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California's climate-related disclosure laws clear first litigation hurdle

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On November 5, 2024, a federal court denied a summary judgment motion to invalidate California's two climate-related disclosure laws on First Amendment grounds leaving them in place as the lawsuit proceeds. With the election of Donald Trump putting the future of the SEC's climate disclosure rules in doubt, the California laws remain the only broadly applicable U.S. climate-related disclosure mandates. Accordingly, companies should continue preparing to comply with these laws.

On November 5, 2024, the court in *Chamber of Commerce of the United States of America et al. v. California Air Resources Board et al.* (C.D. Cal.), the lawsuit challenging the legality of California's S.B. 253 and S.B. 261, denied the plaintiffs' motion for summary judgment. While the lawsuit challenges the S.B. 253 and S.B. 261 on a number of U.S. constitutional grounds—namely, that they violate the First Amendment, Supremacy Clause, and constitutional limitations on extraterritorial regulation—the summary judgment motion was brought solely on First Amendment grounds. Specifically, the plaintiffs argued that the disclosure requirements under S.B. 253 and S.B. 261 impermissibly compel speech and are therefore invalid under the First Amendment as a matter of law.

The court's decision was guided by the fact that the plaintiffs were challenging the laws on their face rather than as applied to a particular set of circumstances. As such the plaintiffs had the heavy burden to show that the unconstitutional applications of the laws "substantially outweighed" applications of the law that are constitutional. The court concluded that in the absence of any factual record developed through discovery, it could not conduct this analysis. Specifically, the court noted that in order to determine whether a particular application of the laws violates the First Amendment it had to first determine which level of scrutiny applies: strict scrutiny, which typically applies to content-based restrictions that don't involve commercial speech, intermediate scrutiny, which typically applies to regulation of commercial speech, and rational scrutiny, which typically applies to compelled commercial speech that is purely factual and uncontroversial. The court discussed examples under which the disclosure compelled by the laws might constitute commercial speech such as if a company subject to the laws had advertised their operations as "green" or "net zero" and the laws had the effect of educating consumers by compelling the company to disclose data regarding its carbon footprint. If such speech were determined to be commercial, the laws as applied in these circumstances would be subject to a more relaxed standard than strict scrutiny typically applicable to content-based restrictions on non-commercial speech. However, without more data, the court could not determine whether such applications of the laws were "substantially outweighed" by unconstitutional applications of the laws. Accordingly, the court denied the plaintiffs' motion for summary judgment. The litigation will presumably proceed to discovery, although the plaintiffs have the option of refiling their summary judgment motion.

Notably, the result of the 2024 presidential election raises the stakes of the litigation. President-elect Trump strongly opposes the Biden administration's climate agenda and we expect his administration to take steps to undo the SEC's climate disclosure rules once a Republican-controlled SEC is in place. This means that the California laws will currently be the only broadly applicable mandatory framework for climate disclosure in the U.S. if they survive the litigation.

While the ultimate fate of S.B. 253 and S.B. 261 is uncertain, the court's decision means that, at least in the short term, they will remain in effect and companies that are in scope should continue to take initial steps to comply. As discussed in our prior update, these efforts should focus on any gaps that exist between their current climate-related disclosure practices and the disclosures required under these laws. In addition, companies should prioritize Scope 1 and 2

emissions reporting under S.B. 253, which is the nearest term compliance item under the law as it requires companies to have appropriate measures in place beginning in 2025 in order to be in a position to report those emissions in 2026.

Law clerk Jared Bivens contributed to this client update.

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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