

## Commercial Property - USA

### California sets schedule for non-residential building energy disclosures

Contributed by [Katten Muchin Rosenman LLP](#)

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In furtherance of its ongoing efforts to promote energy efficiency, California has implemented a new requirement that owners or operators of non-residential buildings disclose a building's past energy use data to prospective buyers, lessees or lenders of the building before the sale, lease, financing or refinancing of the property.

The framework for these disclosures has been in place since 2007, when California enacted Section 25402.10 of the Public Resources Code, which provides for collaboration between electric and gas utilities and building owners in order to document and disclose the energy consumption of nonresidential buildings. Since 2009, electric and gas utilities in California have been required to maintain records of the energy consumption data of all non-residential buildings that they serve in a format that is compatible for uploading to the Environmental Protection Agency's Energy Star Portfolio Manager, and property owners have had the ability to authorise the utility to upload their building's energy consumption data to the Energy Star Portfolio Manager website. Once a building owner has had its building's energy consumption data uploaded, Section 25402.10 requires the owner or operator of a non-residential building, on a schedule to be developed by the California Energy Commission, to disclose the Energy Star Portfolio Manager's benchmarking data and ratings for the most recent 12-month period to a prospective buyer, lessee of the entire building or lender financing the entire building.

On July 11 2012 the California Energy Commission adopted regulations setting down the schedule according to which non-residential building owners must begin making the disclosures mandated by Section 25402.10:

- Owners of buildings with a total floor area of more than 50,000 square feet must begin making the required disclosures on and after January 1 2013;
- Owners of buildings with a total floor area of between 10,000 square feet and 50,000 square feet must make the disclosures on and after July 1 2013; and
- Owners of buildings with a total floor area of between 5,000 square feet and 10,000 square feet must make the disclosures on and after January 1 2014.

Property owners and operators should immediately begin familiarising themselves with the Energy Star Portfolio Manager website, as the regulations require that the property owner's account on the website be opened at least 30 days before a disclosure must be made. Section 25402.10 requires that disclosures be made "as soon as practicable" before the execution of a sales contract or lease or the submittal of the loan application, the practical effect of which is that these disclosures will need to be made at the outset of any discussions with potential purchasers, tenants and lenders.

The specific disclosures that the owner must provide for the building are:

- a statement of energy performance;
- a data checklist; and
- a facility summary.

Each of the required disclosure documents is generated on the Energy Star Portfolio Manager website. The owner must also access the California Energy Commission's compliance website, download a disclosure summary sheet and submit a compliance report to the California Energy Commission.

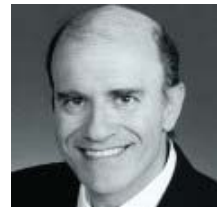
The disclosures must be made only to prospective purchasers, tenants or financiers of the entire building and do not apply to residential buildings. Presumably, owners of multi-tenant buildings will not need to make the disclosures to tenants of individual demised spaces; nor will individual owners of commercial condominium units on the sale or financing of such individual units.

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While the statute makes these energy usage disclosures mandatory, it also provides that the disclosure requirement does not increase or decrease the duties of a property owner, operator or its agent or broker to disclose the existence of a material fact affecting the real property that it would otherwise be obligated to disclose. It is clear that these disclosures are to be made in addition to, and not in lieu of, any other disclosures that a property owner needs to make regarding the property.

Neither Section 25402.10 nor the newly issued regulations set forth any penalties for a failure to comply with the disclosure requirement. However, the regulations do provide a safe harbour to the extent that information is missing in a disclosure. As long as the owner has made a reasonable effort to ascertain the missing information, it may use an approximation of the missing information, but it must identify the information as being an approximation and the approximation:

- must be both reasonable and based on the best information available to the owner; and
- may not be used for the purpose of circumventing or evading the disclosures mandated by Section 25402.10.

Court decisions will be needed to determine whether prospective buyers, tenants or lenders can back out of a transaction if the disclosures are not made or if there are other non-compliance penalties.

While the regulations do not prescribe a format for disclosure and do not require that the disclosures be contained in any purchase and sale agreement, loan agreement or lease, sellers, lenders and landlords should consider including in a purchase and sale agreement, loan agreement or lease, as applicable, an acknowledgment that such disclosures have been made in accordance with Section 25402.10.

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