

DOCKETED

Docket Number:	15-OIR-03
Project Title:	Nonresidential Building Energy Use Disclosure Program Certification of Emergency Regulation
TN #:	203679
Document Title:	Notice of Proposed Action - Amendment of Section 1682 of Title 20 of the California Code of Regulations
Description:	Amend the Compliance Schedule for the Nonresidential Building Energy Use Disclosure Program of the California Energy Commission
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CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512
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**NOTICE OF PROPOSED ACTION**

Amendment of Section 1682 of Title 20 of the California Code of Regulations
Amend the Compliance Schedule for the Nonresidential Building Energy Use Disclosure Program of the California Energy Commission

California Energy Commission
Docket No. 15-OIR-03

February 3, 2015

The California Energy Commission (Energy Commission) proposes to amend subdivision (c) of section 1682 of title 20 of the California Code of Regulations. The proposed amendment changes the date after which the disclosure requirement of Public Resources Code section 25402.10 applies to covered nonresidential buildings with total gross square footage measuring 5,000 square feet and up to 10,000 square feet from July 1, 2014 to July 1, 2016.

The Energy Commission previously adopted this change through an emergency regulation approved by the Office of Administrative Law on September 2, 2014, and effective on that date. The purpose of this rulemaking is to adopt the emergency regulation on a permanent basis.

The proposed action is taken under the authority of Public Resources Code section 25213,¹ which generally authorizes the Energy Commission to adopt rules and regulations as necessary to carry out the provisions of Division 15 of the PRC, and section 25402.10, which requires the disclosure of energy consumption and benchmarking data in nonresidential real estate transactions, and requires the Energy Commission to adopt a schedule for compliance with the disclosure mandate. The Energy Commission's regulations implementing section 25402.10 are set forth in sections 1680 through 1684 of Title 20 of the California Code of Regulations, and the schedule for compliance in section 1682.

PRC section 25402.10 together with the implementing regulations are commonly referred to as the Nonresidential Building Energy Use Disclosure Program.

¹ All section references are to the Public Resources Code unless otherwise noted.

NOTICE THAT A PUBLIC HEARING IS SCHEDULED:

April 8, 2015
10:00 a.m.
California Energy Commission
1516 Ninth Street
First Floor, Hearing Room A
Sacramento, California
(Wheelchair accessible)

Please note that this hearing will take place as part of a regularly scheduled Energy Commission Business Meeting.

REMOTE ATTENDANCE

To Participate by Telephone:

To participate by telephone, please call toll free 1-888-823-5065 after 10:01 a.m. (PDT). The pass code for the meeting is "Business Meeting" and the call leader is Jerome Lee. If you plan to speak about an agenda item, please give the operator the item number.

To avoid occasional technical problems with the Commission's telephone link, the Commission recommends that a written comment also be submitted either by facsimile or Fax (916) 654-4493 or e-mail publicadviser@energy.ca.gov.

Broadcast via WebEx:

The Business Meeting is broadcast via WebEx, the Energy Commission's on-line meeting service. To listen to the meeting and view any presentations, please go to <https://energy.webex.com> and enter the unique meeting number: 926 368 651. When prompted, enter your name and the following meeting password: mtg@10am.

The "Join Conference" menu will offer you a choice of audio connections:

1. To call into the meeting: Select "I will call in" and follow the on-screen directions.
2. International Attendees: Click on the "Global call-in number" link.
3. To have WebEx call you: Enter your phone number and click "Call Me."
4. To listen over the computer: If you have a broadband connection, and a headset or a computer microphone and speakers, you may use VoIP (Internet audio) by going to the Audio menu, clicking on "Use Computer Headset," then "Call Using Computer."

If you have difficulty joining the meeting, please call the WebEx Technical Support number at 1-866-229-3239.

Please note that to make comments at the Business Meeting you must participate by telephone.

ORAL AND WRITTEN COMMENTS

Any interested person, or his or her authorized representative, may present oral and written comments on the proposed regulations at the hearing by attending or participating by telephone, or may submit written comments relevant to the proposed regulatory action to the Energy Commission. Please note that written and oral comments, attachments, and associated contact information included within the written comments and attachments (e.g., your address, phone, email, etc.) become part of the viewable public record.

The written comment period closes at **5:00 p.m. on March 31, 2014**. The Energy Commission will consider only comments received at the Energy Commission by that time.

If you wish to provide comments on the draft regulatory language, please submit comments to the Energy Commission using the Energy Commission's e-commenting feature by going to the Energy Commission's TITLE 20 2014 REVISIONS webpage at:

<http://www.energy.ca.gov/ab1103/>

Click on the "Submit eComment" link. A full name, e-mail address, comment title, and either a comment or an attached document (.doc, .docx, or .pdf format) is mandatory.

After a challenge-response test used by the system to ensure that responses are generated by a human and not a computer, click on the "Agree & Submit Your Comment" button to submit the comment to the Energy Commission Dockets Unit.

You are encouraged to use the electronic filing system, described above, to submit comments. If you are unable to submit electronically, a paper copy of your comments may be sent to:

California Energy Commission
Dockets Office, MS-4
Re: Docket No. 15-OIR-03
1516 Ninth Street
Sacramento, CA 95814-5512

Please include the rulemaking docket number 15-OIR-03, and indicate "Nonresidential Building Energy Use Disclosure Program Compliance Schedule" in the subject line or first paragraph of your comments.

PUBLIC ADVISER AND OTHER COMMISSION CONTACTS

The Energy Commission's Public Adviser's Office provides the public assistance in participating in Energy Commission proceedings. If you want information on how to participate in this forum, please contact the Public Adviser's Office at PublicAdviser@energy.ca.gov or (916) 654-4489 (toll free at (800) 822-6228).

If you have a disability and require assistance to participate, please contact Lou Quiroz at lquiroz@energy.ca.gov or (916) 654-5146 at least five days in advance.

Media inquiries should be sent to the Media and Public Communications Office at mediaoffice@energy.ca.gov or (916) 654-4989.

AUTHORITY AND REFERENCE

(Government Code section 11346.5(a)(2))

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

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

Summary of Existing Laws and Regulations (Government Code section 11346.5(a)(3)(A))

Existing law [Public Resource Code section 25402.10(d)(1)] requires that an owner or operator of a nonresidential building shall disclose, pursuant to a schedule established by the Energy Commission, 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. Public Resources Code section 25402.10(d)(2) requires the Energy Commission to set a schedule for compliance.

The California Energy Commission has passed regulations implementing Public Resources Code section 25402.10, codified as the Nonresidential Building Energy Use Program, California Code of Regulations, Title 20, Division 2, Chapter 4, Article 9, sections 1680-1684. The schedule for implementation is set forth in section 1682 of Title 20, and requires the disclosures required by section 25402.10(d)(1) be made as follows:

- (a) On or after July 1, 2013 for a building with total gross floor area measuring more than 50,000 square feet,
- (b) On or after July 1, 2014 for building with a gross floor area measuring more than 10,000 and up to 50,000 square feet.

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

Section 1682(c) of Title 20 reflects an amendment through emergency regulation effective September 2, 2014, to change the effective date for nonresidential buildings with total gross floor area measuring at least 5,000 square feet and up to 10,000 square feet from July 1, 2014 to July 1, 2016

This rulemaking would certify and make permanent the emergency regulation changing the effective date for buildings with a total gross floor area measuring at least 5,000 square feet and up to 10,000 square feet from July 1, 2014 to July 1, 2016.

Policy Statement Overview (Government Code section 11346.5(a)(3)(C))

The broad objective of the proposed regulation is to certify the emergency regulation delaying implementation of the Nonresidential Building Energy Use Disclosure Program for buildings with a total gross floor area measuring at least 5,000 square feet and up to 10,000 square feet from July 1, 2014, until July 1, 2016.

The Nonresidential Energy Use Disclosure Program aims 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 and benchmarking data in nonresidential real estate transactions. Making energy use and benchmarking data available to prospective buyers, lessees and lenders of nonresidential buildings makes it possible for the costs of energy consumption to 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.

In the first six months of implementing the Nonresidential Building Energy Use Disclosure Program, the Energy Commission discovered substantial barriers to implementation and compliance with the program as currently designed. One barrier is the fact that utilities have adopted inconsistent policies in implementing the program and providing the data necessary for disclosures. To preserve the confidentiality of their customers, many utilities are declining to provide energy use data to building owners or operators without written consent of each of the building tenants, unless there are sufficient tenants in the building to mask the data through aggregation. Utilities currently apply different thresholds in the level of aggregation among tenants necessary to avoid tenant consent, with some requiring tenant consent for all transactions. Obtaining tenant consent can be burdensome, and in some cases infeasible. Larger building owners have access to more sophisticated networks of professionals such as attorneys, brokers and consultants. This allows them access to timely information and services that smaller building owners may not have.

Other barriers include the fact that the timing of the disclosure of the Nonresidential Building Energy Use Disclosure Program is not consistent with the timing for other disclosures made in nonresidential real estate transactions, and the fact that the benchmarking data has a short shelf life and must be consistently updated. While these barriers increase the cost of compliance for buildings of all size, the impact on smaller buildings is disproportionate, because the costs associated with disclosure tend to represent a greater cost in comparison to the value of the transaction.

On June 18, 2014, the Energy Commission initiated an informational proceeding to study, address, and overcome these barriers, and on July 2, 2014, the Energy Commission held a workshop on the informational proceeding to gather information. Work on the informational proceeding is ongoing, and the Energy Commission is working to develop proposed modifications to the program to reduce or eliminate program barriers, and lower the cost of compliance.

In the meantime, based on available information and input from a wide array of stakeholders, including building owners and utilities, the Energy Commission believes that it would be harmful and burdensome to the public interest to allow this program to significantly expand under the original implementation schedule. Failing to certify the emergency regulation could disproportionately impact small building owners that may lack technical capacity to overcome existing barriers to implementation.

Anticipated Benefit of Proposed Rulemaking (Government Code section 11346.5(a)(3)(C))

Delaying the extension of the Nonresidential Building Disclosure Program for buildings between 5,000 and 10,000 square feet for two years will allow the Energy Commission to investigate barriers to compliance, and promulgate regulations to address them. It may also allow stakeholders, including utilities, time to develop, adopt, and implement best practices for compliance with the Nonresidential Building Energy Use Disclosure Program.

EVALUATION OF INCONSISTENCY/INCOMPATABILITY WITH EXISTING STATE REGULATIONS

(Government Code section 11346.5(a)(3)(D))

Staff has conducted an extensive evaluation of laws relating to disclosure information related to energy consumption and benchmarking, and has determined that no other statewide regulation in California requires disclosure of energy use data in real estate transactions. Consequently the proposed regulations are neither inconsistent nor incompatible with existing state regulations.

This rulemaking solely proposes to modify existing regulation by changing the date of compliance for nonresidential buildings that are at least 5,000 square feet and up to 10,000 square feet from July 1, 2014 to July 1, 2016. This rulemaking seeks to certify

and make permanent emergency rulemaking approved by the Office of Administrative Law on September 2, 2014.

FEDERAL LAW (Government Code sections 11346.2 and 11346.9)

The Nonresidential Building Energy Use Disclosure Program is not mandated by, or similar to, any federal statute or regulation.

FISCAL IMPACT DETERMINATION REGARDING THE PROPOSED ACTION (Government Code sections 11346.5(a)(5)(6)&(7))

Mandate on local agencies or school districts: None. This 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. It imposes no mandate on local agencies or school districts.

Costs or Savings for State Agencies: None. This proposed rulemaking would only impact the Energy 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 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 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 Energy 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.

RESULTS OF THE ECONOMIC IMPACT ANALYSIS/ASSESSMENT

(Government Code sections 11346.3(b), 11346.5(a)(6)&(7), and 11346.5(a)(10))

The Energy Commission has made the Initial Determination relating to the economic and fiscal impacts of the proposed regulation by checking box A-1(h) on the Form 399 *Economic and Fiscal Impact Statement*.

The Energy Commission concludes that (1) the proposed regulations will not create or eliminate jobs in California, (2) the proposed regulations will not create any new businesses or eliminate any existing businesses, and (3) the regulations will not cause the expansion of businesses currently doing business in California. These conclusions are based on the fact that the regulations merely delay implementation of an existing regulatory requirement, without adding any new obligation.

The benefit of the proposed regulation to the welfare of California residence is that it will delay for two years expansion of the Nonresidential Building Energy Use Disclosure Program, for which there are currently barriers to implementation and compliance, to owners and operators of smaller buildings for whom the costs associated with compliance are highest and the potential benefits are lowest. This delay will allow the Energy Commission to investigate barriers to compliance, and promulgate regulations to address them, before the program expands. It may also allow stakeholders, including utilities, time to develop, adopt, and implement best practices for compliance with the Program, which may further reduce the costs of compliance for entities subject to the Program.

HOUSING COSTS (Government Code section 11346.5(a)(12))

The proposed changes to the regulations will not have a significant effect on housing costs.

INITIAL DETERMINATION RE SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESSES, INCLUDING ABILITY TO COMPETE

(Government Code section 11346.3(a), 11346.5(a)(7), and 11346.5(a)(8))

The Energy Commission finds that the proposed regulations will not have a significant statewide adverse economic, fiscal, or environmental impact directly affecting businesses, including small businesses, and including the ability of California businesses to compete with businesses in other states. This determination is based upon the fact that the proposed regulations impose no new requirements, and merely delay implementation of an existing mandate.

COST IMPACTS ON REPRESENTATIVE PERSON OR BUSINESS (Government Code section 11346.5(a)(9))

The Energy Commission is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. The proposed regulations do not create a requirement that must be complied with by any person or business.

BUSINESS REPORTS (Government Code sections 11356.5(a)(11) and 11346.3(d))

The proposed regulations do not require any business to file a report.

SMALL BUSINESS IMPACTS (1 Cal Code of Regulations section 4)

The proposed regulation will eliminate for two years the costs associated with complying with the Nonresidential Building Energy Use Disclosure Program for small businesses that own or operate buildings between 5,000 and 10,000 square feet, if those buildings are sold, leased or financed between July 1, 2014 and July 1, 2016 in a manner that triggers the disclosure obligation.

The proposed regulations may negatively impact a handful of small businesses working as consultants to facilitate compliance with the Nonresidential Building Disclosure Program, because the proposed regulations reduce the total buildings subject to the program until July 1, 2016. The Energy Commission is aware of at least four small businesses that are currently working in this capacity in the state, and estimates there are no more than ten such consultants statewide. Any economic benefit these consultant businesses might receive if the Program were expanded to nonresidential buildings with at least 5,000 square feet up to 10,000 square feet would come at the expense of other businesses, including small businesses, that own or operate buildings of this size and would therefore be required to comply with the program if the emergency regulation is not certified.

ALTERNATIVES STATEMENT (Government Code section 11346.5(a)(13))

The Energy Commission must determine that no reasonable alternative considered by the agency, or that has otherwise been identified and brought to the attention of the agency, would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Energy Commission considered delaying the implementation date for buildings between 5,000 and 10,000 square feet for only one year, to July 1, 2015, but concluded

this would likely not allow sufficient time to addresses barriers to compliance with the program.

The Energy Commission also considered eliminating the disclosure mandate entirely for buildings with at least 5,000 square feet and up to 10,000 square feet. At this time, it is unclear what the costs of compliance will ultimately be for buildings of this size. For this reason, the Commission does not believe this change is warranted at this time, and consequently determined this alternative would not be equally effective in accomplishing the goals of the underlying statute. However, the Commission's informational proceeding to investigate barriers to compliance with the Program is ongoing, and the Commission continues to collect information about the Program. Depending on how the record of this proceeding and informational proceeding develop, the Commission may determine that the benefits of requiring disclosures for nonresidential buildings of at least 5,000 and up to 10,000 square feet is not worth the cost, and may propose to eliminate the disclosure mandate for buildings of this size entirely, either through this rulemaking pursuant to modified language pursuant to Government Code section 11346.8(c), or in a subsequent rulemaking to address barriers to compliance arising from the pending informational proceeding.

Consequently, at this time the Energy Commission is aware of no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

CONTACT PERSONS (Government Code section 11346.5(a)(13))

Inquiries concerning the proposed regulations may be directed to:

Daniel Johnson
Energy Efficiency Division, Appliance & Existing Buildings Office
California Energy Commission
1516 Ninth Street, MS 25
Sacramento, California 95814
Telephone: (916) 651-3746
Daniel.Johnson@energy.ca.gov

The backup contact person for these inquiries is:

Galen Lemei, Senior Attorney
Office of the Chief Counsel
California Energy Commission
1516 Ninth Street, MS 14
Sacramento, California 95814
Telephone: (916) 654-4873
Galen.Lemei@energy.ca.gov

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS (Government Code section 11346.5(a)(16))

The Energy Commission has prepared an Initial Statement of Reasons for the proposed regulations. To obtain a copy of the initial statement of reasons or the express terms of the proposed regulations, please visit the Energy Commission's website at: <http://www.energy.ca.gov/appliances/enforcement/documents/index.html> or contact Galen Lemei as indicated above.

Additionally, the Energy Commission has available all the information upon which the proposed regulations are based; copies can be obtained by accessing the above website or contacting the Docket Office at DOCKET@energy.ca.gov or by calling (916) 654-5076.

The Energy Commission will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the address above.

AVAILABILITY OF SUBSTANTIAL CHANGES TO ORIGINAL PROPOSAL FOR AT LEAST 15 DAYS PRIOR TO AGENCY ADOPTION/REPEAL/ AMENDMENT OF RESULTING REGULATIONS (Government Code Section 11346.5(a)(18))

Participants should be aware that any of the proposed regulations could be substantively changed as a result of public comment, staff recommendation, or recommendations from Commissioners. Moreover, changes to the proposed regulations not indicated in the express terms could be considered if they improve the clarity or effectiveness of the regulations. If the Energy Commission considers changes to the proposed regulations pursuant to Government Code section 11346.8, a full copy of the text will be available for review at least 15 days prior to the date on which the Energy Commission adopts or amends the resulting regulations. Per section 44, title 1, of the California Code of Regulations, notice of any modified text will be submitted to (1) anyone who submits oral or written comments at the public hearing, (2) anyone who submits written comments to the Energy Commission's docket, or (3) anyone who specifically requests notification of such modifications.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS (Government Code section 11346.5(a)(19))

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Galen Lemei at the address above, or at the Energy Commission's website at: <http://www.energy.ca.gov/ab1103/>

AVAILABILITY OF DOCUMENTS ON THE INTERNET (Government Code section 11346.4(a)(6) & 11346.5(a)(20))

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulations in underline and strikeout can be accessed through our website at: <http://www.energy.ca.gov/ab1103/>

PUBLIC DISCUSSION OF PROPOSED REGULATIONS (Government Code section 11346.45)

The proposed regulation is not complex, and only changes a single date in the schedule for implementing the Nonresidential Building Energy Use Disclosure Program. Nevertheless, the Energy Commission has facilitated extensive public discussion on the proposed Emergency Regulation the Energy Commission proposes to certify, and the Nonresidential Building Energy Use Disclosure Program generally.

Prior to adopting the Emergency Regulation the Energy Commission initiated an informational proceeding to investigate the Nonresidential Energy Use Disclosure Program on June 18, 2014. The Energy Commission held a workshop to investigate barriers to compliance with the Program on July 2, 2014, and received public comments on the program in connection with that workshop, including on the proposed Emergency Regulation. In addition, the Energy Commission and OAL received comment on the proposed Emergency Regulation, which the Energy Commission responded to in the Emergency Rulemaking proceeding.

Served on the following list server: AB 1103, Building Standards, Efficiency