

However, as the end of the year approaches with no relief in sight, the need to avoid the significant penalties for noncompliance is increasingly driving cooperatives and condominium boards to prepare for the appropriate filings.

The individuals required to report by virtue of their association with a co-op or condo (aka the entity's "Beneficial Owners") include: (a) board members; (b) "senior officers"; (c) individuals owning or controlling 25% or more of the entity's equity, voting, or pecuniary interests in the entity; and (d) individuals having any other form of "substantial control" over the entity. These Beneficial Owners will need to provide their legal names, birthdates, full addresses, and driver's license or passport numbers (including photographic copies of the identifying documents) in order to make the filings.

Any boards that have not already contacted their management company and/or counsel to discuss their CTA compliance obligations should do so now. As a threshold matter, they will need to determine whether they need to report at all, because some large buildings with more than 20 full time employees and at least $5 million in reported gross annual receipts are exempt from reporting. There also remains the open question whether condominium associations in New York are technically subject to the law, but in all likelihood many condos will file in an abundance of caution.

As a reminder, the penalties for noncompliance with the CTA are severe, including civil penalties of $500 for each day that the violation continues and criminal penalties of imprisonment of up to two years and fines up to $10,000.




**New Local Law 97 Rules Released**

NYC's Department of Buildings has released **the next round of proposed implementing rules for Local Law 97**, and there are significant new developments in those rules for building owners to digest.

To set the context, **Local Law 97** was enacted in 2019 to reduce carbon emissions in New York City's buildings sector by 40% by 2030 and to net zero by 2050. Local Law 97 requires that certain buildings (generally, market-rate buildings above 25,000 square feet) lower their annual carbon emissions below set limits or face fines of $268 per metric ton of carbon intensity over those limits. The first compliance period for Local Law 97 began this year, with the first annual building emissions reports due to be filed on or before May 1, 2025.

Since 2019, the Department of Buildings has intermittently released implementing rules to provide details and guidance for building owners on how to comply with the law. This latest release includes four separate rules, two of which warrant discussion here.

**The Rule on Applications to Adjust Emissions Limits (aka the "Hardship" Rule)**

Broadly speaking, buildings that produce carbon emissions over their designated limits have two major ways of avoiding significant fines. First, buildings can seek to have those fines reduced or eliminated after the fact. The procedures for mitigating penalties were laid out in the DOB's "Good Faith Efforts" rulemaking from last year, covered in the **November 2023 edition** of our monthly Digest.

The other way to avoid fines (leaving aside renewable energy credits (RECs) and offsets, the latter of which are discussed below) is to get the DOB to agree to ease the building's emissions limits ahead of time. Local Law 97 provides that such "adjustments" are available upon a finding by the DOB that it is practically impossible for the subject building to comply with its emissions limits. Including where the building is subject to another provision of law, affected by a physical condition, or suffering from a financial hardship.

The good news is that the long-awaited new rule provides detailed guidance for when adjustments are available and how to apply for them. The bad news – at least for those building owners hoping for an easy way out of their compliance responsibilities – is that the criteria for securing adjustments are quite stringent indeed.

Buildings seeking an adjustment for being subject to a provision of law or affected by a physical condition must submit an application package by May 1 of a given year including the following information:

- Confirmation that the building was constructed prior to November 15, 2019 (*i.e.*, that the building predates the enactment of Local Law 97);
- The prior year's building emissions report, including information on the actual building emissions that prior year, the gross floor area of the building, the property types in the building, and the building emissions intensity based on actual emissions for the prior year;
- "A detailed description of the provision of law or physical condition preventing compliance . . . and a technical explanation of how such provision or condition makes it not reasonably possible for the building to achieve strict compliance";
- An affidavit from the NYC Accelerator (or similar) program stating that the building has sought "all city, state, federal, private, and utility incentive programs related to energy reduction or renewable energy[for which [it] could reasonably apply"; and
- Confirmation that the building has purchased the maximum amount of RECs and offsets available to it.

Any building that can successfully make this showing is entitled to an adjustment for up to three years. It is unclear from the text of the rule whether such adjustment will constitute a complete abatement or merely a reduction of the building's emissions limits, and also whether a building can seek an additional adjustment in future years.

The criteria for buildings seeking financial hardship relief are, if anything, even more stringent. As with the physical condition applications, hardship applications must provide the prior year's emissions report and an affidavit from the NYC Accelerator program. In order to demonstrate financial hardship, the building must then provide additional information, depending on the building type.

Of most interest to readers of this Digest is the requirement that cooperatives and condominiums must demonstrate "a 3-year average increase in annual carrying charges per unit of 5% above the average rate of inflation for the same 3-year period." This is, at best, an imperfect and imprecise way to gauge a building's "financial hardship." It is quite easy, in fact, to imagine scenarios in which a building in dire financial straits would nevertheless be unable to make this showing, and *vice versa*. On the other hand, and in fairness to the City's regulators, it is not easy at all to think of an alternative one-sentence objective standard to capture a co-op or condo's financial difficulties over time.

That discussion may be rendered academic, because the final criterion for hardship relief – that for the prior two calendar years, the building in question was on the Department of Finance's annual **tax lien sale list** for arrearages of property taxes, water or wastewater charges, or the Department of Housing Preservation and Development's emergency repair program – will likely remove the lion's share of co-ops and condos from even considering an application for hardship relief.

On top of everything else, the adjustment for financial hardship is only in effect for one year (instead of the three years for those buildings with a physical or legal impediment to compliance).

One final note of interest is that this rule extends the availability of adjustments to certain Article 321 buildings (which are, **as a reminder**, buildings with affordable housing not subject to annual emissions limits) that fail to comply with the deadline to implement **prescriptive energy measures** in their buildings.

**The Rule on Carbon Offsets (aka the "GreenHOUSE Fund" Rule)**

The other major rule release addresses, among other things, the type of carbon offsets that may be used as a deduction from a covered building's annual building emissions budget. Under the new rule, building owners can purchase a limited number of offsets generated by a new fund, **dubbed the GreenHOUSE Fund**, supporting electrification projects at affordable housing buildings in New York City.

This rule addresses a long-standing controversy under Local Law 97. In the sustainability community, "offsets" have a poor reputation as a greenwashing tactic – enabling big multinational companies to claim they are "carbon neutral" using **dubious and unverifiable** reforestation or similar projects. Thus, when Local Law 97 was passed, many were concerned that owners might be able to buy cheap offsets rather than doing the hard work of decarbonizing their buildings. This skepticism about offsets explains why the law does not allow more than ten percent of a building's emissions target to be offset by carbon credits.

This new rule goes further. By limiting the types of offsets that may be purchased to those generated by this new GreenHOUSE fund supporting retrofit projects here in New York City, policymakers are ensuring that the offset credits are "real and quantifiable, permanent, additional, verifiable, and unique." In other words, building owners will not be able to defray their Local Law 97 obligations by paying someone to plant some trees somewhere in Brazil.

Tying offset purchases to the GreenHOUSE fund helps address another concern about the City's decarbonization efforts, which is that lower income building owners may not be able to afford to pay for needed emissions reductions. The GreenHOUSE fund opens up a new resource to support retrofit projects for those buildings, while allowing wealthier buildings to soften the blow of their Local Law 97 obligations.