Davis Polk

SB 253/261 updates: CARB holds second public workshop as litigation shifts to Ninth Circuit

September 3, 2025 | Client Update | 13-minute read

With initial compliance deadlines for California's climate disclosure laws only months away, two recent developments of significance to stakeholders include: (1) a second public workshop held by the California Air Resources Board on key open issues, and (2) a federal court decision denying a preliminary injunction sought by the laws' challengers, which was appealed to the Ninth Circuit. Much uncertainty regarding these laws remains, leaving companies with limited guidance on critical questions.

Key developments at second CARB workshop

On August 21, 2025, the California Air Resources Board (CARB) convened a second virtual public workshop (August Workshop) regarding implementation of S.B. 253 and S.B. 261. While CARB staff announced proposals on important issues relating to applicability, timing and reporting requirements, and issued a guidance document on S.B. 261 on September 2, 2025 (S.B. 261 Guidance), CARB continued to leave key questions unanswered – particularly relating to the application of the laws in the context of affiliated entities – and created new ones with proposals departing significantly from previous CARB statements and stakeholder expectations generally. With initial reporting only months away (January 1, 2026 for initial S.B. 261 reports), significant uncertainty remains on many key issues.

Alternative definition for "doing business in California"

Whereas at the May 29, 2025 CARB workshop (May Workshop) discussed in our earlier client update, CARB proposed to define "doing business in California" based on the definition in Cal. Rev. and Tax Code § 23101 – an approach supported by the legislative history of S.B. 253 and S.B. 261 – at the August Workshop, CARB proposed an alternative definition based on whether a company is listed in the Secretary of State's business entity database. This database lists California entities and out-of-state entities qualified to do business in the state. Note that out-of-state entities are required to qualify to do business in the state (and are entered into the business entity database) if they "transact intrastate business," which, per Cal. Corp. Code § 191(a), is defined as "entering into repeated and successive transactions of its business in [the] state, other than interstate or foreign commerce" subject to a number of exclusions set forth in the statute.[1] Based on this proposed alternative definition, CARB estimates that approximately 2,596 companies will be in scope for S.B. 253 and 4,160 companies will be in scope for S.B. 261.

According to CARB, defining "doing business in California" based on Cal. Rev. and Tax Code § 23101 remains under consideration. However, at the August Workshop, CARB presented a more limited version of that definition, as outlined below:

May Workshop	August Workshop
Actively engaging in any transaction for the purpose of financial or pecuniary gain or profit ***and***	*Actively engaging in any transaction for the purpose of financial or pecuniary gain or profit* ***and***
Any of the following conditions is met during any part of a reporting year: *(1) The entity is organized or commercially domiciled in this state.* *(2) The real property and tangible personal property of the entity in this state exceed the lesser of $73,502 (2024) or 25% of the entity's real property and tangible personal property.* *(3) The amount paid in this state by the entity for compensation exceeds $73,502 (2024) or 25% percent of the total compensation paid by the entity.* *(4) Sales…of the entity in this state exceed $735,019 (2024)*	*Any of the following conditions is met during any part of a reporting year:* *(1) The entity is organized or commercially domiciled in this state.* *(2) Sales…of the entity in this state exceed $735,019 (2024)*

CARB appeared to favor the definition based on the Secretary of State's business entity database because (1) the database is public, whereas using the Tax Code definition would require CARB to access Franchise Tax Board data, which is restricted, and (2) stakeholder feedback was critical of the Tax Code definition as being too broad. CARB indicated that it plans on leveraging the business entity database and overlaying that data with available revenue data to publish a list of entities likely to be in scope.

Proposed exemptions from "doing business in California"

CARB also proposed a number of exemptions from the definition of "doing business in California," including companies whose only connection with the state are remote workers, governmental entities, non-profits and entities such as the California Independent System Operator (CAISO) whose only activity in the state consists of wholesale electricity transactions that occur in interstate commerce. CARB invited public input on these exemptions and whether others should be considered.

Alternative definition for revenues

As shown below, at the August Workshop, CARB proposed an alternative to the definition of revenues proposed at the May Workshop, which was based on Cal. Rev. and Tax Code § 25120(f)(2). According to CARB, the new proposal is consistent with definitions used by data tracking and reporting companies, such as Dun & Bradstreet.

May Workshop	August Workshop
The gross amounts realized (the sum of money and the fair market value of other property or services received) on the sale or exchange of property, the performance of services, or the use of property or capital (including rents, royalties, interest, and dividends) in a transaction that produces business income, in which the income, gain, or loss is recognized (or would be recognized if the transaction were in the United States) under the Internal Revenue Code, as applicable for purposes of this part. Amounts realized on the sale or exchange of property shall not be reduced by the cost of goods sold or the basis of property sold.	*The total global amount of money or sales a company receives from its business activities, such as selling products or providing services. This definition does not deduct operating costs or other business expenses.*

According to CARB, the Tax Code definition was criticized by stakeholders as too broad and difficult to verify. Throughout the August Workshop, CARB expressed openness to tweaking the proposed definition further in response to comments.

Defining parent/subsidiary relationships

As it did at the May Workshop, CARB discussed defining a parent/subsidiary relationship based on the state's Cap and Trade Program. Specifically, CARB proposed the following definition at the August Workshop: "[A] subsidiary is a business in which another company (the parent or holding company) owns more than 50% of its voting stock. A subsidiary has a different legal business name than its parent company. This corporate relationship implies that the parent company has a controlling interest and can influence the subsidiary's operations, management and financial decisions, even though the subsidiary operates as a separate legal entity."

However, CARB made clear throughout the workshop that the proposed definition would serve the narrow purpose of defining the circumstances under which companies can consolidate reporting at the parent level, as provided under S.B. 253 and 261.[2] CARB did not suggest that this definition would be used to determine whether to aggregate revenues among affiliates or to impose reporting obligations on out-of-state parents. CARB stated that these questions were undecided and invited stakeholders to address them in written comments.

In addition, neither the August Workshop nor the S.B. 261 Guidance addressed the level of specificity required in a consolidated parent level report with respect to in-scope subsidiaries. For example, it is unclear whether subsidiary-level information will have to be included in the consolidated report or whether aggregated, company-wide information will be sufficient.

Proposed fee structure

CARB also suggested a structure for calculating annual fees under S.B. 253 and S.B. 261. CARB calculated a per entity annual fee based on an estimate of the total annual cost of administering each statute divided by the number of entities reporting under each statute. CARB's calculation (set forth below) assumes that each entity will pay a flat fee and fees will be levied per entity even if multiple entities are part of the same corporate family and are consolidating their reporting at the parent level. Fees will also be adjusted annually for inflation.

Statute	Estimated annual implementation cost	Estimated number of reporting entities	Proposed per entity annual fee
S.B. 253	$13.9M (S.B. 253/261)	2,596	$3,106
S.B. 261		4,160	$1,403

Statute-specific issues

S.B. 253

- **Format and timing.** CARB proposed a June 30, 2026 deadline for initial Scope 1 and Scope 2 emissions reporting covering fiscal year 2025. CARB expects to release draft templates for reporting Scope 1 and Scope 2 emissions for public comments by the end of September 2025. In response to concerns from workshop attendees regarding the challenge of preparing and obtaining assurance for GHG emissions data in six months, CARB suggested they submit formal comments. However, it should be noted that CARB's enforcement notice dated December 5, 2024 provides that for 2026 reporting of Scope 1 and 2 emissions, in-scope companies are permitted to report emissions data they already possess or were collecting as of the date of the notice, and that "CARB will not take enforcement action for incomplete reporting against entities, as long as the companies make a good faith effort to retain all data relevant to emissions reporting for the entity's prior fiscal year."
- **Assurance criteria.** CARB proposed standards for assurance for GHG emissions reporting, which is required on a limited basis beginning with initial Scope 1 and Scope 2 emissions reporting in 2026 and on a reasonable basis beginning in 2030, and (subject to future rulemaking) on a limited basis for Scope 3 emissions beginning in 2030. CARB proposed that assurance meeting certain third-party standards would be deemed acceptable, including ISSA 5000 (IAASB), AA1000, ISO 14060 and AICPA. CARB suggested that it may audit assurance and reporting activities but is not intending to accredit third-party assurance providers.

S.B. 261

- **Format and timing.** Companies are required to post initial reports under S.B. 261 to their websites by January 1, 2026. CARB will open a public docket on December 1, 2025 and companies will be able to post links to their report on the public docket, which will close on July 1, 2026.
- **Scope of disclosures.** CARB indicated that it is adopting a broad reading of S.B. 261, expecting companies to prepare reports that comply with ***all*** parts of TCFD (or an equivalent framework such as IFRS S2), covering climate-related risks ***and*** opportunities. The S.B. 261 Guidance provides further detail on the "minimum CARB requirements for disclosure" tracking each of TCFD's four "pillars":
  - **Governance:** Description of governance structures for identifying, assessing, and managing climate-related financial risks and opportunities.
  - **Strategy:** Description of actual and potential impacts of climate-related risks and opportunities on the company's operations, strategy and financial planning (where material) taking into consideration the future impacts of climate change under various climate scenarios (which can be qualitative rather than quantitative in nature).
  - **Risk Management:** Description of how climate-related risks are identified, assessed and managed.
  - **Metrics and Targets**: Disclosure of the metrics and targets used to assess and manage relevant climate-related risks and opportunities (where material).

  As we have discussed previously in our earlier client update, the text of S.B. 261 suggests a narrower requirement to report on material climate-related financial risks only, which corresponds to the Strategy section of TCFD, but CARB is reading S.B. 261 as incorporating the entirety of TCFD by reference.

- **S.B. 261 explanatory "statement."** S.B. 261 provides that a report that does not include all required disclosures should include "a detailed explanation for any reporting gaps, and describe steps the covered entity will take to prepare complete disclosures."[3] CARB proposed implementing this provision by requiring companies to include a statement accompanying their report identifying:
  - the reporting framework being followed,
  - the elements of that framework that have been included or omitted by the report, and
  - the reasons for any such omissions as well as any plans for future disclosures.

  For companies concluding that climate-related financial risks are not material, CARB suggested that the statement should address that conclusion as well.

- **Leniencies for initial reporting.** CARB also stated that for the first reporting cycle (due January 1, 2026), it will not insist on full TCFD compliance. Specifically, the S.B. 261 Guidance states that CARB (1) will not require GHG emissions reporting (which is included under the Metrics and Targets "pillar" of TCFD), and (2) will allow companies to report on the most recent or best available data. Notably, at the August Workshop, CARB indicated that initial reporting could also omit scenario analysis. This leniency, however, does not appear in the S.B. 261 Guidance.

  As a practical matter, it isn't clear these leniencies provide meaningful relief to companies. For example, as noted above, S.B. 261 already has a built-in mechanism allowing companies to omit any required reporting element in any reporting period. In addition, the "minimum" disclosure requirements as described by CARB – which are not limited to the first reporting period – do not appear to require GHG emissions disclosure. Instead, the S.B. 261 Guidance provides that companies simply have to disclose the metrics and targets they actually use. Presumably, companies that do not collect GHG emissions data as part of their efforts to assess and manage climate-related risks and opportunities would not be required to collect and report that data in *any* reporting period and would simply have to disclose that they don't use such metrics and targets.

Critical open issues

Similar to the May Workshop, CARB again declined to address a set of critical issues that are top of mind for companies, namely, how the statutes apply in the context of affiliated corporate entities. For example, are there circumstances under which revenues are aggregated among parents, subsidiaries or other affiliates in determining whether the $500M/$1B thresholds are met, or is revenue determined on an entity-by-entity basis? Are there circumstances under which a parent company is deemed to be "doing business in California" solely because of the activities of its subsidiary? Several attendees at the August Workshop posed questions regarding these issues, and CARB responded that it is continuing to consider them and invited written comment.

Next steps for CARB

August 21-September 11	Public comment period for workshop proposals
September (expected)[4]	– CARB to issue proposed template for Scope 1 and Scope 2 emissions reporting under S.B. 253 – CARB to release list of entities potentially subject to S.B. 253 and S.B. 261 based on CARB research
October 14[5]	Notice of proposed rulemaking
October 17-November 30	45-day comment period
December 11-December 12	Board consideration of proposed rulemaking

Update on federal legal challenge

As CARB works towards implementing S.B. 253 and S.B. 261, the federal litigation challenging the laws are at a critical stage. On August 13, the district court denied a preliminary injunction motion brought by the plaintiffs. According to the district court, the plaintiffs failed to show a likelihood of success on their claims (which had previously been narrowed to the assertion that the laws impermissibly compel speech in violation of the First Amendment). The court reasoned that under applicable First Amendment standards, the government made a sufficient showing at the preliminary injunction stage that both laws furthered legitimate government interests, namely, ensuring that investors were provided with reliable information on which to make decisions (both laws) and reducing emissions (S.B. 253 only). The district court further concluded that the other preliminary injunction factors – irreparable harm and the balance of the equities – weighed in favor of denying the motion because of the lack of merit of the plaintiffs' First Amendment claims. The plaintiffs have since appealed the decision to the Ninth Circuit, which has set a briefing schedule running through early November. At the same time, the plaintiffs filed a motion to the district court to enjoin the laws while the appeal is pending, which is scheduled for a hearing on September 15. If this motion is denied, the plaintiffs are expected to seek the same relief from the Ninth Circuit.

What companies should be doing now

While the uncertainty associated with the lack of clarity regarding key issues and the continued possibility of an injunction with only months before the first compliance deadline for S.B. 261 is undoubtedly frustrating, companies should continue to take the steps necessary to be in compliance while also continuing to monitor CARB's activities. For S.B. 261, companies that may be in scope that have not yet completed a report aligned with TCFD or other equivalent framework should begin that process now and be prepared to take advantage of the flexibility built into the statute to report to the best of their ability. For S.B. 253, companies should use fiscal year 2025 data, if available, and if not available, use data from earlier periods in reliance on CARB's December 5, 2024 enforcement notice. In addition, companies should focus on lining up a third-party assurance provider that is familiar with the assurance standards listed above.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

David A. Zilberberg
+1 212 450 4688
david.zilberberg@davispolk.com

Timothy J. Sullivan
+1 212 450 4108
timothy.sullivan@davispolk.com

1 Non-California entities that meet this definition are required to file with California Secretary of State and appoint an agent for service of process. Cal. Corp. Code § 2105.

2 Cal. Health & Safety Code §§ 38532(c)(2)(A)(iii), 38533(b)(2).

3 Cal. Health and Safety Code § 38533(b)(1)(B).

4 CARB did not provide a firm deadline for these items but mentioned they would be forthcoming within "the next few weeks" or by the end of September.

5 Although the workshop deck presented this formal timetable for proposed and final rules in the specific context of implementing the regulations relating to fees, during the workshop CARB staff indicated that the rulemaking would cover the other issues discussed in this memo as well.