

NONRESIDENTIAL BUILDING ENERGY USE DISCLOSURE REQUIREMENTS TO TAKE EFFECT

Background

Starting July 1, 2013, owners of certain nonresidential property will be required to provide disclosures relating to energy consumption levels for their buildings in connection with any sale, financing or leasing of an entire qualifying building. The law also requires utility and energy providers to release the data necessary to allow building owners to comply with these disclosure requirements.

The California Energy Commission (CEC) recently adopted regulations implementing energy use disclosure requirements which were first enacted in 2007 as Assembly Bill 1103. In 2009, Assembly Bill 531 was enacted, which allowed the CEC to set a schedule for compliance with the disclosures. The CEC's regulations are contained in the CEC's Nonresidential Energy Use Disclosure Program, which is available online at the CEC's website (www.energy.ca.gov).

Who is Affected?

The disclosure requirements will apply to "nonresidential buildings," as classified under the California Building Code. Nonresidential buildings include office, industrial and shopping center buildings, as well as theaters, restaurants, educational facilities, hospitals and parking garages, and "residential occupancies containing sleeping units where the occupants are primarily transient in nature," such as boarding houses, hotels and motels. The implementation of these disclosure requirements will occur in three stages, with the largest buildings being affected first, as follows:

- July 1, 2013, buildings with a total gross floor area of more than 50,000 square feet will be subject to the disclosure requirements;
- January 1, 2014, certain buildings with a total gross floor area of more than 10,000 square feet will be subject to the disclosure requirements; and
- July 1, 2014, certain buildings with a total gross floor area of more than 5,000 square feet will be subject to the disclosure requirements.

California Public Resources Code Section 25402.10(d) requires an owner or operator of a nonresidential building, based upon the implementation schedule, to disclose the U.S. EPA's Energy Star® Portfolio Manager benchmarking data and ratings for the most recent 12-month period to (1) a prospective buyer, no later than 24 hours prior to the execution of a purchase and sale agreement; (2) a prospective lessee of the entire building, no later than 24 hours before execution of the lease; and (3) a prospective lender providing financing secured by the entire building, with the submittal of the loan application. The disclosure requirements apply to purchase and sale agreements and leases executed after July 1, 2013, and loan applications submitted after July 1, 2013, and do not apply to

documents executed prior to July 1, 2013. The statute requires disclosure in connection with the execution of a purchase and sale agreement or lease or submittal of a loan application, but does not apply to an amendment of any such documents executed prior to July 1, 2013, but amended after that date. Finally, with respect to leases, disclosure is required only for a lease of an entire qualifying building (*i.e.*, as of July 1, 2013, a building of 50,000 square feet or more) by a single tenant and is not required for multi-tenant buildings.

What are the Disclosure Requirements?

The required disclosures consist of a Disclosure Statement Sheet, Statement of Energy Performance, Data Checklist and Facility Summary as described in the CEC's Nonresidential Energy Use Disclosure Program. In order to timely obtain such information, affected building owners are required to register with the U.S. EPA's Energy Star® "Portfolio Manager" online tool at least 30 days in advance of a required disclosure. Once an account has been created, the building owner will provide information regarding the sources of energy use for the building and the space use characteristics for all space types in the building. Within the Portfolio Manager, the building owner can either request all utility and energy providers to release the energy use data for the most recent twelve months, or the building owner can enter such information manually. Utility and energy providers will have 30 days to upload the requested data after receiving a request from a building owner.

After all utility and energy providers have uploaded the required information, building owners will need to access the Energy Commission's compliance website and complete and submit the compliance report by logging on to the owner's Portfolio Manager account. Building owners can then download the necessary disclosure documents, which will need to be submitted to prospective buyers, lessees and lenders.

Recommended Action

The Portfolio Manager website is currently being upgraded to provide the necessary tools for compliance by building owners, and will be offline from June 26th through July 9th. Prior to June 26th, we recommend that building owners become familiar with the Portfolio Manager website and establish an account for any building that will be subject to the July 1, 2013 implementation deadline in order to be prepared for any upcoming sale, financing or leasing of the entire qualifying building. Although the statutes and regulations do not provide any penalty for failure to comply with the disclosure requirements, building owners should include language in their transaction documents acknowledging and confirming the purchaser's, tenant's or lender's receipt of these disclosures. Because there is a 30-day delay from the date that the building owner registers on the Portfolio Manager website until the disclosure information is uploaded by the utility service providers to the building owner's EPA Portfolio Manager account, an owner contemplating executing a purchase agreement, loan application or lease of an entire building in excess of 50,000 square feet to a single user on or after July 1, 2013 should register and enter the required property information on the Portfolio Manager website as soon as possible.

For more information, please contact David Wensley (dwensley@coxcastle.com) and Robert Sykes (rsykes@coxcastle.com) regarding energy use disclosure in purchase and sale and leasing transactions, or Ira Waldman (iwaldman@coxcastle.com) and Jana De Witt (jdewitt@coxcastle.com) regarding energy use disclosure in finance transactions.