

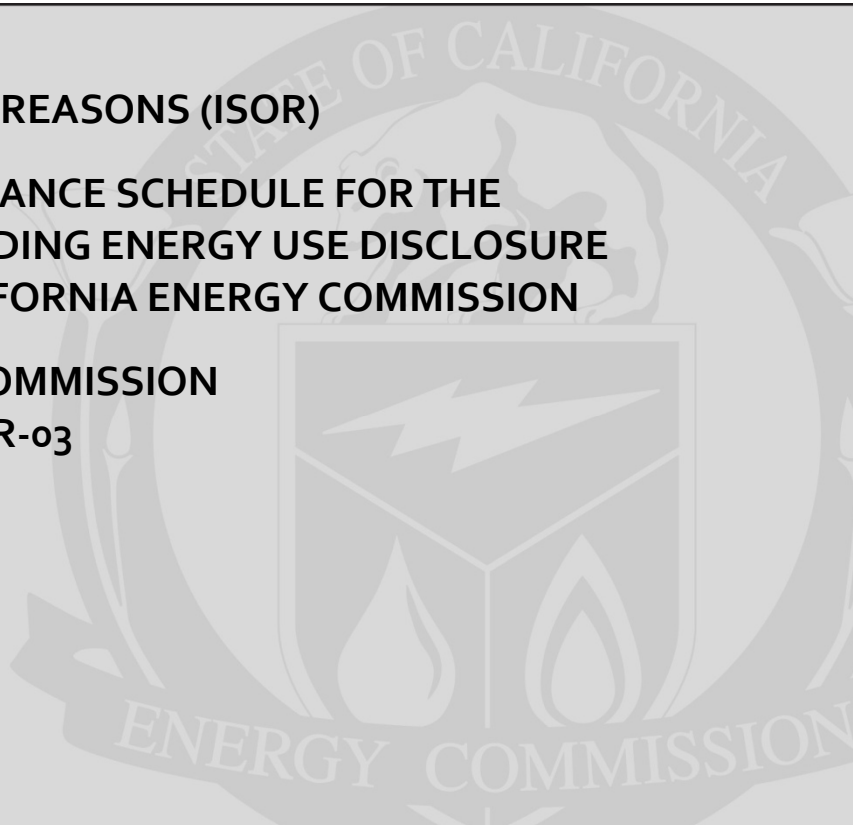
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# **INITIAL STATEMENT OF REASONS (ISOR)**

## **TO AMEND THE COMPLIANCE SCHEDULE FOR THE NONRESIDENTIAL BUILDING ENERGY USE DISCLOSURE PROGRAM OF THE CALIFORNIA ENERGY COMMISSION**

**CALIFORNIA ENERGY COMMISSION  
DOCKET NUMBER 15-OIR-03**



CALIFORNIA  
ENERGY COMMISSION  
Edmund G. Brown Jr., Governor

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## **INITIAL STATEMENT OF REASONS**

### **TO 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

#### **I. Statement of Specific Purpose and Rationale- Government Code §11346.2(B)(1)**

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 building with total gross square foot are measuring 5,000 square feet 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.

Public Resources Code (PRC) section 25402.10 and the implementing regulations adopted by the Energy Commission set forth in 20 California Code of Regulations Sections 1680-1684 codify the Nonresidential Building Energy Use Disclosure Program (the Program). The Program requires disclosure of energy use and benchmarking data to prospective buyers, lessees, and financiers of certain nonresidential buildings. Disclosure of energy use and benchmarking data in nonresidential real estate transactions 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.

PRC section 25402.10(d)(2) requires the Energy Commission to establish a schedule for compliance with the Program. This schedule is set forth in section 1682 of title 20 of the California Code of Regulations. Pursuant to the schedule initially adopted by the Energy Commission, the Program went into effect for nonresidential buildings with more 10,000 square feet on January 1, 2014, and would expand to buildings with at least 5,000 square feet and up to

10,000 square feet on July 1, 2014.<sup>1</sup>

In the first six months of implementing the 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. 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, 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 (sometimes referred to as the AB 1103 OII) to study, address, and overcome these barriers. On July 2, 2014, the Energy Commission held a workshop on the informational proceeding to gather information and hear from stakeholders.

Contemporaneously with initiating the informational proceeding to study barriers to the program, the Energy Commission began working on emergency regulations to amend the schedule for compliance set forth in 1682(c) of title 2 of the California Code of Regulations, to delay the application of the program for buildings with a total square footage greater than of at least 5,000 square feet and up to 10,000 square feet from July 1, 2014, until July 1, 2016. As the Energy Commission explained in a Finding of Emergency adopted on July 18, 2014:

Throughout May and June 2014, the Energy 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 Energy 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 Energy Commission proposes to delay the implementation schedule for owners of

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<sup>1</sup> Pursuant to 20 CCR § 1682(a), the Program initially went into effect for buildings with a total square footage greater than 50,000 on July 1, 2013. However, the Energy Commission suspended compliance until January 1, 2014 because Energy Star Portfolio Manager, the platform the statute specifies must be used for benchmarking and disclosures, was not functional.

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 Energy Commission sufficient time to study, address, and resolve these barriers to implementation through the Informational Proceeding adopted on June 18, 2014, discussed further below.

#### Finding of Emergency for Proposed Emergency Regulations to Amend the Compliance Schedule for the Nonresidential Building Energy Use Disclosure Program, pages 1-2.

Comments received in connection with the informational proceeding and the July 2 workshop supported delaying implementation of the Program for smaller nonresidential buildings, such as those between 5,000 and 10,000 square feet. Several presenters at the workshop had experience with nonresidential disclosure and benchmarking programs in other jurisdictions throughout the United States. Many of them pointed out that economies of scale for disclosure and benchmarking programs tend to diminish for smaller buildings. For example, Mr. Burr from the Institute for Market Transformation stated that in most cities, a threshold between 25,000 and 50,000 square feet would capture 50 percent of the total nonresidential square footage, which implies that the majority of the benefit from disclosure may be captured through a program that targets larger buildings. Another factor is that transaction costs associated with compliance for owners and operators of smaller buildings are proportionately greater than for owners of larger buildings. A third factor is that owners and operators of smaller buildings may be less sophisticated and have fewer resources dedicated to compliance with an energy use disclosure program. For these reasons, disclosure and benchmarking programs in each other jurisdiction discussed at the workshop set the threshold for compliance at or above 10,000 square feet, and in some cases much higher. See Transcript for July 2 Workshop on Informational Proceeding for the Nonresidential Building Energy Use Disclosure Program, pages 23-24, 37, 40-41, 73-74, 83-84, 98-99, and 111-112.

Also, compared with programs in other jurisdictions, the impacts on owners and operators of smaller nonresidential buildings in California may be even greater, because energy use data can be difficult to obtain. For example, at the workshop each of the three investor-owned utilities indicated that they have been requiring tenant consent for a substantial portion of transactions before they will provide energy use data, even though the Energy Commission has advised utilities that decisions of the California Public Utilities Energy Commission requiring tenant consent are not applicable to the Program.

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, the Energy Commission believes that it would be contrary to the interest of the public to allow the emergency regulation to expire, which would immediately extend the disclosure mandate to residential buildings with at least 5,000 square feet—half the size of the smallest buildings 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.

The specific purpose of the proposed regulation is to certify the Emergency Regulation and make permanent the delay in implementation of the Program to buildings of this size until July 1, 2016. This will have the benefit of allowing time for the Program to be redesigned to overcome barriers to the Program, and lower the cost of compliance, before the Program expands to buildings of this size. It may also allow stakeholders, including utilities, time to develop, adopt, and implement best practices for compliance with the Program.

## **II. Documents and Reports Relied Upon- Government Code §11346.2(B)(3)**

The Energy Commission has relied upon the following technical, theoretical, or empirical studies, reports, or similar documents in drafting the proposed regulations and in preparing this Initial Statement of Reasons:

Finding of Emergency for Proposed Emergency Regulations to Amend the Compliance Schedule for the Nonresidential Building Energy Use Disclosure Program

([http://www.energy.ca.gov/ab1103/notices/2014-07-22 Notice to Consider Adoption Emergency Regs 1682c and 11346-1 on July 22 2014.pdf](http://www.energy.ca.gov/ab1103/notices/2014-07-22%20Notice%20to%20Consider%20Adoption%20Emergency%20Regs%201682c%20and%2011346-1%20on%20July%2022%202014.pdf), attachment B to Notice)

Response to Comments filed by Randy Walsh on Proposed Emergency Regulations to Amend EUDP Compliance Schedule in 20 CCR § 1682(c)

Transcript for July 2 Workshop on Informational Proceeding for the Nonresidential Building Energy Use Disclosure Program ([http://www.energy.ca.gov/ab1103/documents/2014-07-02\\_workshop/2014-07-02\\_ab1103\\_transcript.pdf](http://www.energy.ca.gov/ab1103/documents/2014-07-02_workshop/2014-07-02_ab1103_transcript.pdf))

CMUA Comment letter to 7-2-14 CEC Workshop Re Barriers Challenges and Experiences from CECs BEDP Program AB 1103 2014-07-18 TN-73437.pdf

([http://www.energy.ca.gov/ab1103/documents/2014-07-02\\_workshop/comments/CMUA Comment letter to 7-2-14 CEC Workshop Re Barriers Challenges and Experiences from CECs BEDP Program A B 1103 2014-07-18 TN-73437.pdf](http://www.energy.ca.gov/ab1103/documents/2014-07-02_workshop/comments/CMUA%20Comment%20letter%20to%207-2-14%20CEC%20Workshop%20Re%20Barriers%20Challenges%20and%20Experiences%20from%20CECs%20BEDP%20Program%20AB%201103%202014-07-18%20TN-73437.pdf))

Southern California Edison Company's Comments on Staff's July 2, 2014 Workshop on the AB 1103 OII

([http://www.energy.ca.gov/ab1103/documents/2014-07-02\\_workshop/comments/14-EUDP-01 Southern California Edison Comments on Staff Workshop 2014-07-21 TN-73445.pdf](http://www.energy.ca.gov/ab1103/documents/2014-07-02_workshop/comments/14-EUDP-01%20Southern%20California%20Edison%20Comments%20on%20Staff%20Workshop%202014-07-21%20TN-73445.pdf))



Comments of Pacific Gas and Electric on Staff's July 2, 2014 Workshop on the AB 1103 OII ([http://www.energy.ca.gov/ab1103/documents/2014-07-02\\_workshop/comments/Pacific Comments Lead Commissioner CEC 7-02-14 Workshop 2014-07-21 TN-73442.pdf](http://www.energy.ca.gov/ab1103/documents/2014-07-02_workshop/comments/Pacific_Comments_Lead_Commissioner_CEC_7-02-14_Workshop_2014-07-21_TN-73442.pdf))

### **III. Consideration of Reasonable Alternatives, Including Those That Would Lessen Any Adverse Impact On Small Business - Government Code §11346.2(B)(4)**

The Energy Commission considered two potential alternatives to the proposed regulations, but determined that neither would be both less burdensome and equally effective in accomplishing the goals or the statute.

First, the Energy Commission considered delaying the implementation date for buildings of at least 5,000 square feet and up to 10,000 square feet for only one year, to July 1, 2015. The Energy Commission rejected this alternative because it would likely not allow sufficient time to addresses barriers to compliance with the program. Consequently, this alternative would not be equally effective in accomplishing the goals of the proposed regulation. Also, this alternative would not lessen the impacts of the proposed regulation.

Second, the Energy Commission considered eliminating the disclosure mandate entirely for buildings with at least 5,000 square feet and up to 10,000 square feet. While small buildings represent a proportionally smaller percentage of energy use from the nonresidential building sector, the total energy use from buildings of this size is not insignificant. Whether the disclosure mandate should be eliminated entirely for buildings of this size depends on whether the benefits of requiring compliance of buildings of this size outweigh the costs. The Energy Commission is currently working to revise the program to eliminate barriers to compliance and lower the costs of compliance. At this time, it is unclear what the costs of compliance will ultimately be for buildings of this size. For this reason, the Energy 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 Energy Commission's informational proceeding to investigate barriers to compliance with the Program is ongoing, and the Energy Commission continues to collect information about the Program. Depending on how the record of this proceeding and informational proceeding develop, the Energy 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.

#### **IV. Specific Technologies or Equipment– Government Code §11346.2(B)(1)**

This amended rulemaking does not impose any requirement for special technologies or equipment.

#### **V. Impact on Business (Government Code §11346.2(B)(2) And §11346.3)**

Section 11346.2(b)(2)(A) states that, “[f]or a regulation that is not a major regulation, the [ISOR must include the] economic impact assessment required by subdivision (b) of Section 11346.3.”

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) it is unlikely that the regulations will create or eliminate jobs in California, (2) it is unlikely that the regulations will create any new businesses or eliminate any existing businesses, (3) it is unlikely that the regulations will cause the expansion of businesses currently doing business in California. The Energy Commission believes this delay will avoid market confusion, and will benefit the welfare of California residents.

For the vast majority of businesses in the state, the effect of the proposed regulation will be to delay for two years their obligation to disclose the information required PRC section 25402.10 when they sell, lease, or finance a building covered by the Program. Because there is some cost associated with disclosures, the proposed regulations will not represent a significant adverse impact, but rather a small economic benefit.

Since the Program went into effect on January 1, 2014, a small number of individuals and businesses have been working as consultants to owners and operators of nonresidential buildings required by the Program to disclose energy use and benchmarking data. The Energy Commission is aware of at least four small businesses are currently working in this capacity in the state, and estimates there are fewer than ten such consultants statewide. The proposed regulation may have an adverse economic impact on these consultants, because it will reduce the number of potential customers for these consultants until July 1, 2016.

Based on their conversations with affected stakeholders and comments received in the informational proceeding, Energy Commission staff estimates that between 5 and 10 individuals and businesses currently work in this capacity, as consultants to owners and operators required to comply with the Program. 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.

Consequently, the Energy Commission concludes the proposed regulations will not have a significant adverse economic impact on businesses in the state as a whole.

## **VI. Duplication or Conflicts With Federal Regulations Government Code §11346.2(B)(6)**

There are no 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.

## **VII. Evidence Supporting Finding of No Significant Adverse Economic Impact Affecting Business (Government Code §11346.2(B)(5)(A))**

The Energy Commission's finding of no significant adverse impact is based on fact that the regulations delay an existing regulatory requirement, while imposing no new regulatory requirements. Evidence relating to the small number of consultants that may be adversely impacted is based on conversations between Energy Commission staff and stakeholders affected by the program and participating in the informational proceeding to investigate barriers to compliance with the program, as well as comments received in connection with the July 2 Workshop. (See comments of Marika Erderly, Charles Orr, Rick Williams, and Randy Walsh and on Staff's July 2, 2014 Workshop on the AB 1103 Informational Proceeding (OII), listed in the documents relied upon.)