March 21, 2025

Submitted via Corporate Climate Data Reporting and Financial Risk Programs Comment Docket

Re: *Comments Regarding the California Corporate Greenhouse Gas (GHG) Reporting and Climate Related Financial Risk Disclosure Programs*

California Air Resource Board:

The International Liquid Terminals Association (ILTA) appreciates the opportunity to provide comments on the California Air Resource Board's ("CARB") California Corporate Greenhouse Gas Reporting Program, and writes specifically in response to CARB's implementation question(1)(d):

> Should entities that sell energy, or other goods and services, into California through a separate market, like the energy imbalance market or extended day ahead market, be covered?

We write to strongly discourage CARB from including such entities under the definition of entities that "do[] business in California" as including them raises serious constitutional concerns. Specifically, a definition that included these entities would create significant Due Process concerns, as well as violate the Commerce Clause and notions of federalism by attempting to subject out-of-state entities to this law based on actions that have no or at best only a theoretical nexus to the State of California. CARB must adopt a reasonable definition of "doing business" in California in order to provide a clear and workable definition to regulated entities and to ensure its climate disclosure implementation rules are on sound legal footing.

I. Background on energy markets

Our nation relies on complex webs of interconnected transmission lines—in the forms of pipelines and cables—to deliver the energy necessary to power our every day lives. Like our interstate highway system, this web spans the Continental U.S., as it must: the locations of the sources of our energy (whether oil, natural gas, wind, solar, or coal) are rarely located right alongside the facilities needed to process or refine it into usable energy, and even more rarely located close to the population centers that need the energy. As a result, most forms of energy will cross multiple state borders before reaching their end user, making it difficult and in many cases impracticable for energy producers and transporters to truly know the ultimate destination of their products and services.

Regardless of where or how the form of energy is produced, it is frequently co-mingled with identical products from other producers through that transmission process before it reaches its ultimate user. In the same way that a river may be fed from run-off from many different sources, and the water co-mingles such that you cannot determine the source of any particular molecule of water, so too natural gas or electricity is frequently mixed with the product of other producers during transportation and storage. This co-mingling renders it impossible to know whether a particular company's product takes one path or another after it reaches certain "hubs" within the transmission system. Moreover the nature of this system also practically means there is often no way for an energy producer or transporter to know exactly where the energy will ultimately be used because of how many times it changes hands between the producer, transporters, storage facilities, and the ultimate customer.

These complex market dynamics underlie the serious constitutional concerns that would arise if CARB were to consider entities that sell energy, or other goods and services, into a separate market that could theoretically reach California as covered by the definition of "doing business in California." Put simply, some companies that participate in these energy markets will have no nexus to California, and an overly broad definition of "doing business in California" including them would be unlawful.

II. Subjecting these entities to SB 253 and 261 raises fair notice and Due Process issues in the enforcement context where entities cannot determine whether they are covered and cannot necessarily conform their behavior to avoid being subject to the laws.

Both the U.S. Supreme Court and California courts have recognized that it would be unjust for a court to exercise jurisdiction over an out-of-state company purely because its products end up in the State of California. Courts have therefore recognized that it is not "fair" or "reasonable" to exercise jurisdiction over a non-resident that does not "purposefully avail" itself of the benefits of the state. *See, e.g., Bombardier Recreational Prods., Inc. v. Dow Chem. Canada ULC*, 157 Cal. Rptr. 3d 66, 71-72 (Cal. App. 3d Dist. 2013). "The purposeful availment inquiry . . . focuses on the defendant's intentionality. This prong is only satisfied when the defendant purposefully and voluntarily directs [its] activities toward the forum so that [it] should expect, by virtue of the benefit [it] receives, to be subject to the court's jurisdiction based on [its] contacts with the forum." *Id*. at 602 (quoting *Pavlovich v. Super. Ct.*, 58 P.3d 2, 7 (Cal. 2002)). And "California exceeds the limits of due process" when it tries to exercise jurisdiction over a company that "did not create, control or employ the distribution system that brought its [product] to California." *Id.* at 599 (quoting *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 112–113). In another context, the California courts have also explained that, "[a]lthough it is not reasonably disputable that today's energy markets are closely interconnected, with regard to electricity and natural gas and other forms of power, more than general allegations of interconnectedness are still required" before a California court can exercise power over an out-of-state company. *Aquila, Inc. v. Super. Ct.*, 55 Cal. Rptr. 3d 803, 820 (Cal. App. 4th Dist. 2007). Put simply, even in instances when products reach the California market, more is required to show that a company "purposefully availed itself of the privilege of doing business in this state." *Id.*

While CARB's rule does not directly implicate the exercise of court jurisdiction, the bedrock constitutional protection of Due Process likewise requires that it limit the scope of its implementing rules to only those businesses that take actions to direct their products into California. Unless a company knows with certainty that its product will end up in California or if it intentionally and specifically markets, prices and sells its products into the California market, it should not be considered to be "doing business in California." In some scenarios, there is no way for entities selling energy through a separate market to know, *ex-ante*, whether their product might ultimately make its way to California and whether this would subject them to these laws. Because of the co-mingling of fungible products and independent decisions of third parties who subsequently buy (and potentially resell) their products, there is no way for such entities to change their behavior in order to avoid their products potentially ending up in California.

The types of markets called out in CARB's implementation question reveal the problems with an overly broad approach to "doing business in California." For example, the Western Energy Imbalance Market extends well beyond the borders of California. Indeed, the Western Energy Imbalance Market has grown to include participants in 11 states and British Columbia. Again, by simply participating in such a market, a supplier of electricity is not guaranteeing that its product will end up in California. Since there is no way to distinguish between electrons on a transmission line or molecules of natural gas in a pipeline, even if a generator in this market makes the affirmative decision to dispatch energy to California, it is not necessarily that producer's energy that reaches California. CARB surely cannot be contemplating a scope for its implementation rules that covers all entities in the Western Energy Imbalance Market. While extending climate disclosure regulation over entities in these markets is problematic in general, California and federal courts are likely to take a skeptical view of any attempt by CARB to regulate entities that do not affirmatively transact with the California market. Further, the California Independent System Operator ("CAISO") has already assured participants that the extended day ahead market is not designed to "impose the policies of California or any other state on other market participants."[1] "All states retain autonomy over their own policies that meet the needs of their residents, and [the energy day ahead market] accommodates these different policies." [2]

California also could impact its own grid reliability if it creates a scenario where energy producers no longer wish to participate in CAISO due to the threat of becoming subject to these laws. California has already seen energy production capacity, particularly on the refining side, decline sharply over the past decade as companies have struggled with increased regulatory burdens. Extending the scope of the SB 253 and SB 261 implementation rules to cover producers and/or transporters of out-of-state electricity and other forms of energy could cause companies in the Western Energy Imbalance Market and any same day energy market to reconsider their participation. Put another way, if CARB ultimately adopts a definition of "doing business in California" that reaches into these out-of-state special markets, it could disrupt the fundamental purpose of those markets: shoring up the reliability of the California Grid.

A clear definition of "doing business in California" is critical for ensuring CARB's final rules do not run afoul of Due Process considerations. Due Process "requires the invalidation of laws that are impermissibly vague," meaning that they "fail[] to provide a person of ordinary intelligence fair notice of what is prohibited, or [are] so standardless that [they] authorize[] or encourage[] seriously discriminatory enforcement." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). In evaluating whether a vague law gives fair notice such that a regulated entity "knows what is required of them," the law's requirements must be clear from common understanding of the terms used. *See Butcher v. Knudsen*, 38 F.4th 1163, 1173 (9th Cir. 2022). The nature of energy markets, described above, means that there are businesses that will *not* have fair notice that they are subject to SB 253 and 261 if they do not sell products *directly* into the California market. Specifically, there are companies that participate in energy markets that have no reason to believe that they are "doing business" in California and thus subject to SB 253 and SB 261. This will be particularly true for companies whose products are intermixed with the products of other companies during the transmission or transportation process, or are sold or traded at hubs where there is limited ability to control or know the ultimate location that the product will be sent.

This is all the more true because a reading of the California Revenue and Tax Code provides no greater clarity to such businesses that they are subject to SB 253 and SB 261. Specifically, the California Revenue and Tax Code section 23101 defines "doing business" in California as including "engaging in any transaction for the purpose of financial . . . gain" within California, being organized or domiciled within California, or doing business exceeding certain sales amounts. The phrase "within California" implies that an entity must generate revenue or sell its product within California's borders. However, even this definition would fail to give notice to a company who is domiciled outside of California and transacts wholly outside its borders that it would be subject to SB 253 and SB 261's disclosure requirements if its product eventually reaches California through a separate channel. And the State's implementing regulations do not provide any additional clarity for out-of-state energy providers. *See* Cal. Code Regs. 18 § 23101 (defining "doing business"). CARB's implementation rules must be clear, provide fair notice to those it seeks to regulate, and follow legal guideposts. Otherwise, CARB could end up adopting rules that seek to regulate companies operating wholly outside of California who have little reason to expect that their actions could be subject to California state laws *at all*.

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[1] California ISO, Extended Day-Ahead Market (EDAM) FAQs at 3 (Nov. 15, 2024), https://www.caiso.com/documents/extended-day-ahead-market-edam-faq.pdf.

[2] *Id.*

In light of these concerns, California should appropriately narrow the definition of "doing business," in implementing SB 253 and SB 261 to exclude energy companies and others that provide goods and services that potentially could enter California through a separate market. Otherwise, California's laws and implementing regulations will likely be deemed unconstitutional for lack of fair notice on Due Process grounds.

III. Including these entities would violate the Commerce Clause and notions of federalism in scenarios where it is unclear whether their products will enter and ultimately remain in the State of California.

Due Process considerations are not the only constitutional limitation on CARB adopting an overly broad definition of "doing business in California." The Constitution grants Congress the exclusive power to "regulate Commerce . . . among the several States." U.S. Const. art. I., § 8, cl. 3. There are "two primary principles that mark the boundaries of a State's authority to regulate interstate commerce." One of them is that "States may not impose undue burdens on interstate commerce." *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021, 1026 (9th Cir. 2021) (quoting S. *Dakota v. Wayfair, Inc*., 138 S. Ct. 2080, 2090-91 (2018)). A state law is impermissibly extraterritorial if it directly regulates conduct that is wholly out of state. *Id.* at 1029. *See also Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 614 (9th Cir. 2018) ("the Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." (quoting *Healy v. Beer Inst.,* 491 U.S. 324, 336 (1989)). Any law that does so is "invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* And the "mere fact that some nexus to a state exists will not justify regulation of wholly out-of-state transactions." *Id.* at 615. CARB should therefore narrow the definition of "doing business in California" to ensure that it does not cover companies that potentially sell energy into California through a separate market by reaching wholly out-of-state transactions and products that may not ultimately end up in California.

For example, there is always the possibility that a fungible energy product may simply be traveling through the state of California before reaching a final destination for use or sale elsewhere, even if originally put on a transmission system connected to the California market. Just as it would be incorrect to state that a widget supplier "does business" in California simply because its product is shipped through the state before finally ending up in Oregon, Idaho, or even abroad, it would violate the Commerce Clause and basic notions of federalism to attempt to apply these requirements to a company simply because its product may pass through the state on its way to a final destination. In energy markets, it will not always be clear where the final destination is. *See, supra* Section II. Just as in the river example provided in this comment letter, *see supra* Section I, energy companies, particularly natural gas companies, cannot control where the natural gas distributed through their pipelines eventually ends up or where it will go along the way because of the nature of the industry. Energy companies would be forced to assume their products end up in California and comply with the disclosure requirements of SBs 253 and 261 or risk penalties. This results in California, in practical effect "project[ing] its legislation into other States," violating the dormant Commerce Clause and notions of federalism.

CARB should also seriously consider the impact that an overly broad definition of "doing business in California" could have on California-based businesses in the currently contentious arena of different state climate-change policies. As courts have noted when discussing the Commerce Clause "[T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Daniels Sharpsmart,* 889 F.3d at 614–15 (quoting *Healy*, 491 U.S. at 336). If, for instance, Texas were to *prohibit* companies "doing business in Texas" from making climate change disclosures along the lines of those required by SBs 253 and SB 261 then companies—particularly those with no way to control the ultimate destination of their product—would be caught in an untenable position of being unable to simultaneously comply with both requirements. This is particularly problematic for energy companies that cannot limit where their products ultimately end up, and therefore cannot operate in a way that would not subject them to conflicting state laws. CARB should narrow its definition of "doing business in California" to avoid creating tension with its sister states, and an impossible business climate for those engaged in energy markets.

ILTA appreciates your time in considering these comments.

Sincerely,

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President
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