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To our clients and friends:

We are pleased to present you with our February issue of Mintz Levin's *Green Building Newsletter*.

AB 1103 Update: Nonresidential Building Energy Use Disclosure Requirements Now In Effect

BY BRANDON BARKER

After a series of delays in both implementation and enforcement, as of January 1, 2014, California Assembly Bill 1103 ("AB 1103," codified as California Public Resources Code Section 25402.10) is now in effect and enforceable by the California Energy Commission ("CEC") for all nonresidential buildings¹ exceeding a total gross floor area of 10,000 square feet.² Nonresidential buildings with a total gross floor area measuring at least 5,000 square feet and up to 10,000 square feet will be required to comply with the statute as of July 1, 2014.³

Under AB 1103, owners and operators of nonresidential buildings must disclose certain building energy performance data to a prospective buyer, a tenant of the entire building, or a lender who would finance or refinance the entire building before the sale, lease, financing, or refinancing of the building occurs.

For a more extensive discussion of the background of AB 1103, and the nature, scope, and timing of the required disclosures, please access the March 2013 issue of Mintz Levin's *Green Building Newsletter* [here](#).

Mixed Use Buildings

The CEC recently clarified the applicability of AB 1103 to mixed use buildings.⁴ If a portion of a mixed use building is residential (e.g., condominium), the owner or operator of the building is not required to disclose the energy performance data; however, as set forth in Endnote 1 below, the regulations provide that AB 1103 applies to R-1 buildings (e.g., a hotel) and I-1 buildings (e.g., an assisted living facility). Consequently, buildings that contain a mixture of nonresidential and R-1 use or nonresidential and I-1 use (among other possible combinations) are required to comply with the statute.

Access to Tenant Utility Usage Data

Frequently in leases, tenants will pay utilities directly to utility companies, and a landlord may not have access to such utility bills. As a result, where a landlord wants to sell, lease, finance, or refinance the entire building (and the building is subject to the statute), a landlord may have difficulty obtaining the relevant energy usage data from the tenant.

The regulations do permit an owner or operator to reasonably approximate data if an owner or operator has made a reasonable effort to ascertain missing information. Additionally, in cases where only partial data is available, the CEC has stated that owners or operators may, for example, use the data from one tenant for another, or use the partial data of one tenant to determine the energy usage of the entire building. Building energy models may also be used to estimate missing energy usage data. Further, where no data is available (and other measures to approximate the data are not suitable for the particular building), the Energy Star Portfolio Manager website does

provide default values for different building types that may be applied by an owner or operator to the relevant building.

Nonetheless, to avoid relying on estimations that could trigger compliance questions from the CEC, a more prudent approach is to include language in leases and lease amendments, which obligates a tenant to provide energy usage data upon a landlord's request. Here is an example (specific language would need to be tailored to the particular property and lease):

"If Tenant is billed directly by a utility company with respect to Tenant's electricity [and natural gas/propane] usage at the Premises, then, promptly upon request, Tenant shall provide monthly electricity [and natural gas/propane] usage data for the Premises to Landlord for the period of time requested by Landlord (in electronic or paper format) or, at Landlord's option, provide any written authorization or other documentation required for Landlord to request information regarding Tenant's electricity [and natural gas/propane] usage data with respect to the Premises directly from the utility company."

Enforcement of Statute and Regulations

Although neither the statute nor the regulations expressly impose fines or other penalties for noncompliance, the CEC recently indicated that it may investigate allegations of noncompliance, initiate civil and administrative proceedings to enforce compliance or obtain injunctive relief, and impose penalties and fines for noncompliance. Further, parties may file complaints with the CEC alleging noncompliance and request that the CEC undertake an investigation. It remains to be seen whether the CEC will be aggressive in enforcing the disclosure requirements.

Endnotes

¹ Most nonresidential buildings are required to comply with the statute and its accompanying regulations. Specifically, the following building occupancy types, as defined in the California Building Code, are subject to the statute: Assembly (A), Business (B), Educational (E), Institutional – Assisted Living (I-1, R-1), Institutional – Nonambulatory (I-2), Mercantile (M), Residential – Transient (R-1), Storage (S), and Utility – Parking Garage (U). Conversely, all other building occupancy types are *not* subject to the statute, including, without limitation, the following: Factory and Industrial (F-1, F-2), High Hazard (H-1, H-2, H-3, H-4, H-5), Institutional (I-3, I-4), Residential (R-2, R-2.1, R-3, R-3.1, R-4), and Laboratory (L). Building occupancy types are set forth on building occupancy permits.

² The updated final regulations promulgated by the CEC are available [here](#).

³ Since a building owner or operator must open an account or update an existing account on the EPA's Energy Star Portfolio Manager website at least 30 days before a required disclosure, a building owner or operator would need to initiate the compliance process on or before June 1, 2014 for a sale, lease, financing, or refinancing of an entire building that occurs on July 1, 2014.

⁴ An updated FAQ promulgated by the CEC is available [here](#).

CONTACTS:

Ani E. Ajemian
617.348.1882
AEAjemian@mintz.com

Christa S. Eilers
858.314.1890
CSEilers@mintz.com

Jeffrey A. Moerdler
212.692.6700
JAMoerdler@mintz.com

David M. Alin
212.692.6294
DALin@mintz.com

Meryl J. Epstein
617.348.1635
MJEpstein@mintz.com

Mary Lee Moore
617.348.1697
MLMoore@mintz.com

Frederick S. Armstrong
617.348.4497
FSArmstrong@mintz.com

Raymond C. Estes
617.348.1895
RCEstes@mintz.com

Marilyn Newman
617.348.1774
MNewman@mintz.com

Brandon E. Barker
415.432.6108
BEBarker@mintz.com

Eric J. Freeman
617.348.3072
EFreeman@mintz.com

David L. O'Connor
617.348.4418
DOConnor@mlstrategies.com

Brady Berg
650.251.7758
BBerg@mintz.com

Stephen E. Friedberg
212.692.6875
SEFriedberg@mintz.com

Susan P. Phillips
617.348.1713
SPhillips@mintz.com

Scott Biel

Kenneth M. Gantz

Jennifer Sacco Smith

858.314.1555
SBiel@mintz.com

Joel R. Bloom
617.348.1608
JRBloom@mintz.com

Thomas R. Burton, III
617.348.3097
TRBurton@mintz.com

Allan Caggiano
617.348.1705
ACaggiano@mintz.com

Susan E. Carlson
617.348.4438
SCarlson@mintz.com

Ralph A. Child
617.348.3021
RChild@mintz.com

Paul Churchill
415.432.6099
PChurchill@mintz.com

Adam B. Coffin
617.348.1701
ABCoffin@mintz.com

Andrew A. Dean
617.348.3081
AADean@mintz.com

617.348.4924
KMGantz@mintz.com

Daniel O. Gaquin
617.348.1874
DOGaquin@mintz.com

Jason W. Georgitis
617.348.1644
JWGeorgitis@mintz.com

David A. Gilbert
617.348.1645
DAGilbert@mintz.com

Jeremy D. Glaser
858.314.1515
JDGlaser@mintz.com

William M. Hill
617.348.1794
WHill@mintz.com

Jennifer M. Kiely
617.348.4417
JMKiely@mintz.com

Peter D. McCarthy
617.348.1719
PMcCarthy@mintz.com

617.348.1678
JSaccoSmith@mintz.com

Dawn Saunders
858.314.1875
DSaunders@mintz.com

Gabriel Schnitzler
650.251.7720
GSchnitzler@mintz.com

Samuel M. Starr
617.348.4467
TStarr@mintz.com

Bryan M. Stockton
202.434.7480
BStockton@mlstrategies.com

Jennifer Sulla
617.348.3092
JSulla@mintz.com

Sahir Surmeli
617.348.3013
SSurmeli@mintz.com

Colin G. Van Dyke
617.348.1655
CGVanDyke@mintz.com

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