

California Dreamin'? New Energy Use Disclosure Program Requirements not Just Pie in the California Sky

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Practice Area: Retail Real Estate

If you own or lease non-residential property in the State of California, you should be aware of a new program that took effect at the beginning of 2014. The California Non Residential Building Energy Use Disclosure Program, codified at Public Resources Code § 25402.10 and implemented by the regulations found at California Code of Regulations Title 20, §§ 1680-1684 (the "Disclosure Program"), requires an owner of a non residential building to disclose certain information regarding the building's energy use prior to certain transactions. A disclosure is required in connection with any of the following transactions:

- A sale of the building
- A financing of the entire building
- A lease of the entire building (Note: this only applies if the entire building is being leased in the same transaction and, therefore, is not likely to apply, for example, to individual leases of portions of a multi-tenant retail property)

The Disclosure Program requires a building owner to use the U.S. Environmental Protection Agency's (EPA) Energy Star Portfolio Manager ("Portfolio Manager") to gather the building's energy use data and prepare certain disclosure materials.

Effective Dates

The Disclosure Program applies to transactions occurring on or after January 1, 2014 for non-residential buildings with a gross square footage of at least 10,000 square feet and on or after July 1, 2014 for non-residential buildings of at least 5,000 square feet. The Disclosure Program does not apply to transactions involving non-residential buildings of less than 5,000 square feet.

The program also does not apply to buildings for which the building occupancy permit lists the following building occupancy types:

- Factory and industrial
- High hazard
- Institutional
- Residential
- Laboratory

In addition, the program does not apply to mixed-use buildings if part of the building is residential, such as condominiums or apartments.

Procedure

The Portfolio Manager should be used to collect the required energy use data. The Portfolio Manager is then used to generate a disclosure report which is valid for 30 days. The data that must be disclosed is the building's most recent 12 months of energy usage. The building owner first opens an account on the Portfolio Manager, creates a portfolio for the building and then uses the Portfolio Manager to request the electric and/or gas utilities serving the building to generate a report of the previous 12 months of energy use data.

The required disclosure documents, which include a disclosure summary, a statement of energy performance, a data checklist, and a facility summary, must be given to any prospective buyer or lessee of the entire building no later than 24 hours prior to execution of the sales contract or the lease, as applicable, or no later than the submittal of a loan application to a prospective lender for the financing of the entire building. The regulations provide that if information is missing in any of the disclosure documents, the building owner may approximate that information providing the owner has made a reasonable effort to obtain the missing information. It is important to note that the owner should begin this process well in advance of the projected closing of any transaction triggering the disclosure requirements. At least 30 days will be required, as this is the amount of time the utility companies are given under the Disclosure Program within which to upload their data into the Portfolio Manager.

Penalties for Non-Compliance and Enforcement Actions

If a building owner does not comply with the Disclosure Program, the California Energy Commission is authorized to take a number of actions, including the following:

- Investigating non compliance allegations;
- Initiating administrative proceedings before the Energy Commission to seek an order compelling compliance;
- Initiating civil judicial proceedings to enforce an Energy Commission order or to obtain injunctive relief;
- Settling enforcement actions through negotiated settlements, including possible penalties.

While there is as yet no clear guidance, it is possible that a failure to comply with the Disclosure Program requirements could be found by a court to be a material fact in a real estate transaction, making any failure to comply a litigation risk.

Though the Disclosure Program only applies to certain types of transactions and for certain types of properties, property owners, prospective purchasers, tenants, and lenders should familiarize themselves with the requirements. In particular, commercial retail property owners may want to update their lease documents to reflect the Disclosure Program requirements, as the owner may be required to obtain energy use data from utilities that are typically listed in the tenant's name. Tenants in commercial retail properties should be aware of the requirement since information about the tenant's energy use must be obtained by the landlord and disclosed to prospective purchasers or lenders.

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