

How Efficient Is Your Building? The Trend Toward Energy Efficiency Benchmarking and Disclosure

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Energy benchmarking is the new trend across America. Concerned with energy conservation, cities and states are passing initiatives requiring disclosure of energy—and sometimes water—consumption. Using tools such as the U.S. Environmental Protection Agency’s ENERGY STAR Portfolio Manager, energy usage for certain types of buildings is collected, ranked against other similar buildings and disclosed to encourage energy efficiency. These tools assign buildings a rating from 1 to 100 on energy performance by comparing them to other similar buildings based on type, space attributes, location and fuel type. In 2007, California was the first state to pass legislation requiring building owners to benchmark and disclose energy consumption. Since then, New York City; Washington, D.C.; Washington State; Seattle; Austin; Philadelphia; Boston; Chicago; Minneapolis; San Francisco; and Montgomery County, Maryland, have all adopted similar regulations. More states and municipalities are sure to join the list in the near future.

What follows is a summary of some of the existing and pending legislation and an informational discussion of some of the issues that commercial landlords and tenants will inevitably face in the near future concerning these energy efficiency initiatives.

California

In 2007, California became the first state to adopt legislation requiring energy-use benchmarking for commercial buildings. *See* AB1103/AB531, codified at California Public Resources Code § 25402.10. These regulations require owners of nonresidential buildings in California to disclose information about their buildings’ energy use when the “entire building”—defined as “the portion of the building for which the owner possesses title”—is being offered for sale, lease, finance or refinance. To enable this disclosure, electric and gas utilities are required to keep track of the energy use of nonresidential buildings using the ENERGY STAR Portfolio Manager. The utilities must then release the most recent 12 months of energy usage data for the entire building to the Portfolio Manager website, upon the building owner’s authorization.

New York City

New York City passed the “Greener, Greater Buildings Plan” on December 9, 2009, requiring buildings to benchmark their energy consumption. The law requires privately owned buildings over 50,000 square feet, or two or more buildings on a single lot larger than 100,000 sq. ft., to benchmark their energy usage annually. Public buildings larger than 10,000 sq. ft., which are either owned by the City or owned by others but where the City pays all or part of the annual energy bills, must also annually benchmark their energy consumption. If buildings have been equipped with automatic water meter reading equipment by the Department of Environmental Protection for the entire year, they must also benchmark water use.

New York City’s legislation requires benchmarking to be conducted through the ENERGY STAR Portfolio Manager website. Covered buildings must report their usage data through this website by May 1 each year. Further, New York City’s legislation requires owners who lease out space in their buildings to report the energy and water consumption of their

tenants. Tenants within covered buildings that have separately metered utilities must disclose certain energy usage information to the owner upon request. The legislation also provides that utility companies may—but are not required to—directly upload benchmarking data to the ENERGY STAR Portfolio Manager website, eliminating the need for owners to request and report this information for their separately metered tenants.

Washington, D.C.

Washington, D.C.'s *Clean and Affordable Energy Act of 2008* ("CAEA"), DC ST § 6-1451.03, was signed into law on August 4, 2008. This legislation requires that all private buildings over 50,000 sq. ft. and District government buildings over 10,000 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. To rate energy performance, utility data is collected for one year and then reported to the District Department of the Environment via the ENERGY STAR Portfolio Manager by April 1 each year.

If space in commercial buildings is leased to nonresidential tenants, owners may need to solicit information from these tenants in order to comply with CAEA's disclosure requirements. Under the law, nonresidential tenants are required to provide their energy and water consumption data within 30 days of receiving a request from the owner. If a building has only one tenant, the responsibility to benchmark the building's energy and water usage may be delegated to that tenant.

Washington State

Washington State passed the Efficiency First bill, SB 5854, in 2009 (codified in relevant part at RCW 19.27A.170). Modeled after California's legislation, the bill's purpose is to focus on energy efficiency in the built environment. The bill requires qualifying utilities to maintain records of energy consumption data for nonresidential and public buildings. Upon the authorization of a nonresidential building owner, those utilities must upload energy consumption data to the ENERGY STAR Portfolio Manager. Further, owners and operators of nonresidential buildings greater than 10,000 sq. ft. must disclose benchmarking data and ratings to potential buyers, renters or lenders.

Seattle

Seattle similarly passed its Energy Benchmarking and Reporting Program in 2010 with Ordinance 123226, amended in 2012 by Ordinance 123993. This program expands upon the building energy rating and disclosure requirements of the Washington State's Efficiency First bill. Namely, owners of nonresidential buildings and multifamily buildings that are greater than 20,000 sq. ft. are required to track energy performance through the ENERGY STAR Portfolio Manager and to disclose this data annually to the City. In addition to annual disclosure to the City, owners of benchmarked buildings must disclose rating data to existing or prospective tenants, buyers or lenders upon their request. To aid owners in tracking a building's energy consumption, utilities must maintain energy consumption data for each building and directly release this information to the ENERGY STAR Portfolio Manager upon a building owner's authorization. Industrial manufacturing buildings are exempt from all benchmarking and disclosure requirements, but smaller commercial and multifamily buildings may soon be subject to benchmarking, as Seattle's Office of Sustainability and Environment is considering implementing benchmarking and reporting requirements for such buildings under 20,000 sq. ft.

Austin

The Energy Conservation Audit and Disclosure Ordinance (“ECAD”), which was 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 enhance energy efficiency in existing homes and commercial buildings.

The ordinance applies to residential properties, multifamily facilities and commercial buildings over 10,000 sq. ft. that receive electric service from the Austin Electric Utility and that are over 10 years old. Commercial properties used for manufacturing are exempt due to the unavailability of tools sufficient to rate extremely large facilities.

Under the ordinance, residential property owners must have an energy audit conducted before selling the property, and they must provide a copy of the audit to the City and to prospective buyers. Multifamily buildings must have an energy audit conducted every 10 years, and they must provide the audit to the City and to prospective tenants. Owners of commercial buildings must benchmark their buildings’ energy usage annually with the ENERGY STAR Portfolio Manager and report the resulting energy rating to the City and to purchasers or prospective purchasers.

Philadelphia

As part of its Greenworks plan, Philadelphia passed the Building Energy and Benchmarking Law, Bill No. 120428, in 2012. This law requires owners of commercial buildings over 50,000 sq. ft.—as well as owners of commercial portions of mixed-use buildings that have at least 50,000 sq. ft. devoted to a commercial use—to track energy and water consumption using the ENERGY STAR Portfolio Manager tool. This information is disclosed to the City, which then publishes energy and water performance metrics for the buildings on a public online database. Upon request, building owners must also provide prospective purchasers and lessees with a copy of the building’s most recent energy performance data.

Boston

Boston enacted the Building Energy Reporting and Disclosure Ordinance in May 2013. This ordinance requires all nonresidential buildings over 35,000 sq. ft., residential buildings with 35 units or greater or at least 35,000 sq. ft. and City-owned buildings (including buildings for which the City pays annual energy bills) to benchmark energy and water consumption data. Building owners must report their energy and water usage to the City through the ENERGY STAR Portfolio Manager. The City then publishes this data on a public website. Every five years, all reporting buildings must complete an energy assessment or action to increase energy efficiency. These assessments and actions are specified by the Commission, and may include such measures as retro-commissioning (commissioning of an existing building/system/equipment that has not been previously commissioned) of energy systems and development of energy management plans.

Chicago

Chicago passed the Building Energy Use Benchmarking Ordinance in September 2013. Under this ordinance, all buildings over 50,000 sq. ft., including both commercial and residential buildings, are required to benchmark their energy usage with the ENERGY STAR Portfolio Manager. Owners of these buildings must disclose their energy ratings to the City, which may then disclose this information on a public website, excluding any benchmarking data that is

attributable to a particular individual from the first year a building is required to benchmark. In order to comply with the benchmarking requirements, building owners may request energy usage information from their tenants. In turn, tenants must provide this information within 30 days.

Minneapolis

The Minneapolis City Council passed the Commercial Building Energy Benchmarking and Disclosure ordinance, Ordinance 47.190, in February 2013. The ordinance applies to commercial buildings over 50,000 sq. ft. and City-owned buildings over 25,000 sq. ft. It requires owners of these covered buildings to track their buildings' energy and water consumption with the ENERGY STAR Portfolio Manager. Building owners must also disclose energy usage data to the City, which then publishes this information to the public. In order to aid building owners in complying with the benchmarking requirements, the ordinance mandates that tenants provide energy consumption data to building owners within 30 days of a request.

San Francisco

San Francisco's Existing Commercial Buildings Energy Performance Ordinance took effect in February 2011 and is intended to complement California's statewide legislation. The ordinance requires public and private nonresidential buildings over 10,000 sq. ft. to benchmark energy consumption, periodically conduct energy audits, and annually disclose benchmarking information to the City and to tenants using the ENERGY STAR Portfolio Manager.

Montgomery County, Maryland

On May 1, 2014, Montgomery County, Maryland, passed a building energy benchmarking and disclosure ordinance, Bill 2-14. The ordinance requires County-owned buildings and buildings greater than 50,000 sq. ft., both commercial and residential, but not including buildings used for industrial, manufacturing, transportation, communication and utilities purposes, to benchmark their energy consumption with the ENERGY STAR Portfolio Manager. This data must be provided to the County, which then discloses the information to the public, excluding individually attributable information from the first year a building is required to benchmark. Tenants must provide their energy usage data to building owners within 30 days of a request. Owners of covered buildings must also file energy efficiency reports every 10 years; and, before filing the report, owners must conduct energy audits and perform retro-commissioning for their buildings.

Other Cities and States Taking Steps to Require Energy Consumption Disclosure

Kansas

Passed in 2007, § 66-1228 of the Kansas Statutes requires energy efficiency disclosure for all new and existing residential buildings of four units or less. Under the law, when a home is sold, the builder or owner must disclose energy efficiency information to the buyer.

Connecticut

The Connecticut Legislature passed SB 1243 in June 2011, which requires that electric and gas utilities (1) maintain records of all nonresidential buildings they serve and (2) disclose that energy consumption data to the public in a format compatible with the ENERGY STAR Portfolio Manager. Although the utilities must disclose energy consumption data generally, they must maintain customer confidentiality.

West Chester, Pennsylvania

The Borough Council of West Chester, Pennsylvania, passed the ENERGY STAR Ordinance for Private Commercial Construction in February 2008. This ordinance applies only to new commercial construction that needs conditional use approval by virtue of being taller than 45 ft. Under the ordinance, new commercial construction must be designed to earn the ENERGY STAR label, and these buildings must be benchmarked annually using the ENERGY STAR Portfolio Manager.

South Dakota

South Dakota passed Senate Bill 64 in 2009, requiring builders or sellers of newly constructed, previously unoccupied residential buildings of four units or less to disclose energy efficiency information to prospective buyers.

Massachusetts

Massachusetts proposed a Building Energy Asset Labeling Program that would require giving labels to buildings in relation to their asset rating and operational energy rating. The purpose of the proposal is to integrate the program with other utility-funded energy efficiency programs. Currently, the proposal is in the middle of a pilot program, and the goal is to demonstrate the ability of energy labels to drive further investment in energy efficiency improvements in the commercial building sector. The proposed legislation would apply to public buildings, commercial buildings and multifamily buildings that are greater than 10,000 sq. ft.

Portland, Oregon

Portland has proposed an ordinance entitled High Performance Green Building Policy as part of its Climate Action Plan. Commercial and multifamily buildings over 20,000 sq. ft. are required to benchmark their energy consumption using the ENERGY STAR Portfolio Manager.

Vermont

In 2014, the Vermont Legislature introduced H-657, which would require owners of multifamily residential buildings to disclose energy performance information to prospective tenants and purchasers. In the past, the Vermont Legislature introduced Bill H-57, titled *An Act Relating to Disclosure to Potential Buyers of a Building's Energy Performance*, which would have required a seller to complete a statement of energy performance at the time a commercial or residential building or unit is offered for sale; to inform potential buyers of their right to obtain the statement; and to supply the statement to a buyer prior to any such sale. Bills H-497 and S-143, both introduced in 2012, would also have required a seller of a building to provide a potential buyer with an energy disclosure when showing the property and to disclose, at a prospective buyer's request, the building's energy performance.

Maryland

Maryland's legislature introduced SB 261 in 2011. This bill would require owners of commercial buildings larger than 10,000 sq. ft. to disclose energy benchmarking information to prospective purchasers and lessees. Purchasers or lessees that did not receive this information would have the right to rescind the sale or lease contract.

New Mexico

In 2011, New Mexico's legislature introduced SB 442, the *Building Energy Disclosure Act*; however, action on this bill has been postponed indefinitely. The bill would require owners of nonresidential buildings that are 5,000 sq. ft. or greater to benchmark energy consumption data and to disclose energy efficiency information to current and prospective tenants, buyers and lenders. The bill would further require utilities to release energy information to building owners to aid in benchmarking.

Et al.

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, frequently working with utility providers to discuss implementation of energy consumption disclosure for buildings.

Additionally, many cities are implementing "green" campaigns and contests to promote energy efficiency. While these cities do not require benchmarking or disclosure, they provide financial incentives for building owners who benchmark and achieve certain ENERGY STAR standards.

Addressing the Trend Requiring Energy Consumption Disclosure]

Legislatures across the country are paying attention to energy consumption by passing laws and policies requiring or encouraging energy benchmarking. Management of energy consumption, long thought to be a purely private issue, is quickly becoming a public matter. As a building owner, here is how to prepare for the possibility that your city or state might soon require energy benchmarking and disclosure:

- First, ensure that your leases allow for easy compliance with benchmarking and disclosure requirements. Most existing leases likely do not require tenants to disclose energy usage data to their landlords, although arguably tenants might be obligated to produce the information under a provision requiring them to "comply with applicable law." Nevertheless, as a landlord, analyze whether an amendment addressing the issue of a tenant's disclosure of energy consumption is appropriate.
- Second, think about how you want to handle disclosure of energy efficiency information within the context of your building's ownership and occupancy, and consider how often you will need disclosure to be 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. As a building owner, you will want to ensure that you can obtain such disclosure as frequently as may be required by law or at intervals that allow you to perform regular energy reviews. Also, review local privacy law to determine whether your state views energy consumption data as a privacy right that cannot be disclosed without the consumer's consent.
- Third, familiarize yourself with the ENERGY STAR Portfolio Manager. While there are other programs that offer similar services, the ENERGY STAR Portfolio Manager is the program most commonly referred to in any proposed legislation. More information about this tool can be found at www.energystar.gov

- Fourth, review either the California or the New York City legislation. These are the most comprehensive initiatives, and advocates of energy consumption disclosure frequently refer to these laws as examples of model legislation.
- Fifth, review any additional costs you may incur from monitoring energy or water consumption, such as periodic energy audits, capital improvements or retro-commissioning to reduce energy consumption. In addition to aiding you in planning your budget in advance, consideration of these costs should also help you determine how you, as a building owner, can share in the efficiency gains that may benefit the tenants, even though you will likely pay for these improvements.

Finally, begin to develop a system to collect, manage, and maintain data and information relevant to energy usage. You will want to have the capability to comply with the benchmarking and disclosure requirements that are sure to apply to you soon.

While energy benchmarking regulations may seem to step into the private domain, building owners who anticipate such regulations and who plan in advance should be able to make more informed decisions on how to improve their buildings' energy performance. These building owners also should be able to better position themselves in a market where tenants are more conscientious of the costs of energy consumption. And, in areas where utilities have been deregulated by selecting less costly utility providers, well-informed building owners may be able to reduce their energy costs in advance.

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