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## California Energy Commission Implements New Energy Use Requirements

After several delays in implementation and enforcement by the California Energy Commission, California's new energy use disclosure requirement commenced on January 1, 2014, for all non-residential buildings with a total gross floor area measuring more than 10,000 square feet. Beginning on July 1, 2014, owners of non-residential buildings larger than 5,000 square feet will also have to make the disclosures.

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 applies to buildings with uses (as shown on the building's occupancy permit) classified as assembly (A), business (B), education (E), institutional-assisted living (I-1, I-2), mercantile – retail (M), residential – transient (R-1, hotels/motels), storage (S) and utility – parking garage (U). It does not apply to residential buildings (R) or factory/industrial buildings (F). **This disclosure must be made no later than 24 hours prior to the execution of the sales contract, lease or submittal of the loan application.** In order to make the disclosure, a building owner must cause the building's energy usage data to be uploaded 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 upload the energy usage 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.**

To create the necessary account, access [www.energystar.gov](http://www.energystar.gov) and click on the "Buildings & Plants" tab. There is a link on that page to the Portfolio Manager, which allows you to create a new account. Once the account is created, you may add properties and import facility data. To have the utility upload the building's energy use, select the "Automated Benchmarking" link, which allows you to select the utility providers for the building 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.

Once the account is created, you must generate a Data Verification Checklist through the ENERGY STAR Portfolio Manager website. The Data Verification Checklist will be disclosed to the prospective buyer, tenant or lender. The owner must also submit a copy of the Data Verification Checklist to the California Energy Commission at [AB1103report@energy.ca.gov](mailto:AB1103report@energy.ca.gov) within 30 days of generating the report.

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. Owners of multitenant buildings will not need to make the disclosures to tenants of individual demised spaces, nor will individual owners of

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

Douglas W. Pyle  
+1.310.788.4593  
[douglas.pyle@kattenlaw.com](mailto:douglas.pyle@kattenlaw.com)

Benzion J. Westreich  
+1.310.788.4409  
[benny.westreich@kattenlaw.com](mailto:benny.westreich@kattenlaw.com)

commercial condominium units upon the sale or financing of such individual units. Owners of mixed-use buildings that include residential units (other than hotels) do not have to make the disclosures.

To the extent 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 owners. 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 which 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. We would recommend to building owners that they insert in all future leases (and any amendments to current leases) a consent by the tenant to the release of utility data to the owners and an obligation to confirm such consent in writing upon future request.

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 California Energy Commission has broadly outlined the enforcement actions that it may take in the event the statute and regulations are not complied with, including:

- Investigating noncompliance allegations (which can involve issuing subpoenas, compelling testimony and convening investigative hearings).
- Initiating administrative proceedings before the full Energy Commission for an order compelling compliance.
- Initiating a civil judicial proceeding to enforce an Energy Commission order.
- Initiating a civil judicial proceeding to obtain injunctive relief.
- Settling enforcement actions through negotiated settlements that impose reasonable and appropriate requirements, including possible payment of penalties.

Additionally, 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, court decisions will have 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 private remedies available to buyers, tenants and lenders.

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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