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Energy Disclosure for Commercial Properties

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Improving energy efficiency in California buildings is a hot topic, and the state is now pushing the issue by requiring disclosure of energy ratings during lease, lending, and sale transactions for nonresidential buildings.

In 2007, section 25402.10 was added to the California Public Resources Code to create a system for measuring the energy consumption of nonresidential buildings. The goal? A 20 percent increase in energy efficiency by 2015. The statute outlines a simple, two-part benchmarking and disclosure process.

Data and Disclosure

The first part regulates the collection of data. Since the start of 2009, utility companies have been required to maintain all energy consumption records for nonresidential buildings in a format compatible with the EPA's Energy Star Portfolio Manager database. Energy ratings are based on information about a building such as its location, square footage, hours of operation, utility meter information, and other operating conditions. Each building's energy consumption is compared against similar facilities, and assigned a score from 1 to 100 (the most energy efficient).

The second part (and heart) of the law mandates disclosure of this information. As section 25402.10(d) states, "an owner or operator of a nonresidential building shall disclose the [EPA's] Energy Star Portfolio Manager benchmarking data and ratings for the most recent twelve-month period to a prospective buyer, lessee of the entire building, or lender that would finance the entire building."

New Regulations

Last spring the California Energy Commission published a proposed schedule, which after January 1 will require disclosure for any nonresidential building that is solely occupied by the owner or that measures more than 50,000 square feet. Any nonresidential buildings that measure 10,000 to 50,000 square feet will be required to comply as of January 1, 2012, and those as small as 1,000 square feet must be compliant by July 1, 2012. (See Cal. Code Regs., tit. 20, draft §§ 1680?1685.)

A building's energy score must be accurately calculated, either on the EPA's Portfolio Manager website (www.energystar.gov) by a knowledgeable building owner, or by a third-party energy firm. Although the EPA provides helpful resources on its website (see the Tools and Resources tab), this can be complicated stuff. And because an inaccurate disclosure could create liability, some owners will opt to spend a modest amount of money for professional help.

The required disclosures can also create legal issues regarding tenants' privacy rights. A building owner or an energy disclosure professional is responsible for entering data regarding the tenants' energy consumption over the previous twelve months, along with building parameters such as hours of operation, computer usage, and thermal settings. For the landlord of a triple net leased building, this entails disclosing the tenant's energy bill, which raises potential confidentiality issues. At a minimum, counsel should be writing leases that specifically allow for this statutory disclosure; however, in the absence of a specially tailored clause, seek the tenants' cooperation in attempt to comply with the law.

Limitations of the EPA's online Portfolio Manager may prove problematic for some commercial buildings. For example, though office buildings can be rated quite easily, other facilities such as movie theaters, bowling alleys, and funeral homes are not specifically addressed by the free online software.

Despite imperfections, California's energy disclosure law is an important step forward. Commercial tenants, buyers, and lenders in this state will soon be comparing buildings based on their energy efficiency and, it is hoped, the market will reward more energy efficient buildings.

So what should attorneys suggest to their clients who own buildings? They should first see if the online compliance resources will suit their purposes. If a more searching analysis is required, the clients can consider

having their buildings surveyed by an energy engineer to understand their energy spending and how to reduce it. Indeed, some owners may wish to be more aggressive in the "green market," opting for a full-blown energy audit to identify ways to make a building more efficient.

Energy disclosures do more than comply with legal rules. They also can contribute to a smarter real estate market, just as the fuel efficiency stickers on new cars help educate consumers. And studying a building's energy use may lead to less consumption, higher net operating profits, and a healthier planet.

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