

California Commercial Property Owners Face Deadline for Energy Benchmarking Disclosures

by Laura E. Hannusch, Quinn A. Arntsen and Paul C. Levin

The California Energy Commission (CEC) recently issued revised draft regulations setting the implementation schedule for its energy use disclosure program under AB 1103. Under the implementation schedule, commercial real estate owners must disclose energy benchmarking data starting on: July 1, 2012, for buildings with more than 50,000 square feet; January 1, 2013, for buildings with 10,001-49,999 square feet; and July 1, 2013, for buildings with 5,000-10,000 square feet.

The proposed regulations require that, prior to certain transactions, an owner of nonresidential property benchmark its building's energy use through federal and state systems and disclose certain information reports regarding the building's energy usage and ratings. Disclosures must be made to prospective buyers, lessees of the entire building or lenders financing the entire building as soon as practicable before execution of the sales contract, lease or loan application, respectively. The information reports will be generated automatically by the federal and state systems once the building owner and its utility companies submit the required data.

Background

In 2007, the California legislature passed AB 1103 (codified as California Public Utility Code Section 25402.10).¹ AB 1103 requires the owner of nonresidential property in California to benchmark its building's energy use through the United States Environmental Protection Agency's (EPA) ENERGY STAR Portfolio Manager system and disclose the building's energy usage and ratings for the most recent 12-month period. Although the statute as originally enacted required owners to make disclosures in 2009, it was later amended to give the CEC authority to establish an implementation schedule.² The CEC initially issued draft regulations requiring the mandatory disclosures to begin in 2011. However, in light of substantial negative feedback and the weak real estate market, implementation was delayed. The revised draft regulations reflect the CEC's updated (and probably final) rules.

¹ Assembly Bill 1103 (Saldaña, Stats. 2007, ch. 533).

² Assembly Bill 531 (Saldaña, Stats. 2009, ch. 323).

Impact on Commercial Real Estate Owners

Although the disclosure requirements are not overly burdensome, they are an additional task that commercial property owners will need to complete when selling, leasing or financing a property. To comply with the disclosure requirement, owners must take the following steps:³

1. The owner must open an Energy Star Portfolio Manager account through the EPA's Portfolio Manager website and enter space usage information for the building. **This must be done at least 30 days before a disclosure is required.**
2. The owner must select all utility companies that service the building, request that they submit energy usage data and grant them access to the owner's account.
3. All utility companies must upload energy use data to the EPA's Portfolio Manager website.
4. Once all data is entered into the EPA's Portfolio Manager website, the owner must complete the Disclosure Summary Sheet through the CEC website and submit the Compliance Verification Report.
5. The EPA Portfolio Manager website will automatically generate a Disclosure Summary Sheet, a Statement of Energy Performance, a Data Checklist and a Facility Summary, all of which must be presented to the applicable recipient (buyer, tenant or lender) prior to the transaction's closing.

This process must be completed as soon as practicable before a covered transaction (i.e., sale of the property, lease of the entire property or financing of the entire building), which means the property owner must start the process well in advance of executing the sales contract or lease or submitting the loan application.

The CEC believes that this rule will provide several additional benefits for property owners, lessees and lenders:⁴

- Allow owners to prioritize which buildings should receive energy efficiency upgrades throughout an owner's building portfolio.
- Allow owners and lessees to monitor the effectiveness of energy improvements.
- Increase the competitiveness of the property market by providing more information on a topic of interest to numerous owners and tenants.
- Demonstrate that owners are proactively managing energy issues.

However, it is still too early to know whether the required energy disclosures and benchmarking will have a significant impact on commercial real estate practices.

³ For detailed compliance guidance, see the CEC presentation on AB 1103 Disclosure Process, available at <http://www.energy.ca.gov/ab1103/documents/index.html>.

⁴ California Energy Commission, *Draft Regulations for AB 1103*, September 12, 2011. Available at <http://www.energy.ca.gov/ab1103/documents/index.html>.

Other Entities Require Disclosures

Building owners also should be aware of local ordinances and regulations which may impose additional energy audit or disclosure obligations. For example, San Francisco requires energy audits for commercial buildings larger than 50,000 square feet starting in October 2011.⁵

Disclosure of energy usage also is required under the U.S. Green Building Council's LEED for Existing Buildings rating system. Building owners seeking certification under this program must meet a minimum ENERGY STAR rating. As a result, building owners will benefit from improved energy efficiency both in terms of CEC disclosures and in working towards LEED certification.

If you have questions, please contact the Pillsbury attorney with whom you regularly work, or the authors:

Laura E. Hannusch (bio)
San Francisco
+1.415.983.1204
laura.hannusch@pillsburylaw.com

Quinn A. Arntsen (bio)
San Francisco
+1.415.983.1875
quinn.arntsen@pillsburylaw.com

Paul C. Levin (bio)
San Francisco
+1.415.983.1876
paul.levin@pillsburylaw.com



⁵See S.F. Envtl. Code, ch. 20, §2000 *et. seq.*

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.

© 2011 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.