How Efficient Is Your Building?

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The Trend Toward Energy Efficiency Ratings and Energy Usage Disclosure

So why should you be concerned that California has passed legislation requiring disclosure of energy consumption? Because similar regulations have also been adopted in New York; Washington, D.C.; Seattle, WA; and Austin, TX. The list will likely include your state or municipality in the near future.

Below is a brief overview of some of the existing and pending legislation throughout North America, which requires building owners to disclose certain energy or utility consumption information. Also discussed are issues that commercial landlords and tenants will inevitably face in the near future concerning such legislation.

California

In 2007, California became the first state to adopt legislation that requires owners of commercial buildings to benchmark their energy use. *See* AB1103/AB531, codified at California Public Resources Code § 25402.10. The proposed regulations will require the owner of a non-residential building in California to benchmark the building's energy use Energy Star® Portfolio Manager ("Portfolio Manager"). Portfolio Manager is a free Web-based program provided by the United States Environmental Protection Agency, which compares energy and water consumption to past data from the building and to data from other buildings of similar sizes and uses. Owners of non-residential buildings will further be required to disclose statements of the building's energy use to potential buyers, lessees and lenders, where the transaction involves the "entire building" (defined as "the portion of the building for which the owner possesses title"). Moreover, the proposed regulations require utilities serving such buildings to release the most recent 12 months of energy usage data for the entire building to an owner's U.S. Portfolio Manager account, upon request of the owner.

For greater detail on AB1103, see Leslie E. Criswell, Matthew I. Kaplan, and Daniel K. Wright, II, *California Becomes the First State to Require Energy Usage Disclosures by Commercial Property Owners*, ICSC Shopping Center Legal Update, Vol. 31, Issue 22, Summer 2011).

Though California was the first state to approve such legislation, the implementation of the regulations thereunder is delayed. The State of California Energy Commission's original draft regulations called for initial compliance for all non-residential buildings containing more than 1,000 sq. ft. beginning on July 1, 2012. However, according to the Commission, newly proposed regulations will postpone the initial compliance date until January 1, 2013.

Washington, D.C.

Washington D.C.'s Council unanimously passed the Clean and Affordable Energy Act of 2008 ("CAEA"), DC ST § 6-1451.03, on July 15, 2008. On August 4, 2008, the District of Columbia mayor signed the CAEA into law. At that time, the District of Columbia became the first jurisdiction in the United States to require that all public buildings and all commercial buildings over 50,000 sq. ft. disclose their energy and water usage via a public website. Among other energy conservation and efficiency initiatives, the Act requires that the energy performance of commercial buildings be annually rated and disclosed to the marketplace.

The CAEA requires the energy performance of large commercial buildings (over 50,000 sq. ft.) and all public buildings to be rated with Energy Star software and disclosed on a public Website. In order to rate energy performance, utility data are collected for one year and then reported to the District Department of the Environment via Portfolio Manager.

Beginning in 2010, public buildings of at least 10,000 sq. ft. were rated with Energy Star and disclosed online via a publicly available database. With regard to privately owned buildings, the CAEA proposed a phase-in schedule for the reporting of energy benchmark data to the D.C. government, based on building size. The District Department of the Environment is currently engaged in final rulemaking for the commercial buildings portion of the law. Accordingly, the original deadlines for reporting have been extended, pending release of the final regulations. Though subject to further extensions, as it now stands, building owners will be required to report energy and water use of their buildings according to the following schedule:

Building Size (Gross Floor Area)	Utility Year Data	Benchmark Report Due
Over 200,000 sq. ft.	2010	July 1, 2011
Over 150,000 sq. ft.	2011	April 1, 2012
Over 100,000 sq. ft.	2012	April 1, 2013
Over 50,000 sq. ft.	2013	April 1, 2014

For commercial buildings, owners are given a one-year grace period between the reporting of their energy performance and the publication of their scores on the public website.

New York City

New York City's effort to require disclosure of energy consumption and benchmarking for buildings began on December 9, 2009, with the passage of the "Greener, Greater Buildings Plan" (formally known as Intro. No. 476-A, Benchmarking Energy and Water Use). The law required that buildings larger than 10,000 sq. ft., owned by the city—or that such buildings owned by others but where the city pays all or part of the annual energy bills—had to begin annual energy and water benchmarking by May 1, 2010. This initial rollout included approximately 2,790 municipal properties, according to the City's data. With regard to privately owned buildings, the law required that "covered buildings" (which includes buildings more than 50,000 sq. ft.), or two or more buildings held in a condominium form of ownership governed by the same board, which together exceed 100,000 sq. ft., were to benchmark their energy and water usage annually commencing on May 1, 2011.

New York City's legislation is broader than D.C.'s in that it requires benchmarking for water usage as well as for energy. However, benchmarking is required only for water usage in buildings in which the Department of Environmental Protection has installed automatic meter reading equipment that has been in operation for an entire calendar year.

As with D.C.'s legislation, New York's legislation provides that the benchmarking be conducted through the EPA's Energy Start Portfolio Manager Website. Though New York's law encourages utility companies to upload energy usage data directly, that is not a requirement. Furthermore, New York's legislation contains provisions on securing energy usage data from tenants—requiring tenants within covered buildings that have separately metered utilities to disclose certain energy usage information to the owner upon request—and maintaining energy usage records.

Washington State and the City of Seattle

On May 8, 2009, the State of Washington's Governor Chris Gregoire signed into law SB 5854, also known as the Efficiency First bill. *See* RCW 19.27A.170. This bill was modeled after California's legislation. The purpose of the bill was to focus on energy efficiency in the built environment. The bill requires, inter alia, commercial building energy rating and disclosure, major improvements to the state energy code, and energy performance standards and retrofits (if necessary) for public buildings. More specifically, building owners and operators must disclose benchmarking data and ratings to potential buyers, renters or lenders.

The state law applies only to state-owned and non-residential buildings, and the disclosure obligation for benchmarking data were being phased in as follows:

- By July 1, 2010, for all state buildings
- By January 1, 2011, for all buildings greater than 50,000 sq. ft.
- By January 1, 2012, for all buildings greater than 10,000 sq. ft.

In addition, utilities are required beginning January 1, 2010, at the request of a building owner, to automatically upload energy consumption information for a building into Energy Star software.

On January 25, 2010, the Seattle City Council passed CB 116731 unanimously. The ordinance is referred to as the Seattle Building Energy Benchmarking and Reporting legislation (Ordinance 123226). It expands on the building energy rating and disclosure requirements of the Washington State bill. Namely, Ordinance 123226 requires both commercial building owners (with buildings greater than 10,000 sq. ft.) and multi-family building owners (with buildings containing five or more units) to conduct annual energy performance tracking through the EPA's Portfolio Manager. Additionally, rating data must be disclosed upon request to existing tenants in benchmarked buildings.

Seattle's ordinance was phased in as follows:

- Data for non-residential buildings 50,000 sq. ft. or greater were due on October 3, 2011. Thereafter, reports are due annually on April 1.
- Data for non-residential buildings 10,000 sq. ft. or greater and multi-family buildings of five or more units were given until October 1, 2012, to comply (this period was extended from the original deadline of April 1, 2012). Thereafter, reports are due annually on April 1.

[According to Seattle's Office of Sustainability and Environment, the city is performing additional program evaluation and is considering staggered reporting deadlines based on building size in response to public input requesting added assistance and time to comply.]

Under Director's Rule 6-2011, buildings used primarily for manufacturing or industrial purposes are exempt from all benchmarking, disclosure and reporting requirements of this ordinance. Likewise, "campus buildings" are temporarily exempted from the energy performance disclosure and reporting requirements because the EPA's Portfolio Manager does not currently have a program to address Seattle's reporting requirements for such campus buildings.

The term "campus buildings" is as follows: "[w]here multiple buildings are served by a single utility meter, or served from a nearby central plant and not individually metered, it will be impossible to benchmark energy performance for the individual buildings. In these situations, all commonly served buildings should be grouped together and defined as a campus." Nevertheless, owners of campus buildings are still expected to benchmark their energy usage with Portfolio Manager or a similar system, and will be notified once the necessary function is integrated into Portfolio Manager to allow reporting that is consistent with Seattle's ordinance.

Austin, TX

The Energy Conservation Audit and Disclosure Ordinance ("ECAD"), approved in November 2008 and amended as City of Austin Ordinance No. 20110421-002 in April 2011, is a mechanism to disclose building energy performance and facilitate energy improvements in existing homes and commercial buildings.

The ordinance applies to both residential properties and "commercial facilit[ies]," which are defined as buildings "used for civic, commercial and/or industrial uses, excluding manufacturing, with a gross floor area of 10,000 sq. ft. or greater." Further, the ordinance only applies to a facility that receives electric service from the Austin Electric Utility. Manufacturing properties are exempt due to the unavailability of tools sufficient to rate extremely large facilities. The following is a phase-in schedule for owners of commercial facilities to calculate and report their energy use rating:

1) The owner of a commercial facility that has a gross floor area of 75,000 or greater must calculate its energy use rating not later than June 1, 2012;
2) The owner of a commercial facility that has a gross floor area of 30,000 sq. ft. or greater, but less than 75,000 sq. ft., must calculate its energy use rating not later than June 1, 2013;
3) The owner of a commercial facility that has a gross floor area of 10,000 sq. ft. or greater, but less than 30,000 sq. ft., must calculate its energy use rating not later than June 1, 2014.

The owners must calculate the energy rating using an audit or rating system approved by the Director of Austin Electric Utility.

Who Else Is Taking Steps to Require Energy Consumption Disclosure?

San Francisco. San Francisco's "Existing Commercial Buildings Energy Performance Ordinance" took effect in February 2011. The ordinance requires annual benchmarking, periodic energy audits and the public disclosure of benchmarking information via a public website for non-residential buildings (both public and private) using Portfolio Manager. The ordinance is intended to complement California's statewide legislation. It applies to non-residential buildings over 10,000 sq. ft., with compliance deadlines staggered based on building size.

Maryland. Maryland is considering SB261, which would require an owner or operator of certain privately owned commercial buildings to disclose energy benchmarking information to certain persons. SB261 contains further provisions, which would provide that a purchaser or lessee—who does not receive an energy benchmark disclosure statement on or prior to entering into a contract for sale or lease—has the right to rescind the contract within a certain time and the right to the immediate return of any deposit.

Massachusetts. Massachusetts is proposing a "Building Energy Asset Labeling Program," which would require building labeling relating to asset and operational energy ratings. The idea is to integrate the program with other utility-funded energy efficiency programs. At the moment, the proposal calls for a two-to-three-year pilot; the goal is to demonstrate the ability of an energy label to drive further investment in energy efficiency improvements within the commercial building sector. The proposed legislation would apply to public buildings, commercial buildings and multi-family buildings that are greater than 10,000 sq. ft.

Portland, OR. Portland has also implemented a public disclosure requirement for commercial and multifamily-buildings that are 20,000 sq. ft. or larger using Portfolio Manager.

Other. It has been reported that numerous other jurisdictions have proposed or are considering similar measures. Moreover, public interest groups are promoting such legislation throughout the country, and are frequently working with utility providers to discuss implementation of energy consumption disclosure for buildings.

What Should You Do to Address the Trend Requiring Energy Consumption Disclosure?

It is evident that society and government are paying attention to energy consumption. Management of energy consumption, long thought to be a purely private issue, is quickly becoming a public matter.

First, be aware that disclosure requirements will be affecting your property in the future. Therefore, plan accordingly. Similar disclosure regulations will likely become standard for the real estate industry, whether through legislation or practice. Most existing leases likely do not require tenants to disclose energy use data to the landlord—though, arguably, a tenant might be obligated to produce the information under a provision requiring that a lease "comply with applicable law."

Nevertheless, landlords should analyze whether an amendment addressing the issue of a tenant's disclosure of energy consumption is appropriate.

Second, familiarize yourself with Portfolio Manager. While other programs offer similar services, Portfolio Manager is most commonly referred to in any proposed legislation.

Third, review either the California legislation or the New York ordinance, as these tend to be the most comprehensive and are frequently referred to by advocates of energy consumption disclosure.

Fourth, review any additional costs of monitoring energy or water consumption, such as periodic energy audits, capital improvements or retro-commissioning, to reduce energy consumption. Owners should take further steps to analyze how they might pay for the improvements and can share in efficiency gains that may benefit their tenants.

Fifth, think about how disclosure of such information should be both handled and made. Review existing lease provisions concerning confidentiality and draft provisions that would allow for, or require, tenants to disclose energy usage data or permit utilities to do so—which may be required by law or required at such intervals to allow the owner to perform regular energy reviews.

Lastly, begin to develop a system to collect, manage, and maintain data and information relevant to energy usage.

Though it may seem as if such regulation is stepping into the private domain, those owners who get ahead of the curve should be able to make informed decisions on how to improve a building's energy performance, better position themselves in a market where tenants are more conscientious of the costs of energy consumption, and potentially provide a means to gauge costs in connection with the selection of utility providers in areas where utilities have been deregulated.

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