COMMENTS OF THE CLASS OF ’85 REGULATORY RESPONSE GROUP

ON THE

CALIFORNIA AIR RESOURCES BOARD’S INFORMATION SOLICITATION TO INFORM IMPLEMENTATION OF CALIFORNIA CLIMATE-DISCLOSURE LEGISLATION

I. INTRODUCTION

The Class of ’85 Regulatory Response Group (“Class of ’85” or “Group”) respectfully submits these comments on the information solicitation issued by the California Air Resources Board (“CARB”) to inform implementation of Senate Bill (“SB”) 253 and 261.[1] The Class of ’85 is a voluntary, ad hoc coalition of over 40 electric generating companies from around the country that has been actively involved in the development of regulations to implement the Clean Air Act and other statutes for 35 years.[2]

SB 253 requires both public and private U.S. businesses with revenues over $1 billion that do business in California to annually report their greenhouse gas (“GHG”) emissions, including scopes 1, 2, beginning in 2026, and Scope 3 emissions, beginning in 2027. Meanwhile, SB 261 requires both public and private U.S. businesses with revenues over $500 million that do business in California to prepare biennial climate-related financial risk disclosures in compliance with the Task Force on Climate-related Financial Disclosures (“TCFD”) reporting framework or another equivalent framework.

The Class of ’85 would like to stress the importance of ensuring California accomplishes its regulatory objectives of collecting useful, actionable data and information, without unduly burdening businesses only tangentially connected to California and unintentionally harming grid reliability. Balancing the compliance burden on regulated businesses alongside California’s interest in information collection will help to ensure that the data ultimately reported is useful, pertinent, and relevant.

In particular, CARB must ensure that its regulations adequately assess “the potential for adverse economic impact on California business enterprises” and address competitive impacts for existing businesses. *See* Cal. Gov. Code §§ 11346.3(a), (e) and 11340.1(a). California Government Code § 11346.2(b)(4) also requires CARB to consider “reasonable alternatives to the regulation that would lessen any adverse impact on small business,” and reasonable alternatives that are “less burdensome.” As part of these alternatives, CARB must consider “overall societal benefits, including reductions in other air pollutants, diversification of energy sources, and other benefits to the economy, environment, and public health.” To comply with these statutory directives, CARB should develop a cost-effective reporting program that does not impose unnecessary burdens on

[1] CARB, *Information Solicitation to Inform Implementation of California Climate-Disclosure Legislation: Senate Bills 253 and 261, as amended by SB 219*, (Dec. 16, 2024), https://ww2.arb.ca.gov/sites/default/files/2025-01/ClimateDisclosureQs_Dec2024_v2.pdf.

[2] Attachment A contains a list of Class of ’85 members who support these comments.

reporting entities especially those entities that have little, if any, presence in California. This includes out-of-state entities that engage in wholesale electricity, renewable energy certificate, or carbon offset transactions with California entities, as well as out-of-state companies that have a de minimis number of employees working in California.

Without clear guardrails, thresholds, and standards associated with determining applicability and scope of the regulations, an open-ended data grab will not help to advance California's objectives, and will be expensive, complicated, and daunting for both those charged with complying and those tasked with implementation, review, and enforcement. Potentially affected businesses need clear direction on applicability, requirements, costs, and timelines for completing the new disclosure requirements, as well as flexibility to accommodate differing reporting timelines and information available in diverse sectors. Providing certainty and clarity in the form of bright-line definitions, exclusions, and off-ramps will help to narrow the focus to those businesses whose operations are most applicable to greenhouse gas emissions in California.

II. COMMENTS

The Class of '85 provides the following responses to the questions posed in CARB's information solicitation.

Question (1)(a): Should CARB adopt the interpretation of "doing business in California" found in the Revenue and Tax Code section 23101?

As an initial matter, CARB should clarify that the revenue thresholds in SB 253 and 261 are specific to California-generated revenue, not revenue for the company as a whole. Furthermore, CARB should clarify that this threshold applies only to entities actually doing business in California rather than their corporate parents, which may not even be located in the United States.

The California Revenue and Tax Code's definition of "doing business in California" should not be adopted, as this particular definition was not intended to apply in the context of statewide greenhouse gas emissions and is thus overly broad. CARB should consider narrowing the definition to ensure that businesses who have only minimal/immaterial business activity related to California are clearly exempted from regulatory applicability.

CARB has regulatory authority over sources that emit within the state and so should implement the rule in a manner that covers only entities that have a physical presence and directly emit greenhouse gases within California. Cal. Health and Saf. Code § 38530 states: "(b) The regulations shall do all of the following: . . . (1) Require the monitoring and annual reporting of greenhouse gas emissions from greenhouse gas emission sources beginning with the sources or categories of sources that contribute the most to ***statewide*** emissions."[3] Additionally, the Legislature declared in SB 253 that "United States companies that have access to California's tremendously valuable consumer market ***by virtue of exercising their corporate franchise in the state*** also share responsibility for disclosing their contributions to global GHG emissions."[4] This

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[3] Emphasis added.

[4] SB 253, § 1 (emphasis added).

indicates that CARB's regulations must focus on entities that generate emissions within California rather than out-of-state entities that do not generate emissions within the state.

Furthermore, out-of-state companies that have a de minimis number of employees working in California should not be covered. The de minimis threshold should encompass companies not principally located or operating in California and have 1% or less of their employees whose primary residence is in California. These approaches would align with CARB's mandate to consider alternatives that would limit regulatory burdens for covered entities by clarifying regulatory requirements and avoiding unnecessary reporting. *See* Cal. Gov. Code § 11346.2(b)(4).

Question 1(b): Should federal and state government entities that generate revenue be included in the definition of a "business entity" that does business in California?

Government entities and their subdivisions (e.g., a political subdivision of a state) should not be included, regardless of whether they generate revenue. Each such entity is not a "business entity" based upon the plain meaning of that phrase. Government entities are sovereign entities responsible for the public welfare (and, in certain cases, delegate their power to their subdivisions)—not business entities.

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?

Out-of-state entities that sell energy, or other goods and services (e.g., transmission, reserves, or other energy-related products), into California through a separate market should not be covered. These entities are "one step removed" from directly performing business activity in California, and it is therefore appropriate to exempt them due to the existence of the *intermediate entity* of a separate market. In many such cases, the seller in such circumstances has very little or no control over the ultimate fate of their offered goods or services—whether those items end up in California or California markets, how, when, or for how much. It is often not logistically possible for a seller to control, monitor, track, or trace such transactions to that level, which is in any case, the actual function and purpose of the market, brokerage, or other seller.

This interpretation is supported by a letter from the lead sponsors of SB 253 and 261, Senator Wiener and Senator Stern, who clarified the bills were not intended to include companies participating in the Western Energy Imbalance Market and the Extended Day Ahead Market within the scope of the reporting obligation. Specifically, the letter provides the bills "are not intended to include a business entity whose only activity within California consists of wholesale electricity transactions that occur in interstate commerce."[5] To the extent CARB is concerned about the potential emissions associated with imported electricity, such emissions are already accounted for under California's cap-and-trade program.[6]

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[5] California Legislature 2023-24, Senate Daily Journal, 3058, (Jan. 30, 2024), https://leginfo.legislature.ca.gov/faces/pubSenDailyJrn2.xhtml?type=doc&sessionyear=20232024&pagenum=3057&sessionnum=0&fileid=996.

[6] *See* Cal. Code Regs. tit. 17, § 95852(b)(1).

Subjecting out-of-state companies to substantial reporting burdens just for helping balance California's electric grid would disincentivize companies from engaging in such transactions in the future. CARB should strive to avoid disincentives to electricity reliability in California, especially in light of the North American Reliability Corporation's *2024 Long-Term Reliability Assessment*, which highlights future reliability concerns in future years due to a combination of demand growth and planned generator retirements.[7] Furthermore, creating such disincentives could hinder California's goal of electrifying the transportation sector, including Executive Order N-79-20's target of 100% in-state sales of new passenger cars and trucks being zero-emission by 2035,[8] as well as the electrifying other sectors, such as buildings.[9]

Finally, subjecting out-of-state companies to substantial reporting burdens for activities outside of California could be subject to legal challenges. Under the Due Process Clause of the U.S. Constitution, such requirements would be out of proportion to the out-of-state company's connection with California.[10] Similarly, under the Commerce Clause, such requirements would have the impermissible practical effect of regulating activities wholly outside of California's borders by requiring the disclosure of non-California activity.[11] Additionally, SB 253 and SB 261 may violate the First Amendment by compelling speech, as alleged in *Chamber of Commerce of the United States v. California Air Resources Board*, Case No. 2:24-cv-00801-ODW (C.D. Cal.). Excluding out-of-state utilities that do not generate emissions in California will help avoid these potential legal issues.

Separately, CARB should also exclude carbon offset transactions from regulations under SB 253 and 261, because disclosures about such transactions are already covered under AB 1305.[12] CARB has a statutory duty to avoid such duplicative regulations.[13] Imposing additional carbon offset disclosure requirements under statutes other than AB 1305 would be unduly duplicative.

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[7] North American Electric Reliability Corporation, *2024 Long-Term Reliability Assessment*, 17 (Dec. 2024), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_Long%20Term%20Reliability%20Assessment_2024.pdf.

[8] CARB, *Going Zero: Leading the Way to Zero-Emission Drive*, https://ww2.arb.ca.gov/going-zero (last visited Mar. 17, 2025).

[9] CARB, *Building Decarbonization*, https://www.energy.ca.gov/programs-and-topics/topics/building-decarbonization (last visited Mar. 17, 2025).

[10] *See Allied-Signal, Inc. v. Dir., Div. of Tax'n*, 504 U.S. 768, 777 (1992) ("The principle that a State may not tax value earned outside its borders rests on the fundamental requirement of both the Due Process and Commerce Clauses that there be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'") (quoting *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344–345 (1954)).

[11] *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 332 (1989) ("[A] state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause.").

[12] Cal. Health and Saf. Code § 44475 ("A business entity that is marketing or selling voluntary carbon offsets within the state shall disclose on the business entity's internet website all of the following information . . .").

[13] *See* Cal. Gov't Code § 11349(f) ("'Nonduplication' means that a regulation does not serve the same purpose as a state or federal statute or another regulation. This standard requires that an agency proposing to amend or adopt a regulation must identify any state or federal statute or regulation which is overlapped or duplicated by the proposed regulation and justify any overlap or duplication.").

CARB should also exclude bilateral sales of energy or other energy-related products that occur in interstate commerce. Such sales constitute another type of wholesale electricity transactions. Again, the letter of Senator Wiener and Senator Stern (as discussed above) provides that the bills "are not intended to include a business entity whose only activity within California consists of wholesale electricity transactions that occur in interstate commerce."

Additionally, CARB should exclude renewable energy certificate ("REC") sales, as such transactions mitigate emissions of GHG and therefore should be encouraged and not discouraged in any way.

Question 2(a): For private companies, what databases or datasets should CARB rely on to identify reporting entities? What is the frequency by which these data are updated and how is it verified?

Annual tax return data can be used to identify covered businesses, once the definition of "do[ing] business in California" is appropriately clarified. Additionally, entities not required to file any California state taxes have so little economic impact upon or from the State that they also should not be subject to any of California's climate disclosure regulations.

Question 2(b): In what way(s) should CARB track parent/subsidiary relationships to assure companies doing business in California that report under a parent are clearly identified and included in any reporting requirements?

CARB should track parent/subsidiary relationships as they are detailed in tax filings.

Question 3(b): How could CARB ensure reporting under the laws minimizes a duplication of effort for entities that are required to report GHG emissions or financial risk under other mandatory programs and under SB 253 or 261 reporting requirements?

For GHG emissions, the mandatory reporting regulations could be incorporated by reference. This would ensure consistency in this reporting between these regulations, e.g., Scope 1 emissions reported to CARB under the state's Mandatory Reporting of Greenhouse Gas Emissions ("MRR") regulations could satisfy all or some of the Scope 1 reporting obligations under SB 253. This approach would minimize the burden on reporting entities, consistent with Cal. Gov. Code § 11346.2(b)(4).

Question 3(c): To the extent the standards and protocols incorporated into the statute provide flexibility in reporting methods, should reporting entities be required to pick a specific reporting method and consistently use it year-to-year?

Companies subject to this reporting would already have GHG reporting methodologies to calculate emissions, and likely already have their methodologies third-party verified. However, companies should not be locked into a particular methodology, as their business needs may evolve. As such, companies should be required to report which protocol they use and note if the methodology has changed from prior reporting years.

Question 4: To inform CARB's regulatory processes, are there any public datasets that identify the costs for voluntary reporting already being submitted by companies? What

factors affect the cost or anticipated cost for entities to comply with either legislation? What data should CARB rely on when assessing the fiscal impacts of either regulation?

Regarding public datasets that identify the costs for voluntary reporting already being submitted by companies, CARB should consult Federal or state rulemaking dockets of other similar disclosure regulations, such as the 2024 U.S. Securities and Exchange Commission climate disclosure regulation, which has a regulatory impact analysis for the economic impacts of similar regulations.[14]

CARB should also consider the lifetime, ongoing burden on regulated entities for complying with these regulations, and quantify the actual monetary benefits projected from the rules to ensure that a non-negative cost-to-benefit ratio exists.

Question 5: Should the state require reporting directly to CARB or contract out to an "emissions" and/or "climate" reporting organization?

The state should require reporting directly to CARB.

Question 6: If contracting out for reporting services, are there non-profits or private companies that already provide these services?

Yes. The Climate Registry ("TCR") and Trinity Consultants ("Trinity") are capable of providing these services. TCR maintains a database for companies voluntarily reporting Scope 1, 2, and 3 emissions. Trinity is the private consulting firm contracted by Colorado Department of Public Health and Environment to gather Scope 1 GHG emissions data from reporting companies under the Colorado Natural Gas Transmission and Storage Segment Performance Based Program Emission Inventory Protocol. CARB should ensure that any contracted reporting service conducts such services in alignment with the relevant accounting and reporting principles.

Question 7: Entities must measure and report their emissions of greenhouse gases in conformance with the GHG Protocol, which allows for flexibility in some areas (i.e. boundary setting, apportioning emissions in multiple ownerships, GHGs subject to reporting, reporting by sector vs business unit, or others). Are there specific aspects of scopes 1, 2, or 3 reporting that CARB should consider standardizing?

CARB should ensure that rulemaking does not deviate from the flexibilities currently allowed by the GHG Protocol permitting a reporter to establish their own operational, financial, or control boundaries. These determinations are critical to ensuring accurate reporting of emissions that are within the actual control of the reporter.

Question 8(a): For entities required to report under SB 253, what options exist for third-party verification or assurance for scope 3 emissions?

Large corporate auditing firms such as Deloitte, EY, KPMG, and PricewaterhouseCoopers, provide some level of Environmental, Social, and Governance auditing services. Additionally,

[14] *See* U.S. Securities and Exchange Commission, *The Enhancement of Climate-Related Disclosures for Investors*, 89 Fed. Reg. 21,668, 21,829–21,894 (Mar. 28, 2024).

private consulting firms such as Cameron-Cole LLC, LRQA, and TÜV SÜD America, Inc. provide greenhouse gas emissions verification services and are accredited by ANSI National Accreditation Board to ISO 14065. At least one Class of ’85 member utilizes auditors allowed by TCR.

Question 8(b): For purposes of implementing SB 253, what standards should be used to define limited assurance and reasonable level of assurance? Should the existing definition for “reasonable assurance” in MRR be utilized, and if not why?

The “reasonable assurance” standard is appropriate for Scope 1 and 2 emissions. However, the “limited assurance” standard is more appropriate for Scope 3 emissions because reporters have no control over the source of these emissions, have limited capability to verify the methodologies used by others to calculate the emissions provided to them, and may need to rely on inaccurate or incomplete data to calculate certain Scope 3 emission categories.

Question 9(c): What frequency (annual or other) and time period (1 year or more) are currently used for reporting?

Currently, at least one Class of ’85 member reports voluntary, partial Scope 1 and Scope 2 emissions in its Corporate Sustainability Report on an annual frequency, 1 year time period basis. Another member annually reports Scope 1 and 2 emissions, verified to a reasonable level of assurance, and voluntarily reports Scope 3 emissions. Another member annually reports its Scope 1, 2, and 3 emissions and obtains limited assurance of Scope 1 and 2 emissions. This member’s disclosures often include the current reporting year plus 3 to 5 years of historical emissions.

SB 253 reporting should be required no earlier than the end of the year following the reporting year, in order to provide time to make the necessary calculations, obtain regulatory verification of data from EPA and other agencies, and have the data go through third-party verification. In the experience of some Class of ’85 members, verification can take longer, depending upon the staff resources of the verification entity, so there should be appropriate exceptions if such circumstances arise.

Question 9(d): When are data available from the prior year to support reporting?

Select emissions and operational data are available from the prior year by the annual March 31 federal EPA air emissions reporting deadline for electric utilities. Other information, such as data regarding purchased power or power sales, or information supplied to the state or federal government in other reports, are not available until later in the year, up to July 1 in some cases. Third-party verification is generally completed by the end of the year following the reporting year. However, verification can take longer depending upon the available staff resources of the verification entity.

Question 9(e): What software systems are commonly used for voluntary reporting?

Certain Class of ’85 members do not use a dedicated ESG-type software system for voluntary reporting. Through research and review, these members found these systems both too expensive and too complex for their needs, both in their installation and ongoing use.

Other Class of ’85 members generally used Microsoft Excel workbooks for reporting. At least one Class of ’85 member uses Workiva. Another member is in the process of implementing a third-party software called SWEEP to assist in reporting.

Question 10: For SB 261, if the data needed to develop each biennial report are the prior year’s data, what is the appropriate timeframe within a reporting year to ensure data are available, reporting is complete, and the necessary assurance review is completed?

Much information for ESG reporting is taken from other properly vetted, qualified, and submitted state and federal reports, which have various reporting deadlines up to and including July 1 following the previous reporting year. Therefore, the Class of ’85 considers July 1 to be the earliest by which all necessary data and information is available for the prior year.

The Class of ’85 disagrees that assurance is required under SB 261 and thus encourages CARB to omit any such requirement in the promulgated regulations. In the event assurance is required, a reasonable period of time for verification should be considered.

Question 11: Should CARB require a standardized reporting year (i.e., 2027, 2029, 2031, etc.), or allow for reporting any time in a two-year period (2026-2027, 2028-2029, etc.)?

CARB should provide great flexibility to covered entities in preparing their climate-related financial risk reports and allow reporting any time within the biennial reporting period, e.g., 2026-2027 reporting made available not later than December 31, 2027. This would allow covered entities already reporting pursuant to TCFD to align their reporting cadence to the biennial requirements of SB 261. In addition, this would provide a transition period to covered entities not following TCFD disclosure standards to align with the requirements of SB 261. This flexibility in reporting will also help give companies adequate time to perform a thorough materiality risk assessment and to prepare disclosures on their climate risk mitigation and adaptation efforts.

Question 12: SB 261 requires entities to prepare a climate-related financial risk report biennially. What, if any, disclosures should be required by an entity that qualifies as a reporting entity (because it exceeds the revenue threshold) for the first time during the two years before a reporting year?

CARB should provide for a transition process for an entity that needs to move into reporting for a partial reporting period. Such regulations can reference program transition methods of existing standards and frameworks, such as the International Sustainability Standards Board’s (“ISSB”) framework.

Question 13(f): What other types of existing climate financial risk disclosures are entities already preparing?

At least one Class of ’85 member has historically followed the TCFD framework, now disbanded and incorporated into the ISSB’s framework.

Another Class of ’85 member is continuing to publish a TCFD report, which references the climate financial risk disclosures in the member’s 10-K and proxy statement. The member is currently evaluating utilizing disclosures in accordance with the ISSB standards.

Question 13(g): For covered entities that already report climate related financial risk, what approaches do entities use?

At least some Class of ’85 members have historically followed the TCFD framework in their voluntary sustainability reporting.

Question 13(h): In what areas, if any, is current reporting typically different than the guidance provided by the Final Report of Recommendations of the Task Force on Climate Related Financial Disclosures?

SB 261 requires disclosure with the TCFD framework (or a successor). However, the TCFD framework does not include discussion of mitigation measures required in SB 261.[15] This will be a new disclosure requirement.

III. CONCLUSION

The Class of ’85 appreciates the opportunity to comment on CARB’s implementation of SB 253 and 261. If you have any questions about our comments you would like to discuss, please reach out to us at contact@class-of-85.com.

Dated: March 21, 2025

Respectfully submitted,

The Class of ’85 Regulatory Response Group
contact@class-of-85.com

[15] Cal. Health and Saf. Code § 38533(b)(1)(A)(ii) (requiring a covered entity to disclose “[i]ts measures adopted to reduce and adapt to climate-related financial risk disclosed pursuant to clause (i).”).

ATTACHMENT A

List of Class of ’85 members supporting these comments

List of Signatories

AES Corporation
Alliant Energy Corporation
Ameren
Arizona Electric Power Cooperative, Inc.
Arkansas Electric Cooperative Corporation
City of Tallahassee
Cleco Corporation
Cogentrix Energy Power Management, LLC
Dairyland Power Cooperative
Dayton Power & Light Company
Dominion Energy
Duke Energy
Entergy Services, LLC
Evergy, Inc.
Florida Municipal Electric Association
Gainesville Regional Utilities
Great River Energy
Hawaiian Electric Company, Inc.
Indianapolis Power & Light Company
JEA
Lakeland Electric
Louisville Gas & Electric/Kentucky Utilities
Minnesota Power
NRG Energy
OGE Energy Corp.
Orlando Utilities Commission
Portland General Electric
PowerSouth Energy Cooperative
Public Service Company of New Mexico
Rainbow Energy Center, LLC
Southern Company
Talen Energy
Tampa Electric Company
TXNM Energy
Western Farmers Electric Cooperative
Xcel Energy