



WILL ENERGY PERFORMANCE DISCLOSURE LAWS for BUILDINGS BECOME the NORM?

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It's summer and most of us are thinking of staying cool during these long days of near triple digit temperatures. Much like we do in our own homes, business leaders are ever increasingly concerned with keeping energy consumption and costs to a minimum. These goals are also consistent with meeting corporate sustainability objectives to reduce greenhouse gases and other related environmental impacts from the consumption of energy. However, in order to reduce energy consumption (and related costs) you need to know where you stand. As the saying goes, you can't manage what you don't measure.

Some companies are already ahead of the curve and are making use of voluntary benchmarking and disclosure incentives such as the [United States Environmental Protection Agency's \(USEPA\) Energy Star program](#), which recognizes energy efficient buildings rated against their building peer group. In an effort to drive energy performance further, in-house counsel should be aware that regulatory movements are afoot across the nation and some areas of the country already require mandatory disclosure of a building's energy performance. These new energy disclosure requirements may present some previously unknown business risks for building and property owners with poor performing buildings.

Generally speaking, energy disclosure laws require a building owner to disclose the building's energy use and benchmark it against similar buildings on a regular basis (e.g., annually) or during a real estate transaction. Disclosure laws are currently on the books in states such as California and Washington and in cities such as Austin, District of Columbia, New York, San Francisco, and Seattle. Many other states and local governments are lining up to follow suit. The disclosure laws essentially look to build transparency in the energy usage of buildings by making energy usage data publically available to consumers, tenants, prospective purchasers, and those interested in investing in properties with lower energy costs. With this information made public, market forces are expected to drive continuing performance improvement.

For example, New York City's Mayor Bloomberg signed energy benchmarking legislation in December 2009 under [Local Law No. 84](#) as part of the City's Greener, Greater Buildings Plan. The law focuses on the benchmarking and disclosure of 16,000 of New York City's largest properties and includes non-City owned non-residential and multifamily buildings greater than 50,000 square feet in size. These buildings must benchmark their energy and water usage annually using the [EPA's Energy Star Portfolio Manager](#) web-based tool. The initial deadline to benchmark was May 1, 2011 (postponed until August 1, 2011) and benchmarking data will be posted to a public website administered by New York City beginning September 1, 2012 (nonresidential) and September 1, 2013 (multifamily). In a related note, buildings subject to the

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ENERGY PERFORMANCE DISCLOSURE LAWS (cont'd)

New York benchmarking law are also required to conduct building energy audits and retro commissioning once every 10 years. Retro-commissioning is a systematic, documented process that identifies low-cost operational and maintenance improvements in existing buildings and brings the buildings up to the design intentions of its current usage.

In February 2011, the City of San Francisco passed the [Existing Commercial Building Energy Performance Ordinance](#) which will require that owners of commercial buildings of 10,000 square feet or more determine how much energy their building consumes on an annual basis, and make this information publicly available. Reporting to the San Francisco Department of the Environment begins in October 2011 for buildings larger than 75,000 square feet, with smaller buildings phased-in through 2013. In addition, building owners in San Francisco will be required to conduct an energy audit of these commercial properties every five years.

While the disclosure of energy usage data is expected to help improve overall energy efficiency of aging buildings, in-house counsel should be aware of the concerns of the regulated community regarding the risks of disclosing these data, including those involved in real estate transactions. Some issues already floating to the surface include the potential for lack of access to data from building tenants, the reliability and accuracy of the data collected for the disclosure, concerns over confidentiality of the data, and financial penalties for failure to meet disclosure deadlines. In addition, market forces may deem a poor performing building obsolete as compared with it's peers, creating unplanned financial burdens to quickly improve and/or upgrade energy systems.

While disclosure laws are not widespread as of today, the trends show that disclosure laws are gaining favor in state and local governments looking for ways to increase energy efficiency of their built environment and to meet greenhouse gas reduction objectives. In these changing times, in-house counsel will need to understand the requirements for mandatory disclosure, where it is happening next, financial impacts, and risks associated with public disclosure.