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Insights from the EU's Energy Disclosure Regime

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I. INTRODUCTION AND SUMMARY

In late 2014, Mayor Bill de Blasio proposed expanding the scope of New York City's hallmark building energy disclosure law, Local Law 84, to cover a greater number of buildings. Local Law 84 currently requires owners of the City's largest buildings to annually release energy performance data indicating how their building compares to others in its class. Mayor de Blasio proposed extending the law to cover midsized buildings as well.[i] The idea appears to be gaining traction in the New York City Council.[ii]

Extending Local Law 84 to midsized buildings could prove critical to the City's pollution-reduction goals. Buildings account for close to three-fourths of the City's greenhouse gas emissions.[iii] As such, it is hard to imagine how the City will meet its goal of reducing emissions 80 percent by 2050 without significantly reducing energy use throughout its building stock. The largest buildings alone – which account for half of the City's emissions – cannot generate all the savings needed.[iv] By expanding Local Law 84, the City can incentivize more building owners to invest in the upgrades needed to meet the 2050 goal.

In its current form, however, Mayor de Blasio's proposal is likely to leave considerable energy savings on the table. That is because the efficacy of an energy disclosure regime depends not just on the number of properties that it covers, but also on the way in which information is communicated. And, in this respect, Local Law 84 leaves significant room for improvement.

As presently construed, Local Law 84 requires that property owners report energy performance data to the City, which then publishes the data online. It does not, however, require property owners to ensure that prospective tenants or buyers are at any point presented with the information collected. As a result, there is no guarantee that energy performance information will ever be given an opportunity to influence a prospective purchaser's decision. As explained below, this shortcoming is likely to become increasingly significant as smaller properties are brought within the law's regulatory ambit.

The European Union's energy disclosure laws offer an instructive example of a more targeted disclosure regime that ensures that prospective consumers actually view energy performance data before making the decision to purchase or lease a property. Since January of 2013, nearly all advertisements offering buildings for sale or lease in the E.U. have been required to include energy performance information. Large buildings that are open to the public, such as office buildings, are also required to prominently display their energy ratings onsite. While this targeted approach to disclosure differs markedly from Local Law 84's current approach, it aligns with an array of American informational regulations that apply outside the building sector. The E.U. approach is also consistent with measures that have recently been introduced in a select number of American jurisdictions.

This policy brief provides an overview of the E.U. disclosure regime and reviews the case for requiring targeted disclosure to prospective purchasers and tenants. But first, it begins by

reviewing the rationale for energy disclosure laws and the *status quo* regime in New York City.

II. THE PROMISE OF ENERGY DISCLOSURE LAWS

The theory behind building energy disclosure laws is straightforward: assuming most prospective buyers and tenants value energy efficiency (or, at least, the savings that come from reduced energy consumption), releasing energy performance information should increase demand for relatively efficient units, thereby encouraging property owners to invest in efficiency retrofits prior to sale or lease.[v] Looked at from another angle, disclosure laws help to correct an information asymmetry between property owners, who have considerable information about a building's energy usage, and consumers (i.e., purchasers and renters), who lack such information.[vi]

A light-touch approach to regulation, disclosure laws hold the potential to drive the real estate market towards greater efficiency without necessitating resort to costly command-and-control strategies.[vii] And because this data can be useful in a number of contexts, disclosure laws carry relatively little risk of regulatory waste; if disclosure fails to drive the market towards more efficient building stock, the data gathered can nevertheless aid regulators in setting prescriptive rules down the line.[1]

III. OVERVIEW OF LOCAL LAW 84

New York City took its first major step towards requiring building energy disclosure in 2009 when it passed Local Law 84 as part of the Bloomberg Administration's *Greater Greener Building Plan*. Commonly known as the "benchmarking rule," Local Law 84 requires owners of buildings with more than 50,000 square feet (or groups of buildings on a single lot with over 100,000 square feet) to release data that indicates how efficient their building is compared to similar properties throughout the United States. Owners are required to annually upload data into EPA's online Energy Star Portfolio Manager detailing the total amount of energy consumed by the building as well as building characteristics such as the total square footage, opening hours, number of computers, amount of space that is cooled/heated, etc.[viii] The Energy Portfolio Manager then assigns the building an Energy Star score between 1 and 100 that ranks it in relation to its peers.[2] The higher the score, the more efficient the building.

Local Law 84 was a path-breaking ordinance. At the time it was enacted, the law covered more square feet of real estate than that covered by all other American municipal benchmarking laws combined.[ix] And while it is too early to draw robust conclusions about its effects, there are indications that it has decreased energy usage.[x]

Yet, in spite of its virtues, Local Law 84 was just a first step towards transparency. Only about two percent of buildings in New York City are big enough to fall within the regulatory sphere. And while these properties account for approximately 48 percent of energy use in the City,[xi] the City will need to wring savings from a broader class of properties if it is to achieve its ambitious emissions reduction goals. Mayor de Blasio's proposal to expand Local Law 84 to cover midsize buildings – defined as those over 25,000 square feet – recognizes this need.[xii] What policymakers appear to have overlooked, is that there is also a need to improve upon the means of communicating the data gathered to enhance its market impact.

IV. THE CASE FOR TARGETED DISCLOSURE

As noted, Local Law 84 requires property owners to submit building energy reports to the City's Department of Finance,[xiii] which then posts the information on a public website. Disclosing

[1] For instance, it could be used to determine the appropriate efficiency improvements that individual buildings should target.

[2] Notably, another component of the *Greater, Greener Building Plan*, Local Law 87, obligates building owners to conduct a rigorous energy audit every 10 years. The findings of these audits, which are primarily aimed at informing property owners of opportunities for upgrades, are reported to the City Department of Buildings and are not disclosed to the public.

data publicly online is critical because it ensures that the information is accessible to a wide range of building data stakeholders.[xiv] It also enables an array of interested parties outside the government to monitor trends in the efficiency of the City's building stock.

Where Local Law 84 comes up short, however, is that it does not require building owners to ensure that prospective consumers – the constituency with the most direct incentive effect on property owners – are aware of a property's energy performance rating before deciding to purchase or lease. Property owners are not obliged to include the information in advertisements for sale or lease or any other pre-transaction documents. Nor are they required to display the building's Energy Star score anywhere on the premises such that prospective consumers who visit the property may see it.

The upshot of the current approach to disclosure is that only owners of relatively efficient buildings are likely to present their energy ratings to prospective consumers. Individuals looking at property in laggard buildings, by contrast, are unlikely to see energy performance data unless they search it out. And interviews with commercial real estate agents suggest that only sophisticated prospective consumers – such as large corporations with designated sustainability professionals – tend to request this information.[xv] In the residential market, even some real estate agents appear unaware that the data exists.[xvi]

The limitations of the current approach should become increasingly apparent, if, and when, Local Law 84 is extended to cover smaller properties, which tend to house fewer of the sophisticated corporate consumers. Unless targeted pre-transaction disclosure to prospective consumers is required, a relatively small number of these consumers are likely to avail themselves of the energy performance information to which they are entitled.[xvii]

V. THE E.U. APPROACH – A MODEL OF TARGETED DISCLOSURE

The European Union's energy disclosure laws offer a blueprint for developing a more targeted disclosure regime that may be more impactful.

The cornerstone of the E.U.'s building energy disclosure regime is the requirement to issue so-called "Energy Performance Certificates" (EPCs) for all properties over 50 square meters (approximately 500 square feet) prior to construction, sale, or lease.[3] The relevant E.U. legislation, the Energy Performance of Buildings Directive,[xviii] gives the Member States of the E.U. considerable discretion in deciding how to design their EPCs, but they must employ some form of benchmarking.[xix]

The initial Energy Performance of Buildings Directive, enacted in 2002, required only that Energy Performance Certificates be shown upon consumers' request.[xx] This approach, which resembles the *status quo* in New York City, was criticized for failing to make energy efficiency information sufficiently salient to prospective consumers.[xxi] As such, the recast 2010 Directive added three new requirements:[4]

1. EPCs *must* be shown to prospective buyers and tenants when[5] a building or building unit is sold or rented out;[xxii]

2. An indicator of a building's energy performance certificate — usually represented as a letter grade — must be included in all commercial advertisements offering properties for sale or rent;[xxiii]

[3] There are some limited exceptions to this obligation. For example, Member States do not need to issue EPCs for places of worship. Also, publically owned and occupied buildings are subject to additional obligations under the Energy Efficiency Directive. *See* Directive 2012/27/EU art. 5(5).

[4] Notably, some Member States have taken supplementary steps to improve disclosure, including requiring EPC data to be published in online databases. *See* http://boligejer.dk/ejendomsdata/0/10

[5] Member States have taken different approaches to implementing this provision. As an example, Ireland requires a copy of the EPC be provided to persons "*expressing interest"* in buying or leasing the property. *See* ACTION PLAN FOR THE IMPLEMENTATION IN IRELAND OF DIRECTIVE 2010/31/EC, 38 (2012).

3. Buildings with more than 500 square meters (5380 square feet)[6] of useful floor area that are frequently visited by the public must display their EPCs in a prominent place that is visible to the public.[xxiv]

These additional obligations, which became mandatory as of January 9, 2013, did not require property owners to gather any data beyond that which was required by the 2002 directive. They therefore imposed minimal additional regulatory burden. Nevertheless, if properly enforced,[7] they should go a long way towards ensuring that prospective consumers view energy performance information early in the decision-making process, when choices are still malleable.[xxv]

Denmark, which has taken the lead in developing and implementing building disclosure laws,[8] offers encouraging signs regarding the market effects of targeted disclosure. Denmark uses a letter grading system from A to G to rank properties, with G being the worst performers. Last fall, the Danish Energy Agency released data indicating that each step up from G through B corresponded to a statistically significant increase in sales price.[xxvi] Only at the very top end of the spectrum – from B to A – did the agency find that the price effect was not significant.[xxvii]

Notably, retail electricity prices are significantly higher in Denmark than in New York City, so targeted disclosure is unlikely to generate as robust an effect here. Nonetheless, the Danish findings provide an important indication that consumers are responsive to energy efficiency information when directly presented with it.

VI. TARGETED DISCLOSURE IS STANDARD IN OTHER CONTEXTS

Although a departure from building energy disclosure laws most commonly found in the United States, the idea that advertisement for properties and the properties themselves should display energy performance data is far from revolutionary. In fact, targeted disclosure to prospective consumers is a trademark of American informational regulations. Take, for example, federal regulations mandating disclosure of the risks associated with smoking cigarettes or nutritional information. In the environmental sphere, consider fuel economy standards for cars or energy efficiency ratings of appliances. In each case, the relevant information must be disclosed on the product itself – and/or in advertisements for the product – so that it is presented to the person contemplating purchase. Indeed, where website disclosure is required, it is typically to supplement product labels by providing more detailed information that can be reasonably included on a label.[9] Local Law 84 could easily be amended to mirror this approach.

VII. MOVEMENT TOWARDS TARGETED DISCLOSURE IN THE U.S.

Targeted building disclosure policies have started catching on in other American cities and

[6] This threshold was lowered to 250 m^2 on July 9, 2015. The initial 2002 Directive only required buildings with over 1000 m^2 that were occupied by public authorities or housed institutions that provided public services to display EPCs.

[7] Notably, compliance with the new requirements has been uneven among the 28 Members States of the E.U. For example, while well over 80% of commercial advertisements for properties in Austria, Denmark, and Italy are estimated to contain energy performance indicators, only about 15% of advertisements for property in Estonia appear to include such information. ICF INTERNATIONAL, ENERGY PERFORMANCE OF BUILDINGS DIRECTIVE COMPLIANCE STUDY 50 (2015). Unsurprisingly, jurisdictions that have started to randomly check real estate listings and impose financial penalties on agents who fail to include energy performance indicators in their listings have seen dramatic improvements in compliance. *Id.* at 61.

[8] Denmark has required that EPCs be presented alongside contracts for sale or lease since July of 2009 and that energy ratings be included in advertisements since July of 2010. *See* SOREN AGGERHOLM ET AL, IMPLEMENTATION OF THE EBPD IN DENMARK 3-8 (2010).

[9] Federal fuel economy regulations provide an example of this approach. *See* Revisions and Additions to Motor Vehicle Fuel Economy Label, 76 Fed. Reg. 39, 483 (July 6, 2011).

States.[10] Since January of 2012, Washington State has required owners of commercial buildings with more than 10,000 square feet to disclose their Energy Star Portfolio Manager ratings to prospective buyers, lessees and financiers.[xxviii] At the municipal level, Austin, Texas began requiring owners of commercial buildings to provide energy performance data to prospective buyers prior to sale in June of 2009.[xxix] With few exceptions, residential property owners in Austin are also required to provide such information to prospective buyers prior to sale.[xxx] Last year, Berkeley, California passed an ordinance requiring, among other things, that owners of buildings with over 25,000 square feet disclose their Energy Star ratings to prospective renters or buyers before executing a lease or contract for sale.[xxxi] The ordinance also requires that the information be made available to the public at large.[xxxii]

VIII. LEGAL AUTHORITY TO REQUIRE TARGETED DISCLOSURE

The City Council is unlikely to encounter significant legal obstacles if it were to require that energy performance data be included in commercial real estate advertisements and/or displayed onsite.

The New York State Constitution grants New York City wide leeway to regulate matters of local importance under a doctrine known as municipal "home rule."[xxxiii] Indeed, the Constitution specifically recognizes the City's authority to regulate businesses (including real estate agencies) and properties within the municipal boundaries.[xxxiv] The chief constraint on the City's power to regulate in these areas is the potential for a City law to be preempted by a State law addressing the same topic.[11]

But the reforms proposed here are unlikely to be preempted. While New York State law regulates certain aspects of real estate advertisements, it is silent with respect to energy information.[xxxv] And, as the New York Supreme Court recently explained, where a State law is silent on a matter, a local law will not be preempted so long as there is a "rational local basis for its passage" and the law does not "affect State-wide questions."[xxxvi] The same "local basis" – improving the efficiency of the City's buildings – that supported enactment of Local Law 84 in the first instance should support this modest expansion of the law. As for the requirement that local laws not "affect State-wide questions," in practice, this has typically barred only local laws that frustrate or interfere with the operation of a State-wide regulatory regime.[xxxvii] And while New York State regulates certain aspects of building energy efficiency,[xxxviii] there does not appear to be any relevant State regime with which disclosure of energy information in advertisements or onsite would interfere. If anything, targeted disclosure of this sort would further the implementation of the State's regulatory goals.

IX. CONCLUSION

In sum, although expanding the scope of Local Law 84 could lead to significant energy savings, it may also leave considerable savings on the table. To realize the full potential of expanding Local Law 84, the City should require that building owners engage in more targeted communication with prospective consumers. Doing so could greatly increase the effect of Local Law 84 at little additional cost to building owners.

[10] As of yet, no American jurisdiction appears to have taken the leap to require that energy performance data be included in an advertisement or be displayed on the property itself, as the E.U. requires.

[11] A party opposing these reforms might argue that they infringe upon property owners' or real estate agents' First Amendment rights. However, such a challenge appears unlikely to succeed given the Second Circuit's lenient review of commercial disclosure requirements. *See* N.Y.S. Restaurant Ass'n v. New York City Bd. of Health, 555 F.3d 114, 118 (2009) (holding, "the First Amendment is not violated, whereas here, the law in question mandates a simple factual disclosure… and is reasonably related to New York City's [policy] goals.").

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[i] CITY OF NEW YORK, MAYOR'S OFFICE OF LONG TERM PLANNING AND SUSTAINABILITY, ONE CITY BUILT TO LAST 64 (2014) {hereinafter, 'One City Built to Last'}.
[ii] http://nycprogressives.com/2015/12/14/pc-endorses-climate-works-for-all/
[iii] One City Built to Last, *supra* note i, at 7.
[iv] PLANYC, NEW YORK CITY LOCAL LAW 84 BENCHMARKING REPORT 8 (2013).
[v] Constantine Kotokosta, *Energy Disclosure, Market Behavior, and the Building Data* Ecosystem, 1295 ANN. OF THE N.Y. ACAD. OF SCI., 34, 34 (2013).
[vi] Scott Kelly, Doug Crawford-Brown, and Michael Pollitt, *Is SAP Fit for the Purpose?* 16 Renewable & Sustainable Energy Rev. 6861,6871 (2012).
[vii] *See, e.g.*, Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 Univ. Penn. L.R., 613, 625 (1999).
[viii] KAREN PALMER & MARGARET WALLS, RESOURCES FOR THE FUTURE, CAN BENCHMARKING AND DISCLOSURE LAWS PROVIDE INCENTIVES FOR ENERGY EFFICIENCY IMPROVEMENTS IN BUILDINGS? 8 (2015).
[ix] CITY OF NEW YORK, NEW YORK CITY LOCAL LAW 84 BENCHMARKING REPORT 10 (2013).
[x] U.S. DEPARTMENT OF ENERGY, ENERGY EFFICIENCY AND RENEWABLE ENERGY, NEW YORK CITY BENCHMARKING AND TRANSPARENCY POLICY IMPACT EVALUATION REPORT i (May 2015).
[xi] PLANYC, NEW YORK CITY LOCAL LAW 84 BENCHMARKING REPORT 8 (2013).
[xii] OneCity Built to Last, *supra* note i, at 64.
[xiii] Rules of the City of New York, Title 1, Chapter 100, Subchapter C, § 103-06(j).
[xiv] Constantine Kotokosta, *Energy Disclosure, Market Behavior, and the Building Data* Ecosystem, 1295 ANN. OF THE N.Y. ACAD. OF SCI., 38 (2013).
[xv] Interviews with commercial real estate agents at Cushman & Wakefield and SCOPA CRE.
[xvi] Interviews with two leading residential real estate agents that concentrate on the Upper West Side, where there are numerous buildings over 50,000 feet that fall within the purview of Local Law 84.
[xvii] *Id.*
[xviii] Directive 2010/31/EC {hereinafter, EPBD}.
[xix] EPBD art. 11(1).
[xx] Directive 2002/91/EC Art. 7(1).
[xxi] JULIA BACKHAUS ET AL., KEY FINDINGS & POLICY RECOMMENDATIONS TO IMPROVE EFFECTIVENESS OF ENERGY PERFORMANCE CERTIFICATES & THE ENERGY PERFORMANCE OF BUILDINGS DIRECTIVE 3 (2011).
[xxii] EBPD art. 12(2).
[xxiii] EBPD art.12(4).
[xxiv] EBPD art. 13(2).
[xxv] *See* Scott Kelly et al., *supra* note v, at 6872.
[xxvi] Sigurd Næss-Schmidt et al., Danish Energy Agency, Do Homes With Higher Efficiency Have Higher Prices? 9 (2015).
[xxvii] *Id.*
[xxviii] Washington State Building Code, RCW 19.27A.170.
[xxix] Austin, Tex., Code of Ordinances, §6-7-32.
[xxx] Austin, Texas, Code of Ordinances, §6-7-12.
[xxxi] Berkeley, California, Municipal Code, §19.81.040(c).
[xxxii] *Id.*
[xxxiii] N.Y. Const. art. IX. *See also* N.Y. Municipal Home Rule Law §10.
[xxxiv] *Id.*
[xxxv] N.Y. Comp. Codes R. & Regs.tit.19, §175.25.
[xxxvi] McDonald v. New York City Campaign Fin. Bd., 965 N.Y.S. 811, 828 (N.Y. Sup. Ct. 2013) *aff'd as modified*, 985 N.Y.S.2d 557 (N.Y. App. Div. 2014).
[xxxvii] *See e.g.*, Chwick v. Mulvey, 915 N.Y.S.2d 578, 584-86 (N.Y. App. Div. 2010) (holding that a Nassau County Ordinance that prohibited deceptively colored handguns was field preempted by a State licensing regime for handguns that "evince[d] an intent to set forth a uniform system of firearm licensing in the State"). *See contra*, McDonald v. New York City Campaign Fin. Bd, *supra* note xxxvi, at 829 (finding that New York City ordinance regulating campaign finance contributions was not preempted by State campaign finance law because the State and City laws were "not only not inconsistent, but [] actually supplement each other.")
[xxxviii] N.Y.COMP. CODES R. & REGS., tit. 19, part 1240 (2010).