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California's Consequential GHG Emissions Reporting Law: The Climate Corporate Data Accountability Act

On October 7, Governor Gavin Newsom of California signed into law two of the three bills from the California Senators' Climate Accountability Package—SB 253, the Climate Corporate Data Accountability Act, and SB 261, the Climate-Related Financial Risk Act. The passage of SB 253 and SB 261 (collectively, the acts) establish significant greenhouse gas (GHG) emissions and climate-related financial risk disclosure requirements for certain private and public companies "doing business in California." The acts have significant implications for companies doing business in California, as that term is defined in California's Revenue and Tax Code (R.T.C.). This alert highlights the SB 253 GHG emissions reporting law, which in the instances noted below is far broader than the Securities and Exchange Commission's (SEC) proposed GHG Emissions Disclosure Requirement set forth in the SEC's proposed climate disclosure rule (the SEC's Proposed Rule) and the proposed federal contractor GHG emissions disclosure requirement (the Contractor Rule) set forth in the proposed Federal Supplier Climate Risks and Resilience Rule. SB 253, similar to its proposed federal counterparts, draws from the GHG Protocol standards and guidance developed by the World Resources Institute and the World Business Council for Sustainable Development, adopting the emissions scope concepts and methodology for calculating companies' indirect and direct GHG emissions. Under SB 253, a "reporting entity" is to begin publicly disclosing its GHG emissions data on an annual basis as follows:

1. Starting in 2026, the reporting entity's scope 1 emissions (e.g., direct GHG emissions) and scope 2 emissions (e.g., indirect GHG emissions from the reporting entity's consumed energy) for the prior fiscal year; and
2. Starting in 2027, the reporting entity's scope 3 emissions (e.g., indirect upstream and downstream GHG emissions) for the prior fiscal year.

A reporting entity is a partnership, corporation, limited liability company or other business entity formed under the laws of a state of the United States or the District of Columbia or under an act of Congress with a total annual revenue (in the prior fiscal year) greater than $1 billion that does business in California. SB 253 is expected to apply to a large number of public and private companies because the threshold for doing business in California is very low. The state Senate Floor Analyses notes that R.T.C. section 23101 defines doing business in the state as "engaging in any transaction for the purpose of financial gain within California, being organized or commercially domiciled in California, or having California sales, property or payroll exceed specified amounts[.]" By way of example, as of 2020 any company with California sales exceeding the threshold amount of $690,144 or 25 percent of such company's total sales meets this definition. The state Assembly and Senate Floor Analyses estimate that 5,344 companies will be required to report under SB 253. Notwithstanding these estimates, the realized scope of the companies directly impacted will not be able to be assessed until the California Air Resources Board (CARB) provides clarity on how "total annual revenue" will be evaluated (e.g., whether it will be evaluated on a gross or a net basis). Reporting entities are required to pay an annual fee upon filing their disclosures. The fee amount has not yet been set but is required to be sufficient to cover CARB's full costs of administering and implementing SB 253. In addition, in accordance with the phase-in schedule, each reporting entity must obtain an independent third-party assurance of its disclosures. Noncompliance with the disclosure requirements of SB 253 could result in an administrative penalty of up to $500,000 in a reporting year. Noteworthy differences to its proposed federal counterparts:

1. Public and private companies are covered. SB 253 imposes GHG emissions reporting requirements for both public and private companies. By way of comparison, the SEC's Proposed Rule applies only to public companies, and the Contractor Rule applies to significant contractors (e.g., those in receipt of $7.5 million to $50 million in federal

contract obligations in the prior federal fiscal year) or major contractors (e.g., those in receipt of more than $50 million in federal contract obligations in the prior federal fiscal year).

2. All reporting entities must report scope 3 emissions. SB 253 requires scope 3 emissions disclosures from all reporting entities. In contrast, the SEC's Proposed Rule only requires scope 3 emissions disclosures if such data is "material" to the registrant or if the registrant has set a GHG emissions target or goal that includes scope 3 emissions. The Contractor Rule proposes to require scope 3 reporting only by major contractors.
3. Third-party assurance required for scope 3 emissions disclosures. SB 253 authorizes CARB to establish a third-party assurance requirement for scope 3 emissions disclosures beginning in 2027, in addition to the required assurance for scope 1 and scope 2 emissions disclosures beginning in 2026. The SEC's proposed rule only requires attestation for scope 1 and scope 2 emissions disclosures. The Contractor Rule has no attestation requirements.

SB 253 is consequential. SB 253's scope 3 emissions reporting requirement, coupled with the threat of penalty for noncompliance, will have companies directly subject to SB 253's GHG emissions reporting requirements increasingly looking to their partners in their value chains for information relating to the collection and measurement of GHG emissions data for the development of their scope 3 emissions data. It will be incumbent upon small and midsize businesses in these value chains (which likely extends to companies that do not do business in California) to measure their GHG emissions in a manner consistent with GHG Protocol standards and guidance to maintain and/or improve their market share. In addition, with California's economy surpassing that of any other state in the United States, and with it presently poised to become the world's fourth biggest economy, California has a history of pushing national policy. SB 253 stands to challenge the reach of federal policy and is widely expected to be the subject of litigation. CARB must develop and adopt regulations implementing the SB 253 reporting program by January 1, 2025. The regulation development process contains a public participation component, which requires CARB to consider input from various stakeholders, including government stakeholders, investors, consumer and environmental justice groups, and reporting entities "that have demonstrated leadership in full-scope [GHG] emissions accounting and public disclosure and [GHG] emissions reductions." Day Pitney will continue to track the development of these regulations. If you have any questions regarding SB 253 and how it might affect your business, please contact any of the attorneys listed in the sidebar.

Authors



Harold M. Blinderman
Partner

Hartford, CT | (860) 275-0357

hmblinderman@daypitney.com



Todd W. Terhune
Partner

Parsippany, NJ | (973) 966-8040

tterhune@daypitney.com



Elizabeth C. Barton
Of Counsel

Hartford, CT | (860) 275-0371

ecbarton@daypitney.com



Drew A. Levinson
Senior Associate

Parsippany, NJ | (973) 966-8051

dlevinson@daypitney.com