

June 14, 2013

California Updates Energy Use Disclosure Requirements

After a short delay in implementation by the California Energy Commission, California's new energy use disclosure requirements will commence on July 1, 2013, for all non-residential buildings with a total gross floor area measuring more than 50,000 square feet.

Section 25402.10 of the Public Resources Code requires owners or operators of ***non-residential*** buildings to disclose the building's past energy use data to prospective buyers, lessees or lenders of the building prior to the sale, lease, financing or refinancing of the property. **This disclosure must be made no later than 24 hours prior to the execution of the sales contract or lease or submittal of the loan application.** In order to make the disclosure, a building owner is responsible for uploading the building's energy usage data to the US Environmental Protection Agency's ENERGY STAR Portfolio Manager website by setting up an account on the website and authorizing the utility company to release the data (utility companies are already storing the data for upload). **The regulations require that this account be opened or updated at least 30 days before a disclosure is to be made.**

PLEASE BE AWARE THAT THE ENTIRE ENERGY STAR PORTFOLIO MANAGER WEBSITE WILL BE DOWN FOR MAINTENANCE AND A SITE UPGRADE BETWEEN JUNE 26, 2013, AND JULY 9, 2013.

BUILDING OWNERS AND OPERATORS WHO INTEND TO SIGN A CONTRACT, LEASE OR LOAN APPLICATION BETWEEN JULY 1, 2013, AND JULY 9, 2013, MUST PREPARE DISCLOSURE REPORTS PRIOR TO JUNE 26, 2013.

To create the necessary account, access www.energystar.gov and click on the "Buildings & Plants" tab, then navigate to the Portfolio Manager Login under Quick Links. There is a link on that page to the Portfolio Manager, which will allow you to create a new account. Once the account is created, properties may be added and facility data imported by clicking on the "Automated Benchmarking" link, which allows owners and operators to select the utility providers for their buildings and authorize them to upload the required data. There are also tutorials on the website explaining how to navigate the site and upload the necessary data. Please note that one of the reasons the site will be down between June 26, 2013, and July 9, 2013, is to upgrade the site, and while the www.energystar.gov website address will remain the same, the link to the Portfolio Manager may change following the upgrade.

After creating an account, owners and operators must disclose the following reports generated by the ENERGY STAR Portfolio Manager website:

- Statement of Energy Performance
- Data Checklist
- Facility Summary

For more information, please contact one of the following members of Katten's **Real Estate Practice**:

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Owners and operators 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 compliance website does not yet appear to be active, but should be accessible from www.energy.ca.gov/ab1103/.

Beginning on January 1, 2014, owners and operators will have to make these disclosures for buildings with a total gross floor area of more than 10,000 square feet, and beginning on July 1, 2014, for buildings with a total gross floor area of 5,000 feet or more.

It should be noted that the disclosures only need to be made to prospective purchasers, tenants or financiers of the *entire* building (emphasis added) and presently do not apply to residential buildings. Presumably, owners of multitenant buildings will not need to make the disclosures to tenants of individual demised spaces, nor will individual owners of commercial condominium units upon the sale or financing of such individual units.

To the extent that tenants of the building have separately metered utilities, the owner will have to obtain the consent of the tenants before the utility companies will release the data to the owner. However, if there are more than 15 tenants in a building and no tenant represents more than 15% of the total floor space, the utility companies will aggregate and release the otherwise confidential data to the building owner. This "15/15 rule" is not proscribed by either the statute or the regulations, but is the standard practice that has been adopted by California utility companies. As long as the owner has made a reasonable effort to ascertain the missing information, the owner may use an approximation of this information. Nevertheless, the owner 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. The ability to approximate such data may not be used for the purpose of circumventing or evading the disclosures mandated by Section 25402.10.

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 regulations of the California Energy Commission set forth any penalties for the failure to comply with the disclosure requirement. The general rule in California is that failure to comply with a regulation such as the one contained in Section 25402.10 makes a contract an illegal contract. While there are numerous exceptions to the rule, California courts tend to liberally weigh the policy behind such regulations before determining if failure to comply with the regulations would invalidate the contract. As such, property owners and operators will have to wait for court decisions 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 penalties of noncompliance.

Finally, while the regulations do not require that the disclosures be contained in any purchase and sale agreement, loan agreement or lease, sellers, lenders and landlords should consider the inclusion of an acknowledgment in the purchase and sale agreement, loan agreement or lease, as applicable, that such disclosures have been made in accordance with Section 25402.10.

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