March 21, 2025

California Air Resource Board
1001 I Street
Sacramento, California 95814

***Submitted Electronically***

**Re: American Clean Power – California Comments on CARB's Information Solicitation to Inform Implementation of California Climate-Disclosure Legislation: Senate Bills 253 and 261, as amended by SB 219.**

American Clean Power – California ("ACP-California")[1] appreciates this opportunity to provide the following comments on the California Air Resources Board ("CARB") Information Solicitation to Inform Implementation of California Climate-Disclosure Legislation (Senate Bills 253 and 261, as amended by SB 219), issued on December 16, 2024 (the "RFI"). As discussed in our responses below, we encourage CARB to focus the regulation on business in California, leverage other jurisdictions' scope 3 emissions reports, and provide flexibility to reporting entities, particularly in the early stages of this new program.

## <u>ACP-California Responses to CARB's Questions</u>

1. **SB 253 and 261 both require an entity that "does business in California" to provide specified information to CARB. This terminology is not defined in the statutes.**
    a. **Should CARB adopt the interpretation of "doing business in California" found in the Revenue and Tax Code section 23101?**

ACP-California recommends against adopting the interpretation of "doing business in California" found in California Revenue and Tax Code ("Tax Code") section 23101. The definition of "doing business" in Tax Code section 23101 is overly broad and extends beyond the intended scope of the legislation. A taxpayer is doing business in California if *any* of several conditions in Tax Code Section 23101(b) are satisfied. For example, Tax Code Section 23101(b)(3)-(4) includes taxpayers whose real property or tangible personal property exceeds $50,000, or if the entity paid compensation of $50,000 or more to an employee in the state of California, regardless of whether the entity had any actual sales or revenue generated in California that year. This definition of "doing business" in California would subject out-of-state

[1] The American Clean Power Association ("ACP") is the voice of companies from across the clean power sector that are providing cost-effective solutions to the climate crisis while creating jobs, spurring massive investment in the American economy, and driving high-tech innovation across the United States. ACP's mission is to transform the U.S. power grid to a low-cost, reliable, and renewable power system. ACP-California is a state project of ACP, representing companies who develop, own and operate utility-scale solar, storage, land-based wind, offshore wind, geothermal and transmission assets to power a clean and renewable economy for California and the West.

companies to CARB's jurisdiction whose total annual revenue exceeds $1 billion but own only one piece of property in California and have no other contacts with the state. Moreover, from an administrative perspective, the scale of reporting entities captured under this definition would far exceed CARB's capacity to process efficiently or effectively.

ACP-California instead suggests adopting a definition of "doing business" that builds off Section 23101(b)(2). Section 23101(b)(2) states that a taxpayer is "doing business" in California for a taxable year if its:

> Sales, as defined in subdivision (e) or (f) of Section 25120 as applicable for the taxable year, of the taxpayer in this state exceed the lesser of five hundred thousand dollars ($500,000) or 25 percent of the taxpayer's total sales. For purposes of this paragraph, sales of the taxpayer include sales by an agent or independent contractor of the taxpayer. For purposes of this paragraph, sales in this state shall be determined using the rules for assigning sales under Sections 25135 and 25136 and the regulations thereunder, as modified by regulations under Section 25137.

Consistent with the threshold for a reporting entity in Health & Safety Code Section 38532(b)(2), ACP-California proposes the following definition of "doing business" for implementing SB 253:

> Sales, as defined in subdivision (e) or (f) of Section 25120 as applicable for the taxable year, of the taxpayer in this state exceeds one billion dollars ($1,000,000,000). For purposes of this paragraph, sales in this state shall be determined using the rules for assigning sales under Sections 25135 and 25136 and the regulations thereunder, as modified by regulations under Section 25137.

Similarly, consistent with the threshold for a covered entity in Health & Safety Code Section 38533(a)(4), ACP-California proposes the following definition of "doing business" for implementing SB 261:

> Sales, as defined in subdivision (e) or (f) of Section 25120 as applicable for the taxable year, of the taxpayer in this state exceeds five hundred million dollars ($500,000,000). For purposes of this paragraph, sales in this state shall be determined using the rules for assigning sales under Sections 25135 and 25136 and the regulations thereunder, as modified by regulations under Section 25137.

ACP-California's proposed definition of "doing business" will ensure that entities who meaningfully transact in California will be subject to CARB's jurisdiction without expanding the scope of regulation beyond what was contemplated in SB 253 and SB 261, and without creating an overly burdensome administrative regime for CARB.

Regardless of how CARB sets the thresholds for reporting under the legislation, the scope of reporting should be applied only to business activity in California. Given that there are already climate disclosure laws in foreign markets, it does not make sense for California to attempt to enforce state-specific disclosure requirements for activities far beyond its regulatory purview. This would create an onerous and redundant policy patchwork for companies to navigate and increase compliance costs.

**b. Should federal and state government entities that generate revenue be included in the definition of a "business entity" that "does business in California?"**

No response.

**c. Should SB 253 and 261 cover entities that are owned in part or wholly owned by a foreign government?**

Reporting entities should have the flexibility to report at the parent corporation level that covers subsidiaries, or in the event that only one subsidiary does business in California, reporting should be allowed solely at the subsidiary entities' level.

**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?**

No. CARB has already developed rigorous reporting protocols for electricity imports under the Mandatory Greenhouse Gas Reporting Regulation ("MRR"). In addition, load-serving entities are subject to power source disclosure rules implemented by the California Energy Commission, which account for in-state and out-of-state electricity sales and greenhouse gas ("GHG") emissions on an annual and hourly basis (starting in 2028). These laws also require GHG-related disclosures to retail customers through the Power Content Label. Since the state already has comprehensive GHG reporting and disclosure rules for participation in wholesale electricity markets that achieve the fundamental purpose of SB 253 and SB 261, CARB should not create new and potentially conflicting requirements for the power sector.

Finally, the bill authors of SB 253 and SB 261 drafted a joint letter to include in the Senate Daily Journal on January 30, 2024, explaining that

> [i]t was not our legislative intent to include such energy transactions [wholesale electricity transactions that occur through the Western Energy Imbalance Market and will occur through the Extended Day Ahead Market, operated by the California Independent System Operator] within the scope of this reporting obligation, and we are therefore providing clarification to the Senate Daily Journal and to the California Air Resources Board as they proceed with implementation of both laws.
>
> The definitions of a "reporting entity" in SB 253 (now Section 38532 (b)(2) of the Health and Safety Code) and of a "covered entity" in SB 261 (now Section 38533 (a)(4) of the Health and Safety Code) are not intended to include a business entity whose only activity within California consists of wholesale electricity transactions that occur in interstate commerce.[2]

[2] California Senate Daily Journal – January 30, 2024, Link

2. **What are your recommendations on a cost-effective manner to identify all businesses covered by the laws (i.e., that exceed the annual revenue thresholds in the statutes and do business in California)?**

    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?**

    No response.

    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?**

This depends on how CARB defines the phrase "does business in California" in the regulations. If CARB limits reporting to entities that exceed the revenue thresholds in the bills, as suggested in our response to Question 1, this process could be cost-effective and straight forward. However, an overly broad definition of "does business in California" would significantly complicate the reporting and verification process.

3. **CARB is tasked with implementing both SB 253 and 261 in ways that would rely on protocols or standards published by external and potentially non-governmental entities.**

    a. **How do we ensure that CARB's regulations address California-specific needs and are also kept current and stay in alignment with standards incorporated into the statute as these external standards and protocols evolve?**

CARB could utilize an existing mandate in SB 253. Health and Safety Code Section 38532(d)(1) requires CARB to contract with an academic institution to prepare a report on the public disclosures made by reporting entities and "greenhouse gas emissions from reporting entities in the context of *state* greenhouse gas emissions reduction and climate goal" (emphasis added), as well as an evaluation of the regulations adopted by CARB. To stay in alignment with external and non-governmental entity standards, CARB could expand the study's scope to include an assessment and comparison of CARB's regulations with other "national and international reporting requirements, including any reports required by the federal government." To stay current, CARB could update the initial report at its discretion at regular intervals (e.g., every three years). Finally, in regard to SB 261, CARB is already required under Health and Safety Code Section 38533(d)(2) to "regularly convene representatives of sectors responsible for reporting climate-related financial risks" to stay current on best practices. CARB could use this process to keep apprised of developments and ensure its regulations both meet California-specific objectives and align with external or non-governmental entity standards.

    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?**

Considering the breadth and scope of SB 253 and 261, ACP-California encourages CARB to provide flexibility for reporting entities. Scope 3 emissions reporting is a relatively new and evolving area of law. The European Union ("EU"), United Kingdom, and Australia are generally implementing their standards through a phased or voluntary approach. As these reporting requirements are phased in over the balance of the decade, we expect regulators and large companies will refine their reporting requirements to provide more accuracy and reduce administrative burden.

Health and Safety Code Section 38532(c)(2)(D)(i) allows CARB to accept emissions reports from other entities "as long as those reports satisfy all of the requirements of this section." Taken plainly, this means that CARB should certify specific programs and reports that meet its standards and allow reporting entities to submit any one of them to satisfy its obligation.

As part of the stakeholder process, CARB could determine that certain well-established organizations, such as the GHG Protocol or the Science Based Targets Initiative, satisfy the requirements of SB 253 and SB 261. Similarly, EU reporting requirements (the Corporate Sustainability Reporting Directive and the Corporate Sustainability Due Diligence Directive) should be used if a company is already subject to those laws. Further, allowing reporting entities to have flexibility would enable competition between reporting providers that could help manage compliance costs for reporting entities and their consumers and might provide a forum for establishing best practices.

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?**

While we generally believe that consistency is important year over year, as noted above, scope 3 emissions reporting is an evolving area, and we do not believe it makes sense to lock reporting entities into a particular methodology at this early stage in the program. Moreover, the Science Based Targets Initiative, the gold standard for target setting for corporate sustainability, recently proposed amendments to its scope 3 target setting. The amendments stem from stakeholder feedback arguing that many companies have limited visibility into their supply chains and as a result, struggle to accurately measure, let alone mitigate, the emissions generated in the scope 3 category. Given the recent developments at the Science Based Targets Initiative, it may be premature for CARB to require specific reporting methodologies while the industry continues to refine and enhance current best practices. Given the complexity of modern corporations and certain categories of emissions reporting, it is crucial that reporting entities maintain flexibility to account for their emissions while maintaining flexibility to adapt methodologies based on changing corporate circumstances.

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?**

ACP-California recommends CARB review the Climate Risk Disclosure Rule stakeholder process.[3] The U.S. Securities and Exchange Commission ("SEC") was challenged by the lack of concrete data around the current costs associated with voluntary climate risk disclosure and how those costs may change under a mandatory reporting regime.[4] After an extensive stakeholder process, the SEC's final rule acknowledged that:

> Commenters offered a wide range of cost estimates, suggesting that there is significant heterogeneity when it comes to expected compliance costs among registrants, and such estimates may not provide a representative view of the costs of compliance for all affected registrants. The cost estimates submitted by commenters varied considerably depending on a given company's size, industry, complexity of operations, and other characteristics. This variability adds to the challenges in estimating compliance costs. Additionally, many commenters provided aggregate cost estimates that did not include certain elements required by the final rules, or included other elements that are not required in the final rules, without providing a breakdown of the component costs. Without a breakdown of component costs, it is difficult to use these cost estimates to quantify the direct cost of the final rules.[5]

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

ACP-California recommends allowing reporting directly to CARB for entities already subject to European Sustainability Reporting Standards / Corporate Sustainability Reporting Directive ("CSRD") to avoid having to report to a separate agency that may have different requirements.

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

No response.

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**

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[3] RIN 3235-AM87_The Enhancement and Standardization of Climate-Related Disclosures for Investors, Link

[4] Summary of Comment Letters for the SEC's Proposed Climate Risk Disclosure Rule, Duke Department of Economics, Link

[5] RIN 3235-AM87_ The Enhancement and Standardization of Climate-Related Disclosures for Investors, pg. 725, Link

**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 align its program with the GHG Protocol as much as possible. The GHG Protocol is the most widely used GHG accounting standard and guidance in the world. The popularity of the GHG protocol is due in part to the widespread stakeholder outreach and consultation that is facilitated by the World Resources Institute and the World Business Council for Sustainable Development during each standard development project. For example, the Corporate Value Chain (Scope 3) Standard has been created through a broad, inclusive, multi-stakeholder process. Over a three-year period, 2,300 participants were involved from 55 countries; 96 members participated in technical working groups to draft the standard; and 34 companies from various industries road tested the standard in 2010.[6]

CARB should align with the GHG Protocol standards and incorporate any updates that come from their revision processes. We believe this will help reduce the administrative burden on CARB and reporting entities needing to develop multiple reports.

Regarding scope 3 emissions reporting, CARB should develop guidance on the materiality of the 15 scope 3 emissions captured in the Corporate Value Chain (Scope 3) Accounting and Reporting Standard. It may be unreasonable and overly burdensome for reporting entities to expect full compliance on all 15 emissions for specific entities that either do not have access or capacity to measure their scope 3 emissions. Moreover, CARB should explicitly recognize in its regulations that reporting entities may exclude scope 3 activities in the minimum boundary of each category with full disclosure and justification consistent with chapter 6 of the Corporate Value Chain (Scope 3) Accounting and Reporting Standard.

8. **SB 253 requires that reporting entities obtain "assurance providers." An assurance provider is required to be third-party, independent, and have significant experience in measuring, analyzing, reporting, or attesting in accordance with professional standards and applicable legal and regulatory requirements.**
    a. **For entities required to report under SB 253, what options exist for third-party verification or assurance for scope 3 emissions?**

Similar to the MRR, CARB should develop an approved and vetted vendors list for reporting entities to use. CARB should also conduct regular trainings and provide guidance documents to verifiers to ensure they are consistently applying verification standards.

   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 MRR "reasonable assurance" standard has proved to be a successful standard in the context of the MRR. In other contexts, it has led to high costs, as noted in the response below. However, in the MRR context, it gives verifiers some discretion in how widely they sample

[6] Greenhouse Gas Protocol, Scope 3 Standard Background, Link

verified data. Given the volume of data that is likely to be accumulated in the SB 253 reporting, we agree that the "reasonable assurance" standard should be applied in this program.

We also encourage CARB to consider that the EU Commission proposed removing[7] reasonable assurances from reporting requirements in a larger effort to reduce costs and reporting burdens on reporting entities. The EU Commission's proposal discussed that

> [m]any stakeholders noted that uncertainty surrounding the limited assurance requirement, particularly concerning the extent of the auditor's role in providing sustainability assurance and checking the results of the double materiality assessment, are creating a situation of over-compliance and increased burden. Stakeholders noted that despite the limited assurance requirement, the external audit of sustainability data is costly and complex due to underdeveloped market skills compared to financial audits.[8]

The SEC's Climate Risk Disclosure Rule similarly recognized that reasonable assurance is expected to be three-times the cost of limited assurance.[9] ACP-California requests CARB recognize the current direction of well-established climate disclosure regimes and consider maintaining limited assurance for emissions reporting, or implement the "reasonable assurances" standard consistent with the approach under the MRR.

9. **How should voluntary emissions reporting inform CARB's approach to implementing SB 253 requirements? For those parties currently reporting scopes 1 and 2 emissions on a voluntary basis:**
    a. **What frequency (annual or other) and time period (1 year or more) are currently used for reporting?**

ACP-California proposes to allow for reporting anytime in a two-year period, with a biennial deadline that reporting entities must meet.

b. **When are data available from the prior year to support reporting?**

ACP-California proposes to allow a minimum of 180 days after a fiscal year ends in order to meet internal and external assurance timelines.

c. **What software systems are commonly used for voluntary reporting?**

ACP-California's members do not have a specific recommendation for software systems used for voluntary reporting. Although many relevant software exist, they are all very expensive and lack critical user-interface infrastructure for effective use. Specifically, for the energy

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[7] European Commission, Questions and answers on simplification omnibus I and II, Link

[8] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, pg. 19, Link

[9] RIN 3235-AM87_ The Enhancement and Standardization of Climate-Related Disclosures for Investors, pg. 739, Link

industry, there is a lack of availability of utility integrations and invoice scanning technologies. For example, one member has to analyze 800+ energy invoices and 150 mobile sources to determine its scope 1 & 2 emissions. That analysis does not include distributed generation affiliates that may be required to be included under SB 253 and SB 261.

**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?**

ACP-California proposes to allow a minimum of 180 days after the fiscal year ends for compiling data. Please note that SB 261 does not require assurance review, and we do not recommend that CARB include this requirement as part of its regulations.

**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.)?**

ACP-California encourages CARB to allow for reporting any time in a two-year period with a deadline for reporting at the end of the two-year period.

**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?**

California should follow the EU's example (e.g., CSRD) and only require companies to report if they hit the thresholds for at least two consecutive years.

ACP-California recommends limiting any disclosed information to the year when the revenue threshold was surpassed. CARB should ensure that private companies are excluded from reporting actual financial data associated with the risks disclosed through qualitative descriptions.

Finally, ACP-California seeks clarity regarding the Task Force on Climate-related Financial Disclosures ("TCFD") alternative reporting mechanism contemplated in Health and Safety Code Section 38533(b)(3)(B). This provision allows a reporting entity to prepare a publicly accessible biennial report "using a framework that meets the requirements of clause (i) of subparagraph (A) of paragraph (1) or the International Financial Reporting Standards Sustainability Disclosure Standards, as issued by the International Sustainability Standards Board." It is not clear if the reporting entity is expected to develop a robust standalone report or can rely on an existing environmental, social, and governance ("ESG") report describing its approach to manage climate risks and impacts but modeled after the TCFD's four pillars or TCFD Disclosure Index. Given the nascent state of this regulation, we would recommend allowing entities to rely on an existing ESG report that aligns with the TCFD Disclosure index.

13. **Many entities that are potentially subject to reporting requirements under SB 261 are already providing other types of climate financial risk disclosures.**
    a. **What other types of existing climate financial risk disclosures are entities already preparing?**

No response.

    b. **For covered entities that already report climate related financial risk, what approaches do entities use?**

For entities that are already disclosing climate financial risk via the EU's CSRD mandate, the same approach to determining materiality and climate related financial risk should be allowed under CARB's regulations.

    c. **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?**

No response.

    d. **If not consistent with the Final Report of Recommendations of the Task Force on Climate-related Financial Disclosures, are there other laws, regulations, or listing requirements issued by any regulated exchange, national government, or other governmental entity that is guiding the development of these reports?**

No response.

## Conclusion

ACP-California appreciates CARB's proactive engagement on these new laws. We look forward to working with CARB to develop a program that provides consumers with meaningful information regarding scope 2 and 3 emissions without creating overly burdensome compliance requirements.

Respectfully Submitted,

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