

AUGUST 28, 2009

## CALIFORNIA BENCHMARKING DISCLOSURE FOR NONRESIDENTIAL BUILDINGS

Beginning January 1, 2010, unless the California legislature acts to postpone it, owners of commercial property in California will have a new mandatory disclosure to give to buyers, lenders or renters of their property. The disclosure requirement is contained in a somewhat obscure law signed by Governor Schwarzenegger two years ago.

Assembly Bill 1103 (“AB 1103”), passed in 2007, is intended to facilitate the availability and disclosure of benchmarking data for energy consumption for all nonresidential buildings in California. The benchmarking system, to be maintained by utility companies through the U.S. Environmental Protection Agency’s Energy Star Portfolio Manager (“ESPM”), allows owners and operators to compare their buildings’ performance to that of similar buildings, to manage their buildings’ energy cost, and to help to justify financial investments to improve the buildings’ energy profile. AB 1103 requires owners of “nonresidential” property in California to disclose ESPM benchmarking data and ratings for the most recent 12-month period to any “prospective buyer, lessee of the entire building, or lender that would finance the entire building.”

### **Energy Star Portfolio Manager**

ESPM is an online energy management tool that can track and benchmark energy use over time for any type of building. Certain types of buildings can also benchmark energy use relative to similar buildings, using statistical models that account for the impact of climate and other variables. This benchmark is called a “national energy performance rating” and is expressed on a scale of 1 to 100. A rating of 50 indicates that energy performance is average compared to similar buildings, while a rating of 75 or better indicates top performance and makes the building eligible to earn the Energy Star label. To receive an Energy Star rating, the gross floor area of the building must be comprised of 50% or more of a specified use type, including: financial institutions, courthouses, hospitals, offices, retail stores, supermarkets and warehouses.

AB 1103 requires that all electric and gas utilities, beginning January 1, 2009, maintain records of the energy consumption data for all nonresidential buildings for the most recent 12 months in a format compatible for uploading to the ESPM. Further, electric and gas utilities are required to upload this data to ESPM upon the authorization of the building owner or operator.

Note that if a building has a tenant that is billed directly by the electric/gas service provider, the service provider will need the tenant’s written authorization to release its energy consumption data.

### **Effective Date**

Under AB 1103, the disclosure requirement for all owners of nonresidential property commences with sales, leases or financings on or after *January 1, 2010*. However, legislation currently pending in the California legislature would replace the January 1<sup>st</sup> effective date with a schedule of compliance to be established by the California Energy Commission.<sup>1</sup>

### **Nonresidential Buildings**

The disclosure requirement only applies to “nonresidential buildings,” meaning any building which (i) “is heated or cooled in its interior” and (ii) does not fall into an excluded occupancy type.<sup>2</sup> The following are examples of *excluded* occupancy types: hotels, apartment houses, dwellings, lodging houses, private garages, carports, sheds and agricultural buildings. The following are examples of *included* occupancy types: stadiums, theaters, educational buildings, hospitals, prisons, nursing homes for ambulatory patients, nurseries, office buildings, wholesale and retail stores,

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restaurants, factories and power plants.<sup>3</sup> It should be noted that the disclosure requirement applies only to the sale, lease or financing of an entire building, so it would not be applicable to space leases within a multi-tenant building, but it would apply to leases of entire buildings within a multi-building site.

### **How Owners Get Benchmarking Data**

In order to obtain ESPM benchmarking data and ratings, a building owner or operator must register for an ESPM account at <http://www.energystar.gov/benchmark>. The owner may authorize its utility service providers to automatically upload benchmarking data to the owner's ESPM account by selecting those service providers during the online registration process with ESPM.

### **Benchmarking Data and Ratings**

AB 1103 requires disclosure of ESPM "benchmarking data and ratings for the most recent 12-month period." This implies that (i) it will not be sufficient to disclose the ESPM ratings without the underlying data, and (ii) the building owner or operator will be expected to take the additional step of obtaining a national energy performance rating for each building that is eligible to receive a rating. The law does not specify the point in a negotiation at which this disclosure must be made to a prospective purchaser, tenant or lender.

If you have any questions regarding this alert, please contact:

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<sup>1</sup> Assembly Bill 531, introduced in the Assembly on February 25, 2009, and as amended by the Senate as of June 11, 2009.

<sup>2</sup> AB 1103 is codified in Section 25402.10 of the Public Resources Code. "Nonresidential building", as used therein, is defined in Section 25130 of the Public Resources Code as "any building which is heated or cooled in its interior, and is of an occupancy type other than Type H, I, or J, as defined in the Uniform Building Code, 1973 edition, as adopted by the International Conference of Building Officials."

<sup>3</sup> See Part II of the Uniform Building Code, 1973 edition, as adopted by the International Conference of Building Officials.