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## California Governor Signs Climate Disclosure Bills for Public and Private Companies

Two climate disclosure bills signed by California Governor Gavin Newsom on October 7, 2023 will require certain public and private companies organized in the United States that do business in the state of California to disclose information on carbon emissions and report other climate-related financial risks. The bills add to an increasingly complex landscape of laws and regulations that require companies to disclose climate-related information. S.B. 253, the “Climate Corporate Data Accountability Act,”<sup>1</sup> will require public and private companies to make annual reports on their greenhouse gas (“GHG”) emissions, including direct GHG emissions (“Scope 1”), indirect GHG emissions from purchased energy (“Scope 2”), and indirect upstream and downstream GHG emissions (“Scope 3”). S.B. 261, the “Climate-Related Financial Risk Act,”<sup>2</sup> requires public and private companies to disclose certain climate-related financial risks in accordance with recommendations of the Task Force on Climate-Related Financial Disclosures (“TCFD”), created by the Financial Stability Board. Both of these bills are designed to improve corporate transparency regarding climate emissions and promote the public’s interest in various climate goals. Both bills will require the California Air Resources Board (“CARB”) to promulgate regulations in the near future to assist with execution and enforcement.

These new laws represent what for many U.S. companies will be their first mandatory climate-related disclosure requirements. While the Securities and Exchange Commission (“SEC”) has proposed rules that would require climate-related disclosure in a company’s public filings (the “SEC Proposed Rule”),<sup>3</sup> those rules have yet to be finalized. The requirements of the California bills overlap significantly with those of the SEC Proposed Rule. However, unlike the SEC Proposed Rule, the California bills apply to large, private companies as well as public companies. While the California bills will require disclosure of Scope 3 emissions by all covered companies, the SEC Proposed Rule only requires Scope 3 disclosure if the emissions are material or if the company has established emission reduction targets that include Scope 3. These differences mean that the California bills could impact companies that will not be subject to the SEC Proposed Rule and require more disclosure.

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<sup>1</sup> S.B. 253 can be found at [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=202320240S.B.253](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240S.B.253).

<sup>2</sup> S.B. 261 can be found at [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=202320240S.B.261](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240S.B.261).

<sup>3</sup> The Enhancement and Standardization of Climate-Related Disclosures for Investors, first released in March 2022, would require climate-related disclosure in the periodic reports and registration statements of public companies (<https://www.sec.gov/files/rules/proposed/2022/33-11042.pdf>). Please see our previous memorandum discussing the SEC Proposed Rule at <https://www.cahill.com/publications/firm-memoranda/2022-04-06-sec-proposes-climate-related-disclosure-for-public-companies>.

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## S.B. 253; the Climate Corporate Data Accountability Act

### *Companies Impacted*

S.B. 253 will impact U.S. public and private corporations, limited liability companies, partnerships, and other entities that (i) have total annual revenues in excess of \$1 billion and (ii) do business in California. What it means to do business in the state is not defined by the bill, and further guidance will be needed from CARB to assess whether a given company will be subject to the law. However, it is clear that the law is not limited to California-based companies and may affect any company operating or generating revenue in California. The language of the bill does not provide for any exceptions or exemptions. Furthermore, the bill gives no guidance as to how revenues are to be calculated, which will also require further clarification from CARB. However, the express language of the bill suggests the calculation will likely include total global revenues of the company, as opposed to revenues generated only within California.

### *Requirements*

S.B. 253 will require companies to which the law applies (“253 Impacted Companies”) to publicly file GHG reports providing information as to the three different scopes below.

- Scope 1 – “all direct greenhouse gas emissions that stem from sources that [the company] owns or directly controls, regardless of location, including, but not limited to, fuel combustion activities.”
- Scope 2 – “indirect greenhouse gas emissions from consumed electricity, steam, heating, or cooling purchased or acquired by [the company], regardless of location.”
- Scope 3 – “indirect upstream and downstream greenhouse gas emissions, other than scope 2 emissions, from sources that the [company] does not own or directly control and may include, but are not limited to, purchased goods and services, business travel, employee commutes, and processing and use of sold products.”

A 253 Impacted Company must report all emissions generated globally, not just within the state of California. Reports must be filed with an emissions reporting organization to be designated by CARB and must conform to the Greenhouse Gas Protocol standards developed by the World Business Council for Sustainable Development and the World Resources Institute. 253 Impacted Companies must obtain an “assurance engagement,” performed by an independent third-party assurance provider, of their public disclosure. The third-party assurance provider must have “significant experience in measuring, analyzing, reporting, or attesting to the emission of greenhouse gases and sufficient competence and capabilities necessary to perform engagements in accordance with professional standards and applicable legal and regulatory requirements.”

### *When will the Bill Take Effect?*

The bill provides that the first required reporting of Scope 1 and Scope 2 emissions data will begin in 2026 (using emissions data from fiscal year 2025) and, until 2029, will be required to be performed at a “limited assurance” level, indicating that the assurance provider is not aware of any material misstatements. Beginning in 2030, Scope 1 and Scope 2 reporting must be completed at a “reasonable assurance” level, indicating that the assurance provider has confirmed that there are no material misstatements. Reporting of Scope 3 emissions will begin in 2027 (using emissions data from fiscal year 2026) and, until at least 2030, may be submitted up to 180 days after the Scope 1 and Scope 2 disclosure for the same reporting period. Scope 3 emissions will be required to obtain a “limited assurance” level in 2030, unless CARB determines an assurance is needed earlier. Specific reporting dates and

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other implementing regulations, including fee levels, must be promulgated by CARB by January 1, 2025. In recognition of the potential for overlapping reporting requirements, the bill instructs CARB to structure the reporting obligations in a manner that minimizes such duplication and allows submission of reports in other formats so long as they satisfy the requirements of the bill.

### ***Penalties***

The bill sets a maximum penalty for violations at \$500,000 per reporting year, with the actual amount charged to depend on the 253 Impacted Company's compliance history and whether it acted in good faith. However, given the inherent complexities of gathering and reporting Scope 3 emissions, no penalties will be assessed on Scope 3 reporting between 2027 and 2030 except for missed filings. After 2030, there will be no penalties for Scope 3 misstatements as long as the reporting company can show that the statements were made with a reasonable basis and in good faith.

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## **S.B. 261; the Climate-Related Financial Risk Act**

### ***Companies Impacted***

S.B. 261 will impact U.S. public and private corporations, limited liability companies, partnerships, and other entities that (i) have total revenues in excess of \$500 million and (ii) do business in California. Like S.B. 253, S.B. 261 does not define "doing business" in California, does not state how revenues are calculated, and contemplates no exceptions or exemptions, other than insurance companies (which are already regulated by the National Association of Insurance Commissioners and by the states). Also like S.B. 253, S.B. 261 will require reporting for the whole company, not just California operations, although climate-related financial risks of covered subsidiary companies meeting the revenue threshold may be consolidated in a single report by their parent companies.

### ***Requirements***

S.B. 261 will require companies to which the law applies ("261 Impacted Companies") to publish on their websites a climate-related financial risk report that is in accordance with the recommended framework and disclosures contained in the Final Report of Recommendations of the TCFD<sup>4</sup>, as well as measures adopted by the company to reduce and adapt to climate-related financial risks. A 261 Impacted Company will satisfy its climate-related financial risk reporting requirement if it has already prepared a publicly accessible biennial report that includes climate-related financial risk disclosure information that is consistent with the TCFD recommendations, whether voluntarily or pursuant to a "law, regulation or listing requirement issued by any regulated exchange, national government, or other governmental entity." The statute adds that disclosure adhering to the International Financial Reporting Standards Sustainability Disclosure Standards, as issued by the International Sustainability Standards Board, will also satisfy this requirement. It remains unclear what form the SEC Proposed Rule will take when finalized. However, if the SEC's final rule continues to incorporate the TCFD, a company that makes climate-related financial risk disclosure pursuant to the final SEC rule will likely not need to prepare an additional report for the state of California. Further guidance will be required from California to clarify this issue when the SEC rule is finalized. Reporting companies will be required to pay an annual fee to be set by CARB.

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<sup>4</sup> The final TCFD report can be found at <https://assets.bbhub.io/company/sites/60/2023/09/2023-Status-Report.pdf>.

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## ***When will the Bill Take Effect?***

S.B. 261 requires 261 Impacted Companies to make their first climate-related financial risk report available by January 1, 2026. Thereafter, 261 Impacted Companies will be required to make biennial reports.

## ***Penalties***

Currently, the bill contemplates a maximum administrative penalty of \$50,000 per reporting year for failing to report or publishing an inadequate or insufficient report. The climate reporting organization, to be designated by CARB, will be responsible for analyzing the sufficiency of disclosure. The bill recognizes that a reporting company may not complete all the required disclosures but requires that it must do so to the best of its ability with explanations about any gaps and steps it is taking to be able to provide a complete report. As with the penalty provisions of S.B. 253, the level of penalties under S.B. 261 will take into account the 261 Impacted Company's compliance history and whether it acted in good faith.

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## **Conclusion**

S.B. 253 and S.B. 261 aim to address climate risk through mandatory disclosure, backed by the potential for penalties. However, when Governor Newsom signed the two bills, he cautioned that S.B. 253's deadlines "are likely infeasible" and expressed concern "about the overall financial impact of this bill on businesses."<sup>5</sup> Given Newsom's statements, it seems reasonable to expect further modifications to these two laws. The bills are also likely to face legal challenges, such as whether the bills unlawfully compel speech under the First Amendment or whether they will be subject to preemption in light of federal regulations. Furthermore, 261 Impacted Companies will need guidance on which laws or standards will be considered compatible with S.B. 261, such as future rulemaking by the SEC or the European Union's Corporate Sustainability Reporting Directive. Formal rulemaking by CARB will also be essential to assessing the full impact of these bills on individual companies. Companies should pay close attention to the development of these bills and related rules and be prepared to disclose considerable additional climate-related information in the years ahead.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to contact authors Helene Banks (Partner) at 212.701.3439 or [hbanks@cahill.com](mailto:hbanks@cahill.com); Lynn Schmidt (Senior Attorney) at 212.701.3641 or [lschmidt@cahill.com](mailto:lschmidt@cahill.com); or Jason Wang (Associate) at 212.701.3884 or [jwang@cahill.com](mailto:jwang@cahill.com); or email [publications@cahill.com](mailto:publications@cahill.com).

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<sup>5</sup> <https://www.gov.ca.gov/wp-content/uploads/2023/10/S.B.-253-Signing.pdf>

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