

September 11, 2025

California Air Resources Board

1001 I Street

Sacramento, CA 95814

Comments Portal: <https://ww2.arb.ca.gov/public-comments/public-comments-august-21-2025-climate-disclosure-workshop>

Re: Public Comments to August 21, 2025, Climate Disclosure Workshop

To Whom It May Concern:

Thank you for the opportunity to provide feedback in response to the California Air Resources Board, SB 253/261/219 Public Workshop.

A. “Doing Business in California”

Page 3 of the 7/9/25 staff FAQ reads in part:

CARB’s initial staff concept is as follows:

An entity is considered to be “doing business in California” for purposes of the reporting regulation if:

(1) the entity is actively engaging in any transaction for the purpose of financial or pecuniary gain or profit (Cal. Revenue & Taxation Code § 23101(a)); and

(2) any of the following conditions is met during any part of a reporting year (Cal. Revenue & Taxation Code § 23101(b)) ...

This is reiterated in Slide 15 of the 8/21/25 public workshop slides. Slide 17 discusses parent/”subsidiary” relationships. Slide 19 discusses how to identify businesses that are active in California, including by “parent” companies. Slide 17 proposes to define “subsidiary” as:

“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.”

This is consistent with Corp. Code §189(a), which says: “Except as provided in [189](b), ‘subsidiary’ of a specified corporation means a corporation shares of which possessing more than 50 percent of the voting power are owned directly or indirectly through one or more subsidiaries by the specified corporation.”

Putting this together, I read the staff proposal as that to be covered, an entity must be doing business in California and itself have or be majority owned by a parent entity with global sales in excess of \$500,000,000. I read the 7/9/25 FAQ requiring both §23101(a) and §23101(b), as meaning that an entity that (1) is not a majority owner of a company that conducts business in California and (2) conducts no business of its own in California (i.e., itself or through a majority-owned subsidiary) is not “doing business in California” for purposes of SBs 253/261/219.

And in converse, I read CARB staff as saying that in order to be covered, the entity needs to be both (x) “actively engaging in any transaction for the purpose of financial or pecuniary gain or profit” in California, and (y) either (1) itself have sales in excess of \$500,000,000, or (2) be majority-owned by an entity with sales in excess of \$500,000,000.

Assume an out-of-state LLC that elects partnership taxation on its federal returns and does a lot of business in California, and has a couple of dozen members, each with less than 25% ownership interest, and none of which individually control the LLC. Assume also that all these members are out of state entities with no California employees, sales, or property, and some of these members have annual revenues of over \$500 million from sales in other states. I read applying the CARB staff 7/9/25 FAQ to mean that these minority LLC members would not be required to report under SBs 253/261/219, even if the LLC is disregarded for tax purposes. With both 23101(a) and 23101(b) required, if a minority LLC member is not “actively engaging in any transaction for the purpose of financial or pecuniary gain or profit” in California, i.e., itself does not have (or have a majority ownership interest in a company with) any employees, sales or property in California, it does not meet the CARB test and does not have to report under SBs 253/261/219 even if it has a billion dollars in revenue from sales in other states.

If I am correct in the above, I think it would be very helpful to protect investment in California for CARB to be explicit and note that entities that are not either (a) themselves “actively engaging in any transaction for the purpose of financial or pecuniary gain or profit” in California or (b) majority owners of entities “actively engaging in any transaction for the purpose of financial or pecuniary gain or profit” in California are not subject to SBs 253/261/219, and that they do not become subject to SBs 253/261/219 by taking minority non-controlling interests in entities that do business in California, including through minority LLC membership or partnership interests or by minority ownership in entities that are disregarded for tax purposes.

B. Energy Markets

Thank you for CARB’s helpful proposal on slide 18 of the 8/21/25 workshop slides to exempt “CA Independent System Operator (CAISO) or a business entity whose only activity within California consists of wholesale electricity transactions that occur in interstate

commerce”.

Senators Stern and Wiener, the authors of the statutes, filed a letter with the Senate Daily Journal stating that “[i]t was not our legislative intent to include [CAISO EIM and EDAM] energy transactions within the scope of this reporting obligation, and are therefore providing clarification ... to the California Air Resources Board.”¹

It would be helpful for CARB to note further that a transaction in wholesale energy markets that occurs between two points within California is also a transaction that occurs in interstate commerce and would be exempt. Typically, transactions that originate and end in the same state, without leaving state borders are in “intrastate” commerce. However, the nature of electricity generation, transmission and delivery is different. In *New York vs. FERC*,² the United States Supreme Court ruled that electricity transactions, outside of Texas, Alaska and Hawaii, are always in interstate commerce:

unlike the local power networks of the past, electricity is now delivered over three major networks, or “grids,” in the continental United States. Two of these grids—the “Eastern Interconnect” and the “Western Interconnect”—are connected to each other. It is only in Hawaii and Alaska and on the “Texas Interconnect” which covers most of that State—that electricity is distributed entirely within a single State. In the rest of the country, any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce.³

Therefore, according to the Supreme Court, any electricity transaction involving the “Western Interconnect,” even if occurring between two delivery points each wholly within California, is in interstate commerce. Bilateral sales of energy or other energy-related products occur in interstate commerce and do not constitute “doing business in California” because such transactions are wholesale electricity transactions occurring in interstate commerce.

This exemption is good policy. California suffers power shortages every hot summer; to implement any measure of any kind that discourages any entity from providing energy to California in any respect is bad policy. SB253/261/219 should not be a suicide pact.

California already has a GHG reporting regime for energy through AB32. EIM “deemed imports” through GHG factor bidding, at interconnection points physically hundreds or even a thousand miles from California should not be considered a sale into California, as doing so would decrease use of EIM and EDAM, defeating the substantial energy cost savings they provide. AB32 already provides a GHG compliance structure through EIM and EDAM, which unlike SB253/261/219, assesses a cost on and actually could reduce GHG emissions.

Neither REC sales nor carbon offset sales should constitute “doing business in California.” These transactions each have their own separate regulatory regimes, including the

¹ Wiener, Stern, *re Legislative Intent- SB 253 and SB 251*, Jan. 29, 2024, <https://www.politico.com/f/?id=0000018d-5c5b-da8e-a3ed-fefb3b570000>.

² *New York vs. FERC*, 535 U.S. 1 (2002).

³ *New York vs. FERC*, 535 U.S. 1, 7 (2002).

California RPS and AB 2331, respectively. Such transactions also mitigate emissions of GHG and, as such, should be encouraged rather than discouraged with expensive overhead.

Similarly, CARB should specify that injections into, transportation in, and withdrawals from, interstate natural gas pipelines, even if only between injection and withdrawal points wholly within California, also are exempt.

CARB rulemaking with perceived extraterritorial effects would likely be met with furious counteractions by the Trump Administration and Republican-dominated states. The US Department of Justice has already sued four U.S. states in response to Executive Order 14260. The threat in the recent federal enforcement action of the Federal Trade Commission against CARB regarding vehicle emissions could not be more explicit.⁴

C. Non-Profits/Government.

Thank you for CARB's helpful proposal on slide 18 of the 8/21/25 workshop slides also to exempt:

- Non-profits
- Government entities would not be covered and do not need an exemption because they are not formed under business entity laws as defined in HSC 38532 and 38533.

CARB is correct that Non-profits should be exempted. A non-profit is not a "business entity" as that phrase is used in SB253/261. Subjecting non-profits to the requirements of SB253/261 would be especially harmful to the continued viability of non-profits.

CARB is correct that government entities, which include government-related entities, and their subdivisions (e.g., a political subdivision of a state) should not be covered and should not need an exemption. In addition to the fact that such entities are not formed under business entity laws as defined in SB253/261, they should not be covered for other reasons, regardless of whether they generate revenue. Specifically, such entities have an existence based in sovereignty, providing for the public welfare, or similar bases—not a business existence. Each such entity is not a "business entity" based upon the plain meaning of that phrase. To cover such entities that are out of state governments is probably outside the power of California and could invite harmful retaliation. CARB litigating with objecting entities would waste funds and put California and its efforts to mitigate global warming in a bad light, all while failing to provide useful information concerning GHG emissions or mitigating climate change.

⁴ "We are confident that today's outcome ensures the continued free functioning of competition, including by ensuring that consumers are not harmed by California's attempts to coopt private businesses to enforce preempted regulations in large swaths of the nation. Going forward, the [FTC] will intervene where, as here, private parties coordinate with a state actor to execute a sub-regulatory scheme to reduce competition, especially where the legal authority to do so is in grave doubt." Statement of the Federal Trade Commission Regarding The Clean Truck Partnership Investigation (Aug. 12, 2025), avail. at https://www.ftc.gov/system/files/ftc_gov/pdf/clean-truck-partnership-closing-statement.pdf; see also FTC Resolves Antitrust Concerns Arising from Clean Truck Partnership: Truck manufacturers agree to act independently and avoid entering into future anticompetitive agreements with a state regulator (Aug. 12, 2025) avail. at <https://www.ftc.gov/news-events/news/press-releases/2025/08/ftc-resolves-antitrust-concerns-arising-clean-truck-partnership>.

D. Incidental Presence.

Thank you for CARB's helpful proposal on slide 18 of the 8/21/25 workshop slides to exempt: "A company whose only business in California is the presence of teleworking employees." This is the correct policy. Otherwise, large companies would likely consider terminating their California teleworking employees.

I strongly recommend that CARB also provide an exemption for companies providing emergency relief for disasters. Out-of-state companies would think twice before sending emergency aid, like scooper planes, if doing so opted them into SB253/261/219.

E. Implementation Fees.

With respect to slides 20-24 of the 8/21/25 workshop slides, CARB should consider and discuss the statutes' "administrative penalties."

For example, there is a maximum \$50k/year "administrative penalty" in §38533(e)(2). One would therefore expect an economically rational calculus for any reporting entity to be whether the \$50k per year "administrative penalty" times the likelihood (expressed as a percentage) of CARB assessing it is more or less than the cost of the CARB implementation fee plus the cost to prepare, review, and submit the reports.

It would therefore be very helpful for CARB to advise if the worst enforcement consequence for failure to comply with SB261 is anything other than the maximum annual \$50k "administrative penalty," e.g., if any California agency has any right to suspend rights or privileges of a non-reporting covered entity. Although a much larger number, \$500,000, applies to §38532(e)(2)(A) for SB 253/219, there is the same calculus, and I have the same recommendation.

Conclusion

Thank you for conducting an open and communicative rulemaking process. These comments are solely my own and are not necessarily the opinions of any client I represent or industry group in which I participate.

Yours truly,



Jeremy D. Weinstein