

CALIFORNIA ENERGY COMMISSION1516 Ninth Street
Sacramento, California 95814Main website: www.energy.ca.gov**NOTICE OF EMERGENCY RULEMAKING ACTION****READOPTION OF EMERGENCY REGULATION
ESTABLISHING THE COMPLIANCE SCHEDULE FOR THE
NONRESIDENTIAL BUILDING ENERGY USE DISCLOSURE PROGRAM
(TITLE 20, SECTION 1682(c))****California Energy Commission
Docket No. 14-EUDP-EMY-01****February 18, 2015**

Pursuant to the requirements of Government Code Section 11346.1(a)(1), the California Energy Commission (the Commission) is providing notice of proposed emergency regulatory action. The Commission proposes to readopt the emergency regulation setting forth Title 20 Section 1682(c) of the California Code of Regulations (the Emergency Regulation). This action is taken pursuant to Government Code Section 11346.1(h).

The Emergency Regulation establishes July 1, 2016, as the date by which nonresidential buildings with a total gross floor area measuring at least 5,000 square feet and up to 10,000 square feet must comply with the Nonresidential Energy Use Disclosure Program. The Nonresidential Building Energy Use Disclosure Program is codified in Public Resources Code Section 25402.10, and the Commission Regulations implementing the program are set forth in Title 20 Section 1680 et seq. of the California Code of Regulations.

The Emergency Regulation became effective on September 2, 2014, and will expire on March 3, 2015, unless the Commission readopts the Emergency Regulation to extend it for an additional 90 days. This will allow the Emergency Regulation to remain in effect while the Commission finalizes a separate rulemaking to certify and make permanent the Emergency Regulation. As discussed in the following section of this notice, the Notice of Proposed Action for this separate rulemaking was published in the California Regulatory Notice Register on February 13, 2015.

The Commission proposes to readopt the Emergency Regulation and the Finding of Emergency at the Business Meeting on February 25, 2015. The Emergency Regulation and the Finding of Emergency are attached to the proposed resolution as Exhibits A and B respectively. If the proposed resolution is adopted by the Commission, it is anticipated that the Emergency Regulation and Finding of Emergency will be filed with the Office of Administrative Law (OAL) on February 25, 2015.

Government Code Section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code Section 11349.6.

OTHER ACTIVITY FOR THE NONRESIDENTIAL BUILDING ENERGY USE DISCLOSURE PROGRAM

The Commission recently initiated a separate rulemaking action to certify and make permanent the Emergency Regulation through a rulemaking in compliance with Government Code Section 11346.1(e) (the Certification Rulemaking). The Notice of Proposed Action for the Certification Rulemaking was published in the California Register on February 13, 2015, and public comments for the Certification Rulemaking are due by March 31, 2015. The Commission will hold a public hearing on the Certification Rulemaking at its regularly scheduled Business Meeting on April 8, 2015. The Commission docket number for the Certification Rulemaking is 15-OIR-03.

The Commission staff will hold a pre-rulemaking workshop on more comprehensive proposed regulatory changes to the Nonresidential Building Energy Use Disclosure Program on February 20, 2015. The Notice of Staff Workshop, which attaches the proposed regulatory changes and provides instructions for offering public comments on the proposed regulatory changes, may be found at http://www.energy.ca.gov/ab1103/documents/2015-02-20_workshop/2015-02-20_staff_workshop.pdf. Staff is accepting public comments on the proposed regulatory changes through 4:00 p.m. on Friday, March 6, 2015, and anticipates initiating a rulemaking proceeding to adopt more comprehensive regulatory changes later this year.

PUBLIC COMMENT ON READOPTION OF EMERGENCY REGULATIONS

In order to be considered, public comments on proposed re-adoption of the Emergency Regulations must be submitted in writing to BOTH of the following:

Office of Administrative Law (OAL)
300 Capitol Mall, Suite 120
Sacramento, CA 95814

Or by email to: staff@oal.ca.gov

Docket Unit
California Energy Commission
Docket No. 14-EUDP-EMY-01
1516 9th Street, MS-4
Sacramento, CA 95814

Or by email to: DOCKET@energy.ca.gov
Or by fax to Dockets at (916) 654-4354

Comments must identify the emergency topic and may address the finding of emergency, the standards set forth in Sections 11346.1 and 11349.1 of the Government Code and Section 25402.10 of the Public Resources Code.

Comments must be received within five calendar days of filing of the emergency regulations. Please refer to OAL's website (www.oal.ca.gov) to determine the date on which the regulations are filed with OAL.

PUBLIC ADVISER

The Commission's Public Adviser's Office is available to assist any person who wishes to participate in this proceeding. For assistance from the Public Adviser's Office, please call (916) 654-4489 or toll-free in California at (800) 822-6228 or contact publicadviser@energy.ca.gov.

Attachment

**[PROPOSED] RESOLUTION
READOPTING EMERGENCY REGULATION
AND FINDING OF EMERGENCY**

20 California Code of Regulations Section 1682(c)

STATE OF CALIFORNIA

State Energy Resources Conservation
and Development Commission

Nonresidential Building Energy
Use Disclosure Program

Docket No. 14-EUDP-EMY-01
Resolution No. 15-0225-1f

[PROPOSED] RESOLUTION
READOPTING EMERGENCY REGULATION
AND FINDING OF EMERGENCY

20 California Code of Regulations Section 1682(c)

WHEREAS staff proposes to readopt pursuant to Government Code Section 11346.1, subdivision (h), the Emergency Regulation amending Section 1682, subdivision (c) of Title 20 of the California Code of Regulations, to delay until July 1, 2016, the application of the Nonresidential Energy Use Disclosure Program to buildings with a total gross floor area measuring at least 5,000 square feet and up to 10,000 square feet, as reflected in the proposed Express Terms attached hereto as Exhibit A; and

WHEREAS staff proposes for the Commission to readopt the Finding of Emergency pursuant to Government Code Section 11346.1, attached hereto as Exhibit B, that the proposed amendments to Section 1682, subdivision (c), of Title 20 of the California Code of Regulations are necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare; and

WHEREAS the emergency circumstances are unchanged since the initial adoption of the Finding of Emergency; and

WHEREAS the Notice of Proposed Action to certify the Emergency Regulation as required by Government Code Section 11346.1, subdivision (e), was published in the California Register on February 13, 2015, demonstrating that the Energy Commission has made substantial progress and proceeded with diligence to certify the Emergency Regulation as required by Government Code Section 11346.1, subdivision (e),

NOW THEREFORE the Commission:

Finds that substantial progress has been made to certify the Emergency Regulation pursuant to Government Code Section 11346.1, subdivision (e), as required by Government Code Section 11136.1(h); and

Finds that the emergency circumstances since the initial adoption of the Finding of Emergency; and

Adopts the proposed Express Terms, attached hereto as Exhibit A; and

Adopts the Finding of Emergency, attached hereto as Exhibit B; and

Directs the Executive Director to take, and delegates to the Executive Director the authority to take, all actions necessary to ensure the Emergency Regulation stays in effect until the Emergency Regulation is certified and made permanent, or superseded by other regulatory action taken by the Commission.

CERTIFICATION

The undersigned Secretary to the Commission does hereby certify that the foregoing is a full, true and correct copy of a Resolution duly and regularly adopted at a meeting of the California Energy Commission held on February 25, 2015.

AYE:

NAY:

ABSENT:

ABSTAIN:

HARRIET KALLEMEYN
Secretariat

RESOLUTION NO. 15-0225-1f

Exhibit A

Emergency Regulation

**Express Terms for the
Nonresidential Building Energy Use Disclosure Program**

**California Code of Regulations
Title 20. Public Utilities and Energy
Division 2. State Energy Resources Conservation and Development Commission
Chapter 4. Energy Conservation
Article 9. Nonresidential Building Benchmarking and Disclosure
Sections 1680-1684**

Effective September 2, 2014

Section 1682. Schedule of Implementation

A building owner shall comply with this article according to the following schedule:

- (a) On and after July 1, 2013, for a building with total gross floor area measuring more than 50,000 square feet.
- (b) On and after January 1, 2014, for a building with a total gross floor area measuring more than 10,000 square feet and up to 50,000 square feet.
- (c) On and after July 1, ~~2014~~2016, for a building with a total gross floor area measuring at least 5,000 square feet and up to 10,000 square feet.

Note: Authority cited: Sections 25213, 25218(e), 25402.10, Public Resources Code.
Reference: Section 25402.10, Public Resources Code.

RESOLUTION NO. 15-0225-1f

Exhibit B

**FINDING OF EMERGENCY
FOR
PROPOSED REGULATIONS
TO AMEND THE COMPLIANCE SCHEDULE FOR THE
NONRESIDENTIAL BUILDING ENERGY USE DISCLOSURE PROGRAM
OF THE
CALIFORNIA ENERGY COMMISSION**

Government Code Section 11346.1 mandates that any finding of emergency shall include a written statement that contains the information required by paragraphs (2) to (6), inclusive, of subsection (a) of Section 11346.5, and a description of specific facts showing the need for immediate action.

FINDING OF EMERGENCY

The California Energy Commission (the Commission) finds that the changes proposed herein are necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare. Specifically, the Commission finds that changing the implementation date for owners and operators of nonresidential buildings of at least 5,000 square feet and up to 10,000 square feet to comply with the requirements of the Nonresidential Building Energy Use Disclosure Program (the Program) is necessary to avoid potential market confusion, which could cause delays and drive up transaction costs in commercial real estate transactions. This change is intended to provide sufficient time to allow stakeholders, including utilities, to develop and implement best practices to accommodate the entrance of these smaller buildings into the compliance requirement, and also allow time for the Commission to consider developing and adopting regulations to promote compliance with the Program. The following information is evidence that an amendment to Title 20, Section 1682(c) of the Program is necessary for the immediate preservation of the general welfare of the public.

Currently, the Program applies to most nonresidential buildings that are at least 10,000 square feet. However, on July 1, 2014, the Program expands to also include nonresidential buildings that are at least 5,000 square feet and up to 10,000 square feet pursuant to the schedule set forth in Section 1682(c). The Commission proposes to delay implementation of Section 1682(c) by two years, until July 1, 2016.

Throughout May and June 2014, the Commission received information from stakeholders indicating that there are significant barriers to compliance with the Program. Some of the specific concerns raised are explained in more detail below.

The Commission is concerned that significantly expanding the scope of this program while these barriers are still in place would cause market confusion and hardship to the public and the stakeholders affected by these regulations.

To avoid these outcomes, the Commission proposes to delay the implementation schedule for owners of nonresidential buildings of 5,000 to 10,000 square feet from July 1, 2014 to July 1, 2016 (Title 20, Section 1682, subsection (c)). This will allow the Commission sufficient time to study, address, and resolve these barriers to implementation through the Informational Proceeding adopted on June 18, 2014, discussed further below.

Background and Justification

Several stakeholders have expressed concerns about significant barriers to compliance, in a number of verbal formats.

For example, there were technical difficulties in the roll-out of the United States Environmental Protection Agency's ENERGY STAR Portfolio Manager platform and software. For much of the first six-months after the Program initially went into effect, the platform was unavailable, which impeded compliance with the program until January 1, 2014.

In addition, the practices of utilities and energy service providers in complying with the Program have been inconsistent. Some utilities require tenant consent before they will release the required information. This can lead to high transaction costs for building owners and operators when tenants are unwilling to sign releases or when it is difficult to locate the person who has authority to consent to the release. In addition, some smaller utilities have expressed concerns about their ability to process the information required to comply with the Program. These smaller utilities may lack the staff and resources to overcome current barriers to implementing the program.

Other stakeholders, including some utilities, have been actively developing best practices approaches to lower transaction costs and paving the way to compliance. The Commission believes that delaying expansion of the program to nonresidential buildings between 5,000 and up to 10,000 square feet by two years will provide time for these practices to be more fully implemented and to allow other utilities to develop and implement their own best practices. It will also allow time for the Commission to consider promulgating regulations that might lower the cost of compliance to utilities, and promote consistent practices across the state.

Specific concerns have also been raised about aspects of the regulations themselves. For example, some stakeholders have stated the regulations are ambiguous as to when disclosures are due, and that they could be read to require disclosure at the beginning of the real estate transaction, which in some cases may not be commercially practical. Others have argued the regulations inappropriately require disclosure of energy use and benchmarking data to the Commission.

Some stakeholders have also suggested that the Commissions' education and outreach efforts have been inadequate.

Given the breadth of concerns about the existing regulatory framework and barriers to compliance, the Commission believes significantly expanding the Program on July 1, 2014, is contrary to the interest of the public. Unless it is amended, the schedule for compliance set forth in Section 1682(c) of Title 20 would expand the Program to buildings half the size of those currently subject to the program. This expansion has the potential to create market confusion, which could cause delays and drive up transaction costs in commercial real estate transactions

For example, the expansion in scope would increase the number of compliance requests received by utilities, impeding their ability to address barriers to compliance with the Program. It would also place a greater burden on smaller building owners, which may lack the expertise, resources, or capacity necessary to overcome current barriers to compliance without incurring undue expense.

The Commission initiated an Order Instituting Informational proceeding (OII) on June 18, 2014, aimed at identifying and addressing these key barriers. Delaying the expansion of the Program until these barriers have been addressed will preserve the general welfare of the public by preventing the market confusion that will likely result from a premature expansion of the Program.

INSUFFICIENT TIME FOR NON-EMERGENCY RULEMAKING (Government Code Section 11346(b)(2))

The Commission did not learn about the barriers to compliance with the Program with sufficient time to amend the schedule set forth in Section 1682(c) of Title 20 through a non-emergency rulemaking before July 1, 2014, when the Program expanded to included non-residential buildings greater than 5,000 square feet up to 10,000 square feet.

Because of technical problems with the United States Environmental Protection Agency's ENERGY STAR Portfolio Manager platform and software, the Program effectively launched on January 1, 2014. The Commission did not realize the extent of the barriers to compliance with the existing program until after the Program had been effective for a few months. From a review of the first few months of disclosure data, it became apparent that the required disclosures were not being made for the majority of transactions for which they were required by Public Resources Code Section 25402.10, according to the schedule adopted by the Commission in Section 1682 of Title 20 of the California Code of Regulations. Additionally, throughout May and June 2014, the Energy Commission received extensive information from stakeholders about barriers to compliance with the program. The Commission responded to these concerns by initiating an informational proceeding to gather information about barriers to compliance with the Program on June 18, 2014.

STATUTORY AUTHORITY AND REFERENCE (Government Code Section 11349.1, 11346.5(a)(2) and 1 California Code of Regulations 14)

The Commission proposes to adopt this modification to the Program under the authority granted by Public Resources Code Sections 25213, 25218(e), and 25402.10, the latter of which codifies the mandates of AB 1103 (Chapter 533, Statutes of 2007) and AB 531 (Chapter 323, Statutes of 2009). The purpose of the Program is to implement, interpret, and make specific these provisions.

Authority:

- Public Resources Code Sections 25213, 25218(e), and 25402.10.

Reference:

- Public Resources Code Section 25402.10.

SPECIFIC LANGUAGE PROPOSED (Government Code Section 11346.1(a)(2)(A))

The Commission proposes to modify Title 20, Section 1682(c) to read as follows:

A building owner shall comply with this article according to the following schedule:

(c) On and after July 1, ~~2014~~ **2016**, for a building with a total gross floor area measuring at least 5,000 square feet and up to 10,000 square feet.

INFORMATIVE DIGEST (Government Code Section 11346.5(a)(3))

Public Resources Code Section 25402.10(a) -- On and after January 1, 2009, electric and gas utilities shall maintain records of the energy consumption data of all nonresidential buildings to which they provide service. This data shall be maintained, in a format compatible for uploading to the United States Environmental Protection Agency's ENERGY STAR Portfolio Manager, for at least the most recent 12 months.

Public Resources Code Section 25402.10(b) -- On and after January 1, 2009, upon the written authorization or secure electronic authorization of a nonresidential building owner or operator, an electric or gas utility shall upload all of the energy consumption data for the account specified for a building to the United States Environmental Protection Agency's ENERGY STAR Portfolio Manager in a manner that preserves the confidentiality of the customer.

Public Resources Code Section 25402.10(c) -- In carrying out this section, an electric or gas utility may use any method for providing the specified data in order to

maximize efficiency and minimize overall program cost, and is encouraged to work with the United States Environmental Protection Agency and customers in developing reasonable reporting options.

Public Resources Code Section 25402.10(d)(1) -- Based on a schedule developed by the commission pursuant to paragraph (2), an owner or operator of a nonresidential building shall disclose the United States Environmental Protection Agency's ENERGY STAR Portfolio Manager 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. If the data is delivered to a prospective buyer, lessee, or lender, a property owner, operator, or his or her agent is not required to provide additional information, and the information shall be deemed to be adequate to inform the prospective buyer, lessee, or lender regarding the United States Environmental Protection Agency's ENERGY STAR Portfolio Manager benchmarking data and ratings for the most recent 12-month period for the building that is being sold, leased, financed, or refinanced.

Public Resources Code Section 25402.10(d)(2) -- The commission shall establish a schedule by which an owner or operator is required to meet the requirements of this subdivision.

Public Resources Code Section 25402.10(e) -- Notwithstanding subdivision (d), this section does not increase or decrease the duties, if any, of a property owner, operator, or his or her broker or agent under this chapter or alter the duty of a seller, agent, or broker to disclose the existence of a material fact affecting the real property.

The California Energy Commission has passed regulations implementing Public Resources Code Section 25402.10, codified as the Nonresidential Building Energy Use Disclosure Program, California Code of Regulations, Title 20, Division 2, Chapter 4, Article 9, Sections 1680-1684.

Section 1680 defines the purpose of the program.

Section 1681 defines terms, including “building owner” (a person possessing title to a nonresidential building, or an agent authorize to act on behalf of a person possessing title) and “nonresidential building” (occupancy type A, B, E, I-1, I-2, M, R1, S, or Type U parking garages), among others.

Section 1682 provides a schedule of implementation.

Section 1683 specifies precisely which disclosures must be made, and prohibits use of energy data for any purpose other than compliance.

Section 1684 specifies the manner in which submissions should be made to the ENERGY STAR Portfolio Manager.

Summary of Effect

These proposed emergency regulations would delay from July 1, 2014 to July 1, 2016, the expansion of the Program to include buildings of at least 5,000 square feet and up to 10,000 square feet. This would provide suitable time for the Commission to work with stakeholders to identify and resolve significant barriers to compliance. Addressing these issues before dramatically expanding the Program avoids market confusion and protects the welfare of the public.

COMPARABLE FEDERAL STATUTE OR REGULATION (Government Code Section 11346.5(a)(3)(B))

The Commission has determined that there are not comparable federal regulations or statutes that address the specific provision found in Title 20, Section 1682(c) of the Nonresidential Building Energy Use Disclosure Program.

POLICY STATEMENT OVERVIEW: (Government Code Section 11346.5(a)(3)(C))

Public Resources Code Section 25402.10 and its implementing regulations set forth in 20 California Code of Regulations Sections 1680-1684, aim to increase building owner awareness of energy consumption and provide an opportunity for improvement of building energy efficiency, by requiring disclosure of certain nonresidential building energy use data. The more information that is available in the nonresidential building market, the more likely the costs of energy consumption will be factored into the valuations of nonresidential spaces, with a goal of increasing market demand for improved building energy efficiency. Energy efficient buildings benefit building owners, small and large businesses, the Californian economy as a whole, and the environment by reducing energy costs and avoiding the environmental impacts associated with energy production and consumption.

The Commission has recently learned that there are currently a wide range of substantial barriers to implementation and compliance. The Commission has initiated an informational proceeding to study, address, and overcome these barriers.

Based on available information and input from stakeholders, including various building owners and utilities, the Commission believes that it would be harmful and burdensome to the public interest to allow this program to significantly expand under the current implementation schedule. Failing to delay extension of the programs to nonresidential buildings greater than or equal to 5,000 square feet could disproportionately impact small building owners (including many small businesses) that may lack technical capacity to overcome existing barriers to implementation. Delaying implementation for two years will allow the Commission to investigate barriers to compliance, and if necessary to promulgate regulations to address them. It may also allow stakeholders, including utilities, time to develop, adopt, and implement best practices for compliance with the Program.

The Commission believes the proposed two-year delay is appropriate to identify and address the issues.

CONSISTENCY AND COMPATIBILITY WITH EXISTING STATE REGULATIONS:
(Government Code Section 11346.5(a)(3)(D))

This proposed emergency rulemaking is consistent and compatible with existing state regulations. This emergency rulemaking solely proposes to modify existing regulation by changing the date of compliance for nonresidential buildings greater than 5,000 square feet and less than 10,000 square feet from July 1, 2014 to July 1, 2016.

OTHER STATUTORY REQUIREMENTS:

(Government Code Section 11346.1(b); 1346.5(a)(4))

None.

RELIED ON DOCUMENTS:

Letter to the California Energy Commission from Randy Walsh dated June 18, 2014

Order Instituting Informational Proceeding for the Nonresidential Building Energy Use Disclosure Program (Order No. 1401618-9)

LOCAL MANDATE DETERMINATION: (Government Code Section 11346.5(a)(5))

The proposed emergency rulemaking would not impose an additional mandate on local agencies or school districts. This emergency rulemaking would only delay expanding reporting requirements to include nonresidential buildings of at least 5,000 square feet and up to 10,000 square feet by two years. There will be no costs to any local agency as a result in this delay.

FISCAL IMPACTS: (Government Code Section 11346.5(a)(6))

Costs or Savings for State Agencies: None. This proposed emergency rulemaking would only impact the Commission, which does not anticipate any budgetary impact from delaying implementation of this subSection by two years.

Costs to Any Local Agency or School District Requiring Reimbursement Pursuant to Section 17500 et seq.: None. This emergency rulemaking would only delay expanding reporting requirements to include nonresidential buildings of at least 5,000 square feet and up to 10,000 square feet by two years. There will be no costs to any local agency as a result in this delay.

Other Non-Discretionary Costs or Savings on Local Agencies: None. This emergency rulemaking would only delay expanding reporting requirements to include nonresidential buildings of at least 5,000 square feet and up to 10,000 square feet by two years. There will be no costs to any local agency as a result in this delay.

The existing regulations require local agencies that own government buildings to benchmark and disclose energy consumption data for their buildings if the entire building were to be sold, leased, or financed. The Commission's analysis from the rulemaking in which the existing regulations were adopted indicate that the financial events triggering AB 1103 benchmarking would be relatively rare for government buildings, and that the cost of compliance with the proposed regulations is low, so that the costs to local agencies from the existing program would be minimal. Additionally, costs of disclosure and benchmarking could be offset by energy cost savings if voluntary improvements in building energy efficiency are undertaken due to increased market value for energy efficiency in

nonresidential buildings. These costs and benefits were fully analyzed in the original rulemaking. The delay in implementation would not result in any additional costs.

Cost or Savings in Federal Funding to the State: None. Federal funding to the State is not affected by this Program.