Davis Polk

SB 253/261 updates: Ninth Circuit temporarily stays SB 261 and CARB holds third public workshop

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On November 18, 2025, two key developments occurred relating to California's climate disclosure laws: (1) a Ninth Circuit injunction of SB 261 enforcement pending resolution of an ongoing appeal by business groups of a lower court's denial of a motion for a preliminary injunction in litigation challenging the laws, and (2) a third public workshop held by the California Air Resources Board on key open issues.

Update on federal legal challenges

On November 18, 2025, the Ninth Circuit enjoined enforcement of SB 261 pending its consideration of plaintiffs' appeal of the lower court's denial of their preliminary injunction motion. The plaintiffs include business groups challenging the validity of SB 253 and SB 261 under the U.S. Constitution, namely that they impermissibly compel speech in violation of the First Amendment, are pre-empted by federal environmental law, and constitute impermissible extraterritorial regulation under the so-called dormant Commerce Clause doctrine. However, in subsequent rulings, the court narrowed the scope of the lawsuit significantly, dismissing the pre-emption and Commerce Clause claims, thereby limiting the lawsuit to the First Amendment claim. After the district court denied plaintiffs' request for a preliminary injunction to pause the implementation of the laws pending the litigation, plaintiffs asked the Ninth Circuit to enjoin enforcement of both laws prior to the January 1, 2026 deadline for the initial SB 261 reporting. The Ninth Circuit granted the motion as to SB 261 only in a short one-paragraph order. The injunction does not apply to SB 253. The Ninth Circuit has scheduled oral arguments to consider plaintiffs' appeal for January 9, 2026.

The ultimate outcome and timing of this appeal, and its impact on the compliance deadlines for SB 261, remain uncertain. If the Ninth Circuit rules in favor of the plaintiffs' request for a preliminary injunction pending the underlying district court challenge on the merits, then the laws may be on hold (depending on the scope of the ruling) until the district court's decision. If the Ninth Circuit upholds the district court's denial of a preliminary injunction, the November 18 injunction of SB 261 enforcement would be lifted and parties would look to the courts and/or the California Air Resources Board (CARB) for further guidance as to next steps. It could be weeks or months after January 9 before the Ninth Circuit issues an opinion.[1]

Key developments at third CARB public workshop

On November 18, 2025, CARB convened a third virtual public workshop (November Workshop) regarding implementation of SB 253 and SB 261. CARB announced proposals on certain key issues such as the definitions of revenue and "doing business in California"; aggregation of subsidiary revenue for parent compliance; a test for whether parent entities can submit consolidated reports for subsidiaries; and delayed timing of SB 253 reporting to August 10, 2026. CARB provided a presentation outlining the key issues discussed in the November Workshop (Presentation Materials), and also released an updated FAQ regarding compliance with SB 253 and SB 261 (FAQs), along with an updated SB 261 compliance checklist (Checklist). We summarize the key developments from the November Workshop

and the updated CARB materials below.

"Doing business in California" to be defined based on California tax code

At the August 21, 2025 CARB workshop (August Workshop) discussed in our earlier client update, CARB proposed two alternative definitions for "doing business in California": (1) a definition based on whether a company is listed in the Secretary of State's business entity database, and (2) a definition based on a limited version of how this term is defined in Cal. Rev. and Tax Code § 23101 (see below). Although CARB had appeared to favor the definition based on the business entity database and published a proposed list of covered entities based in part on this definition, CARB is now proposing the tax code-based alternative. As such, companies should now evaluate whether they are "doing business in California" using the following definition:

> *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) Sales, as defined in The Revenue and Taxation Code subdivision (e) or (f) of Section 25120 as applicable for the reporting year, of the entity in this state exceed the inflation adjusted thresholds of $735,019 (2024). For purposes of this paragraph, sales of the entity include sales by an agent or independent contractor of the entity. For purposes of this paragraph, sales in this state shall be determined using the rules for assigning sales under Sections 25135 and 25136, and the regulations thereunder, as modified by regulations under Section 25137.*

CARB also clarified that the "doing business in California" determination is to be made on an entity-specific basis. Thus, a company that does not itself have the requisite California nexus under the above definition would not be considered to be in scope solely on the basis that its subsidiary meets the definition.

Revenues to be defined based on California tax code

As discussed in our prior client update, at the August Workshop, CARB proposed an alternative to the definition of revenues that CARB stated was consistent with definitions used by data tracking and reporting companies. However, at the November Workshop, CARB abandoned this alternative definition and confirmed that it was proposing the definition based on Cal. Rev. and Tax Code § 25120(f)(2), incorporating the following definition of "gross receipts" contained in such section, from CARB's May 29, 2025 workshop (May Workshop), which we discussed in our earlier client update:

> *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.*

CARB stated that one reason for using this definition is that amounts calculated using the Tax Code's definition can be verified using Franchise and Tax Board (FTB) filings, unlike amounts calculated using the alternative definition based on the business entity database from the August Workshop. CARB also stated that (a) companies can use the lesser of the prior two fiscal years' revenue in determining whether they meet the revenue threshold and (b) the revenue threshold is determined at the individual company level except if a parent and its subsidiaries file California taxes as a unitary business,[2] the revenue of a parent's subsidiaries counts toward the revenue of the parent as part of its gross receipts for determining applicability. As discussed further below, companies can refer to their FTB filings to determine their revenues.

Use of California FTB data to determine revenues and "doing business in California"

CARB suggested that companies can refer to their California corporate tax filings to determine whether they exceed the statutory revenue thresholds and whether they are "doing business in California." Specifically, it stated that to determine a company's total revenues, a company should reference its gross receipts as set forth in Schedule F, line 1a in its Form 100, and to determine whether it meets the sales threshold in the proposed definition of "doing business in California," it should reference Schedule R-1, Col(b) of Form 100. Entities other than corporations should reference applicable tax filings as well, as indicated in the below table:

Entity type	Tax form	Total revenue (gross receipts)	CA sales ('doing business')
Corporation	Form 100	Schedule F, Line 1a	Schedule R-1, Col(b)
S-Corporation	Form 100S	Schedule F, Line 1a	Schedule R-1, Col(b)
Partnership	Form 565	Line 1a	Schedule R-1, Col(b)
LLC	Form 568	Schedule B, Line 1a	Schedule R-1, Col(b)

Proposed exemptions from "doing business in California"

CARB further discussed exemptions from the definition of "doing business in California," Over the course of its three public workshops, CARB has proposed that the following entities would be exempt:

- Federal, state, and local government entities, and companies that are majority-owned by government entities;
- business entities that are subject to regulation by the California Department of Insurance in the business of insurance in any other state;
- non-profit or charitable organizations defined as tax-exempt under the Internal Revenue Code;
- entities whose only business in California is the presence of teleworking; and
- the California Independent System Operator or business entities engaged solely in wholesale electricity transactions occurring in interstate commerce.

Regardless of these exemptions, note that the above entities may very well be out of scope based on CARB's proposed definitions of "doing business" and "revenues." Presumably, CARB intends these categories to be "per se" exclusions to remove any regulatory uncertainty surrounding these entities. CARB also stated that holding companies and mutual funds are likely to be out of scope "given that they do not report gross receipts in their California corporate tax filings, and would not meet the revenue thresholds as a result."

Clarification of test for defining parent/subsidiary relationships for reporting purposes

As in the May Workshop and August Workshop, CARB discussed defining a parent/subsidiary relationship based on the state's Cap and Trade Program. Specifically, in its Presentation Materials, CARB stated that "[a] business entity is a subsidiary if another business entity has ownership interest in or control of the first entity by *direct corporate association* as defined by Title 17, California Code of Regulations, § 95833" and that an entity is a parent if it has at least one subsidiary.

At the November Workshop, CARB provided further details in its Presentation Materials on what counts as a "direct corporate association" under Title 17, California Code of Regulations, § 95833:

A corporate association exists when one entity has an ownership interest in or control over a second entity. The following indicia of control determine ownership of control:

- *Greater than 50 percent of ownership of any class of listed shares, the right to acquire such shares, or any option to purchase such shares of the other entity;*
- *Greater than 50 percent of common owners, directors, or officers of the other entity;*
- *Greater than 50 percent of the voting power of the other entity;*
- *In the case of a partnership other than a limited partnership, greater than 50 percent of the interests of the partnership;*
- *In the case of a limited partnership, greater than 50 percent of control over the general partner or greater than 50 percent of the voting rights to select the general partner; and*
- *In the case of a limited liability corporation, greater than 50 percent of ownership in the other entity regardless of how the interest is held.*

CARB also confirmed that "direct corporate association also exists when two entities are connected through a line of more than one direct corporate association," which indicates that a parent has a direct corporate association with a subsidiary multiple levels down the corporate chain if the direct corporate association relationship exists between all intervening entities.

CARB made clear during the November Workshop that this proposed definition was only for purposes of determining which companies can consolidate reporting at the parent level, as provided under SB 253 and SB 261, and not for purposes of determining whether to aggregate revenues among affiliates or imposing obligations on out-of-state parents.

Consolidated reporting by parent entities

CARB's FAQs confirms that, for both SB 253 and SB 261, parent companies can submit a consolidated report covering their in-scope subsidiaries' emissions data, even if the parent is out of scope and the report includes information regarding out-of-scope entities. In the November Workshop, CARB seemed to indicate that such consolidated reports did not need to include specific data relating to each in-scope subsidiary. However, in response to a stakeholder question specifically related to SB 253 reporting, CARB stated that it will issue further guidance on this point in updates to the FAQs. If it is the case that consolidated reports do not need to include specific data for each in-scope subsidiary, this should ease compliance burdens for parent companies that plan to submit existing company-wide reports.

Preliminary list of covered entities is not a compliance document

As discussed in our prior client update, in September 2025, CARB released a preliminary list of companies considered to be in scope for SB 253 and SB 261. However, at the November Workshop, CARB stressed that this list should not be used to determine whether an entity is subject to these laws. Instead, CARB released this list to provide an initial estimate of the total number of entities subject to the laws for purposes of determining the fees to be paid by each entity (discussed below).

Determination of fees

CARB stated that SB 253 and SB 261 will each have a flat annual fee, to be determined based on the number of in-scope entities divided by the annual program compliance costs (estimated by CARB at $13.9 million in the aggregate for both laws).[3] CARB will issue fee invoices based on the number of entities that are required to report in 2026 under SB 253 and SB 261, and while each in-scope entity will receive its own invoice, a parent entity has the option to pay the fees of all of its in-scope subsidiaries in one combined payment. CARB proposed September 10, 2026 as the date for the first fee assessment.

Statute-specific issues

SB 253

- **Format and timing.** At the November Workshop, CARB discussed various formatting and timing issues:

- In a shift from the deadline proposed in the August Workshop, CARB delayed until August 10, 2026 the deadline for initial Scope 1 and Scope 2 emissions reporting. CARB stated that whether the initial reporting will require 2025 or 2026 data is based on the following test: entities whose fiscal year ends between January 1 and February 1, 2026 will report data from the fiscal year ending in 2026, whereas entities whose fiscal year ends between February 2 and December 31, 2026 will report data from the fiscal year ending in 2025.
- For the initial reporting period, in-scope companies are permitted to report emissions data they already possessed or were collecting as of the date of a CARB enforcement notice dated December 5, 2024, and companies that were not collecting or planning to collect Scope 1 and Scope 2 emissions data as of that date will not be required to submit Scope 1 and Scope 2 emissions data during the initial reporting period. However, such companies are required to submit a statement on company letterhead to CARB stating that they did not submit a report and were not collecting data or planning to collect data at the time the notice was issued.
- For the initial reporting period, companies are not required to report in the format of the draft Scope 1 and Scope 2 emissions reporting template released by CARB in October 2025, and companies can submit their own annual report or other report that contains Scope 1 and Scope 2 emissions data.

– **Assurance not required in 2026.** At the November Workshop, CARB stated that limited assurance of Scope 1 and Scope 2 emissions will not be required for the initial 2026 reporting period in a change to earlier CARB guidance that would have required it.

SB 261

– **Format and timing.** As discussed in our prior client update for the August Workshop, companies are required to post initial reports under SB 261 to their websites by January 1, 2026. CARB will open a public docket on December 1, 2025, and companies will be required to post links to their report on the public docket, which will close on July 1, 2026. However, as discussed above, on November 18, the Ninth Circuit enjoined the enforcement of SB 261 pending resolution of an ongoing appeal by business groups of a lower court's denial of a motion for a preliminary injunction in litigation challenging SB 253 and SB 261. The Ninth Circuit has scheduled oral arguments in this appeal for January 9. As a result, practically speaking, companies will not be required to submit SB 261 reports by January 1, because the ultimate outcome and timing of the resolution of this appeal will not occur until sometime after January 9. Given the uncertainty of the outcome of any litigation, however, companies should continue with their preparations to comply with SB 261 in the event that it is upheld.

– **Scope of disclosures.** CARB's Checklist describes the minimum amount of disclosures that CARB will consider sufficient for the initial reporting period. Importantly, this checklist provides specific descriptions of what degree of information will be considered sufficient for the initial reporting period:

- *Governance*: Describe your organization's governance structure, if any, for identifying, assessing and managing climate-related financial risks. Details should include discussion of any management oversight of climate-related risks and opportunities and should provide a description pertaining to Board oversight of those climate-related risks and opportunities (if the reporting entity has a Board).
- *Strategy*: Describe the actual and potential impacts of climate-related risks and opportunities on the company's operations, strategy and financial planning (where material). This includes describing:
  - the climate-related risks and opportunities the organization has identified over the short, medium and long term;
  - the impact of climate-related risks and opportunities on the organization's operations, strategy, and financial planning; and
  - the resilience of the organization's strategy, if any, taking into consideration the future impacts of climate change under various climate scenarios, which can be qualitative in nature.
- *Risk Management*: Describe how the reporting entity identifies, assesses and manages climate-related risks including a description of the process the reporting entity uses for identifying, managing and assessing climate-related risks, and how those considerations and processes are integrated into the organization's overall risk management.
- *Metrics & Targets*: Disclose the metrics and targets used to assess and manage relevant climate-related risks and opportunities adopted to reduce and adapt to climate-related risk, where such information is material. Note that there is no requirement to disclose Scope 1, Scope 2 and Scope 3 emissions data for the initial reporting period.

These minimum disclosure requirements in the Checklist remain similar to those listed in the earlier checklist issued by CARB on September 2, 2025 and summarized in our earlier client update for the August Workshop.

- **SB 261 explanatory "statement."** As in the August Workshop, in the November Workshop, CARB reiterated that companies should include a statement accompanying their report identifying:
  - the reporting framework being followed (e.g., TCFD or IFRS);
  - 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.

What companies should be doing now

Given the uncertainty of the outcome of the appeal pending before the Ninth Circuit, companies should continue with their preparations to comply with SB 253 and SB 261 while monitoring CARB and litigation developments and, in particular, the oral arguments in connection with the appeal scheduled for January 9 and the Ninth Circuit's ruling expected thereafter. This is particularly true in the case where companies are further along in their preparations. Otherwise, it may be more costly, inefficient and difficult for companies to resume the process after they have stopped once a decision is reached after the January 9 hearing.

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.

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[1] Data as of September 2024 from the U.S. Courts website indicates that final orders in civil appeals in the Ninth Circuit are issued an average of 1.4 months after oral argument has taken place.

[2] A California corporate tax term to refer to a group of affiliated entities that meet certain standards relating to common ownership and centralized operations.

[3] CARB's program administration costs also include a one-time setup cost of $20.7 million.