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**ARTICLE****MANDATORY DISCLOSURES CONCERNING ACCESSIBILITY  
COMPLIANCE AND ENERGY CONSUMPTION IN CALIFORNIA  
COMMERCIAL PROPERTIES**

Xavier L. Gutierrez, Karen R. Turk, and Chad A. Gallagher\*

This article discusses two new disclosures that must be included in certain real estate contracts and leases. The disclosures pertain to Accessibility Compliance and Energy Consumption, and affect the required contents of most non-residential leases of improved real property in California as well as loan applications and purchase agreements affecting such non-residential properties.

**1. ENERGY CONSUMPTION DISCLOSURE:**

**REQUIRED ENERGY STAR disclosure to reduce greenhouse gas emissions.** California law requires that electric and gas utilities, on and after January 1, 2009, maintain records of the energy consumption data of all nonresidential buildings, and upon authorization of the building owner or operator, upload all the data to the EPA's ENERGY STAR Portfolio Manager.<sup>1</sup> This program is in furtherance of federal and state policies to reduce greenhouse gas emissions. As thoroughly explained by the federal government's website,<sup>2</sup> ENERGY STAR is a voluntary labeling program, established by the federal Environmental Protection Agency in 1992, designed to identify and promote energy-efficient

\* Xavier L. Gutierrez, Chad A. Gallagher, and Karen R. Turk are attorneys in the Walnut Creek office of Miller Starr Regalia. Mr. Gutierrez, a senior counsel in the firm, and Chad Gallagher, a shareholder, specialize in leasing and property acquisition, disposition and development.

products to reduce greenhouse gas emissions.<sup>3</sup> In the context of commercial buildings, the uploading of the energy data to the ENERGY STAR Portfolio Manager is intended to enable building owners to rate energy performance on a scale of 1-100 relative to similar buildings nationwide. Buildings rating 75 or greater may qualify for the ENERGY STAR.<sup>4</sup> As evidenced by the EPA's recent list of top cities that have the most ENERGY STAR certified buildings, California has embraced the program, with six cities listed among the Top 25.<sup>5</sup>

**Energy consumption data.** As noted, since January 1, 2009, electric and gas utilities have been required to maintain records of the energy consumption data of all nonresidential buildings in California, and upon authorization of the building owner or operator, upload all the data to the EPA's ENERGY STAR Portfolio Manager.<sup>6</sup> This initial legislation set the stage to eventually require property owners to disclose the data to prospective buyers, tenants and lenders so they would be better able to compare and determine the efficiency of buildings prior to buying, leasing or lending on them. Initially owners and operators of nonresidential buildings were required, on or after January 1, 2010, to disclose the benchmarking data and ratings for the most recent 12-month period to a prospective buyer, lessee of the entire building, or lender that would finance the entire building.<sup>7</sup>

In 2009,<sup>8</sup> the legislature revised the statute to remove the firm January 1, 2010 deadline and instead require the disclosure obligation based on a schedule of compliance to be established by the California Energy Commission.<sup>9</sup> On December 17, 2012, the Commission finally adopted these regulations,<sup>10</sup> which now set forth the following compliance schedule:<sup>11</sup>

- Starting July 1, 2013, the disclosure requirements apply to any owner of a building with a total gross floor area measuring more than 50,000 square feet.
- Starting January 1, 2014, the disclosure requirements extend to any owner of a building with a total gross floor area measuring more than 10,000 square feet.
- Starting July 1, 2014, the disclosure requirements extend to any owner of a building with a total gross floor area measuring at least 5,000 square feet.

Disclosures must be made no later than 24 hours prior to execution of a sales contract (if to a buyer), no later than 24 hours prior to execution of a lease (if to a tenant *of the entire building*) and no later than submittal of a loan application (if to a lender of a loan upon the entire

building).<sup>12</sup> The disclosure requirements pertain to a tenant of the entire building, so it appears that no disclosures are currently required to tenants leasing less than the entire building.

- ♦ **Comment:** The Commission has issued a notice that it will suspend enforcement of the regulations until September 1, 2013 due to the unavailability of the Portfolio Manager, which is being upgraded. In the interim the Commission encourages disclosure of the required information.<sup>13</sup>

**Procedures to implement disclosure.** Before disclosure can happen, the property owner must open an account on the EPA's ENERGY STAR program Portfolio Manager website in order to obtain the relevant data. The Commission's implementing regulations allow the utility or energy provider to take up to 30 days to upload the energy data.<sup>14</sup>

The new regulations further direct that, after the data is uploaded, and before the required disclosure, the building owner must access the Commission's website, and do the following:<sup>15</sup>

- (1) Download a Disclosure Summary Sheet;<sup>16</sup>
- (2) Select the link to the Portfolio Manager and log on to the owner's account;
- (3) Complete and submit the compliance report; and
- (4) Download the building's Statement of Energy Performance,<sup>17</sup> Data Checklist,<sup>18</sup> and Facility Summary.<sup>19</sup> *Significantly*, the documents listed in this subsection (4) expire 30 days after they are generated.<sup>20</sup>

According to the regulations, if there is information missing from the disclosure, and if the building owner has made a reasonable effort to ascertain the missing information, the owner may use an approximation of the information, provided that it is identified as such, and is reasonable, based on the best information available to the owner, and not used for the purpose of circumventing the disclosure requirements.<sup>21</sup>

The statute does not specify the consequences of a failure to include the required disclosure in the lease, contract or loan application. The statute provides that the ENERGY STAR disclosure obligation neither increases nor decreases the duties, if any, of the property owner, operator, agent or broker, to disclose the existence of a material fact affecting the property.<sup>22</sup> However, it can be anticipated that where a lease, contract or loan is entered into by a property owner who failed to comply with the mandatory disclosure requirements, a claim may be asserted that the transaction, or some part of it, is void for illegality or otherwise subject to legal attack, although the statute is completely silent on these issues.

## 2. ACCESSIBILITY COMPLIANCE DISCLOSURE:

**Background; Construction-Related Accessibility Standards Compliance Act.** The second mandatory disclosure is a confirmation of whether or not the property has undergone inspection by a Certified Access Specialist (CASp).<sup>23</sup> The functions of a CASp are set forth in the Construction-Related Accessibility Standards Compliance Act.<sup>24</sup> This Act details a comprehensive scheme for the certification of businesses as being in compliance with accessibility standards. Among other things, the most recent amendment to the Act revises existing disability access law to: (1) prohibit pre-lawsuit letters from lawyers demanding money; (2) prevent “stacking” of multiple claims to increase statutory damages; (3) require that demand letters identify the barriers that prevented full and equal access to the business premises or services, as well as the dates the disabled person encountered those barriers; (4) reduce the amount of statutory damages available for unintentional violations of the law in certain circumstances if the necessary changes are made soon after a suit is filed; and (5) require the aforementioned CASp inspection disclosure.

CASp certification is intended to provide certain advantages to a business owner faced with construction-related accessibility claims. Although the conduct of a CASp inspection is not mandatory, the disclosure of whether the property has been CASp inspected is mandatory.<sup>25</sup> A construction-related accessibility claim means any claim of a violation of specified accessibility standards with respect to a place of *public accommodation* (e.g., a restaurant, store, office, etc.). A place of public accommodation does *not* include housing accommodations.<sup>26</sup>

**Properties that are covered.** The statute purports to require inspections and compliance with accessibility statutes only for places of public accommodation. However, the potential for any use of a property by a tenant to be considered a public accommodation means that possible claims of noncompliance with accessibility statutes will be asserted, and the failure to have an inspection conducted and/or to disclose that it has or has not been done will potentially deprive the owner and its tenant of the benefits of the statute.

CASp certification of a business may entitle a defendant in a construction-related accessibility claim to a stay and early evaluation conference in the lawsuit.<sup>27</sup> The Act encourages CASp certification by lowering certain statutory damages that may be awarded.<sup>28</sup> It also requires plaintiffs to comply with certain notice and other requirements as a precondition to accessibility litigation,<sup>29</sup> and creates a potential for at-

torney discipline in certain cases of noncompliance.<sup>30</sup>

**Employment of a certified access specialist.** Property owners in general are not required to hire a CASp, and according to the statute, such property owner's election *not* to hire a CASp is not admissible to prove the lack of an owner's intent to comply with the law.<sup>31</sup> However, the Act requires local agencies to hire, within specified timeframes, building inspectors who are CASp certified. Additionally, if a permit applicant or member of the public requests consultation from a CASp, the local agency may charge for the services provided.<sup>32</sup> A property owner who fails to make such a request and have the property inspected will be required to disclose the failure to obtain a CASp inspection,<sup>33</sup> and will also be denied the benefits of the Act if an accessibility claim is later filed against the owner or a tenant of the owner.<sup>34</sup>

**Inspection requirements.** Every CASp who inspects the premises must provide the building owner or tenant with a written inspection report with specified contents, as well as a statutorily prescribed notice.<sup>35</sup> Once the CASp determines that the premises meets applicable construction-related accessibility standards, in addition to the report and notice, the building owner or tenant requesting the inspection must be provided with a numbered and dated disability access inspection certificate, and the CASp must keep records of the certificate.<sup>36</sup>

♦ **Comment:** The website for the California Commission on Disability access is <http://www.ccca.ca.gov>. Information concerning Voluntary Certified Access Specialists can be found at <http://www.dgs.ca.gov/dsa/programs/programcert/casp.aspx>.

**Commercial landlord disclosure requirement – CASp Inspection** Effective July 1, 2013, commercial leases and rental agreements must contain a statement by the landlord as to whether a commercial property being leased or rented has undergone inspection by a CASp. If the premises has undergone such an inspection, the disclosure must state whether the property has or has not been determined to meet all applicable construction-related accessibility standards.<sup>37</sup> The statutory notice requirement does not specify that it is limited to properties containing “public accommodations” nor does it lend itself to such an interpretation. The language of the entire disclosure statute is as follows:

A commercial property owner or lessor shall state on every lease form or rental agreement executed on or after July 1, 2013, whether the property being leased or rented has undergone inspection by a Certified Access Specialist (CASp),

and, if so, whether the property has or has not been determined to meet all applicable construction-related accessibility standards pursuant to Section 55.53.

The term “commercial property” is not defined, and while a lease of a dwelling unit to a residential occupant is not required to include the disclosure, it is not certain whether other leases of residential property, such as an apartment project master lease, is required to include the disclosure. The statute also does not specify whether “the property being leased or rented” includes common areas in addition to just the tenant’s exclusive premises; although one would think that common areas may be more important to ensuring accessibility than the interior of a tenant’s premises.

**Import.** In light of this new law, all form leases for properties in California should specifically state whether or not the property has been inspected by a CASp, and whether all the recommendations of the CASp inspector were addressed. Although not expressly noted in the statute, the conservative approach would be to include both the tenant’s exclusive premises and the common areas when making the disclosure. It appears that the underlying goal of this new legal requirement (along with the related accessibility laws that provide benefits to proactive landlords by reducing the fixed fees applicable to a violation) is to reduce Americans with Disability Act<sup>38</sup> issues and related claims by encouraging owners to have their commercial properties inspected by a CASp and to actually perform the work suggested in the inspection report. Although the statute prescribes no penalty for failing to make the disclosure of CASp inspections, it may be assumed that an owner who does not do so is exposing itself as well as its prospective tenants to increased liability for potential accessibility claims, and that some effort to attach liability on the part of a landlord to a tenant or to claim illegality as grounds for rescission of a lease or other relief may be made by tenants in some situations.

## NOTES

1. Pub. Resources Code, §25402.10, codified AB 1103 (2007 Stats., ch. 533) and amended by AB 531 (2009 Stats., ch. 323).
2. [http://www.energystar.gov/index.cfm?c=about.ab\\_history](http://www.energystar.gov/index.cfm?c=about.ab_history).

As additionally explained on the website:

The ENERGY STAR program was established by EPA in 1992, under the authority of the Clean Air Act Section 103(g). Section 103(g) of the Clean Air Act directs the Administrator to “conduct a basic engineering research and technology program to develop, evaluate, and demonstrate non-regulatory strategies and technologies for reducing air pollution.” In 2005, Congress enacted the Energy Policy Act. Section 131 of the Act amends Section 324 (42 USC 6294) of the Energy Policy and Conservation Act, and “established at the Department of Energy and the Environmental Protection Agency a voluntary program to identify and promote energy-efficient products and buildings in order to reduce energy consumption, improve energy security, and reduce pollution through voluntary labeling

of or other forms of communication about products and buildings that meet the highest energy efficiency standards.”

3. The website further explains the following historical development of the label: “Computers and monitors were the first labeled products. Through 1995, EPA expanded the label to additional office equipment products and residential heating and cooling equipment. In 1996, EPA partnered with the US Department of Energy for particular product categories. The ENERGY STAR label is now on major appliances, office equipment, lighting, home electronics, new homes and commercial and industrial buildings and plants.”
4. [http://www.energystar.gov/index.cfm?c=green\\_buildings.green\\_buildings\\_index](http://www.energystar.gov/index.cfm?c=green_buildings.green_buildings_index)
5. The California cities on the List of most ENERGY STAR certifications include: #1 Los Angeles (528), #6 San Francisco (291), #15 San Diego (123), #16 San Jose (114), #20 Sacramento (97), and #24 Riverside (69). See [https://www.energystar.gov/ia/business/downloads/Top\\_Cities\\_chart.pdf](https://www.energystar.gov/ia/business/downloads/Top_Cities_chart.pdf)
6. Pub. Resources Code, §25402.10, codified AB 1103 (2007 Stats., Ch. 533) and amended by AB 531 (2009 Stats., Ch. 323).
7. AB 1103 (2007 Stats., ch. 533).
8. AB 531 (2009 Stats., ch. 523).
9. For information on the commission’s website, see <http://www.energy.ca.gov/ab1103/>.
10. See Cal. Code Regs., tit. 20, Div. 2, ch. 4, Art. 9, §§1680 to 1684 (“tit. 20”).
11. Cal. Code Regs., tit. 20, §1682.
12. Cal. Code Regs., tit. 20, §1683.
13. See notice of postponement of enforcement at [http://www.energy.ca.gov/ab1103/rulemaking/notices/2013-06-13\\_Outage\\_Notice.pdf](http://www.energy.ca.gov/ab1103/rulemaking/notices/2013-06-13_Outage_Notice.pdf).
14. Cal. Code Regs., tit. 20, §1684. **Comment:** If a building has a utility or energy provider account for which the owner is not the customer of record, the provider must aggregate or use other means to reasonably protect the confidentiality of the customer.
15. Cal. Code Regs., tit. 20, §1684.
16. Defined in the regulations as follows: “Disclosure Summary Sheet” means the Energy Commission document detailing the contents and relevance to California buildings of disclosures generated by Portfolio Manager, as represented in Appendix A.” Cal. Code Regs., tit. 20, §1681.
17. Defined in the regulations as follows: “Statement of Energy Performance” means a report generated by Portfolio Manager that supplies data about a building’s energy performance and if available, the building’s ENERGY STAR® Energy Performance Score.” Cal. Code Regs., tit. 20, §1681.
18. Defined in the regulations as follows: “Data Checklist” means a report generated by Portfolio Manager that summarizes a property’s physical and operating characteristics.” Cal. Code Regs., tit. 20, §1681.
19. Defined in the regulations as follows: “Facility Summary” means a report generated by Portfolio Manager that summarizes the space and energy usage of a building and compares a building’s energy use to national medians.” Cal. Code Regs., tit. 20, §1681.
20. Cal. Code Regs., tit. 20, §1684.
21. Cal. Code Regs., tit. 20, §1684.
22. Pub. Resources Code, §25402.10.
23. Civ. Code, §1938. This section codifies a portion of SB 1186 (2012 Stats., ch. 383).
24. SB 1608 (2008 Stats., ch. 549). See Civ. Code, §§55.1 to 55.545.
25. Civ. Code, §1983.
26. Civ. Code, §55.3. “Place of public accommodation” is defined in §55.52, subd. (a)(7) as having the same meaning as “public accommodation” as set forth in Section 12181(7) of Title 42 of the United States Code and federal regulations adopted pursuant to that section.
27. Civ. Code, §55.54, subd. (b).
28. Civ. Code, §55.56, subd. (f).
29. Civ. Code, §55.3.
30. Bus. & Prof. Code, §6106.2.

31. Civ. Code, §55.53, subd. (f). For example, an attorney who causes a summons and complaint to be served for these types of claims must provide a separate notice with specified contents (including the right to the temporary stay) to the defendant—even if the premises is not CASp certified.
32. Civ. Code, §55.53.
33. Civ. Code, §1983.
34. See Civ. Code, §§55.54, subd. (c) (early evaluation enforcement and stay), §55.56 subd. (f) (liability limitations for CASp-inspected properties).
35. Civ. Code, §55.53.
36. Civ. Code, §55.53, subd. (e).
37. Civ. Code, §1938, provides as follows: “[a] commercial property owner or lessor shall state on every lease form or rental agreement executed on or after July 1, 2013, whether the property being leased or rented has undergone inspection by a Certified Access Specialist (CASp), and, if so, whether the property has or has not been determined to meet all applicable construction-related accessibility standards pursuant to Section 55.53.”
38. 42 U.S.C.A. §§12101 et seq.

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