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Climate Disclosure
California Air Resources Board (CARB)
1001 I Street Sacramento, CA 95814

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RE: Comments on Proposed Regulations implementing the California Corporate Greenhouse Gas Reporting Program (Senate Bill 253) and the Climate-Related Financial Risk Disclosure Program (Senate Bill 261)

On behalf of a diverse array of clients represented by Davis Wright Tremaine LLP, we submit these comments regarding the proposed regulations implementing the Corporate Greenhouse Gas Reporting Program (Senate Bill ("SB") 253) and the Climate-Related Financial Risk Disclosure Program (SB 261). To be consistent with both statutes and to clarify which entities are "reporting entities" and/or "covered entities" under the law, we request that the California Air Resources Board (CARB) consider the following recommendations.

A. Amend the definitions of "doing business" and "doing business in California" to reduce confusion and provide clarification regarding which entities are "reporting entities" and/or "covered entities."

As proposed, section 96072(a)(7) states: "'[d]oing business' shall have the same definition as set forth in section 23101(a) of the California Revenue and Taxation Code." Proposed section 96072(a)(8) defines "[d]oing business in California" as "doing business and meeting either of the criteria set forth in subsections 23101(b)(1) or 23101(b)(2) of the California Revenue and Taxation Code."

The adoption of these definitions from the Revenue and Taxation Code (RTC) would present two significant challenges requiring clarification so that entities know whether they will be considered a "reporting entity" (under SB 253) or a "covered entity" (under SB 261).

First, RTC section 23101 is focused on whether a "taxpayer" is doing business in California, and the term "taxpayer" under the RTC may not be the same thing as "entity" under SB 253 and 261. "Taxpayer" is defined in RTC section 23037 as a person subject to the State's corporate income taxes. Staff should ensure that the application of this definition is consistent with the enabling statute. The statutory language is clear that the "reporting entity" or "covered entity" is a single entity, which may in some cases be inconsistent with the "taxpayer" concept. It would thus be appropriate to substitute the word "entity" for the word "taxpayer" so that the definitions are consistent with SB 253 and SB 261. We propose that CARB revise the definition in section 96072(a)(8) as follows:

> "Doing business in California" means doing business and meeting either of the criteria set forth in subsections 23101(b)(1) or 23101(b)(2) of the California Revenue and Taxation Code. <u>For purposes of this section, the term "taxpayer" in subsection 23101(b) is substituted with the term "entity."</u>

Second, CARB should clarify the intended meaning of "doing business" in California in the draft regulation. RTC section 23101(a) defines "doing business" as "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." RTC section 23101(b) provides a set of objective "tests" to determine whether an entity is "doing business." Staff has indicated that rather than adopting the definition in RTC section 23101 wholesale, it made changes to address concerns that RTC section 23101 was overly broad, "potentially including businesses that conduct too few transactions to merit inclusion under this regulation."[1] For this reason, proposed section 96072(a)(8) makes subsections (a) and (b) of RTC section 23101 conjunctive. This change apparently seeks to narrow the definition of "doing business in California" to include only those entities whose activities in the state are for "financial or pecuniary gain or profit."[2] Yet CARB does not clarify the meaning of "financial or pecuniary

[1] CARB, *Kickoff Workshop: California Corporate Greenhouse Gas Reporting and Climate Related Financial Risk Disclosure Programs* ("Kickoff Workshop"), slide 23 (May 29, 2025), https://ww2.arb.ca.gov/sites/default/files/2025-05/SB%20253%20261%20Workshop%20slides%205-29.pdf.

[2] As currently set forth in the proposed regulation, this distinction/limitation is circular, because RTC section 23101(a) defines "doing business" as "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit," whereas (b) provides a set of objective "tests" to determine whether an entity is "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit."

gain or profit" nor does it provide examples of businesses that *do not* engage in transactions that drive "financial or pecuniary gain or profit."

If RTC section 23101(a) is interpreted to mean *any* transaction that benefits the corporation in any way, then establishing RTC section 23101(a) as a separate requirement in order to avoid "including businesses that conduct too few transactions to merit inclusion under this regulation," as was Staff's stated intention, does not serve this stated purpose. In order to serve Staff's stated purpose of excluding "businesses that conduct too few transactions to merit inclusion under this regulation" and to provide clarity to businesses regarding Staff's intention in making subsections (a) and (b) of RTC section 23101(a) conjunctive, we propose that the definition in section 96072(a)(7) be revised as follows:

> "Doing business" shall have the same definition as set forth in section 23101(a) of the California Revenue and Taxation Code <u>except that, for purposes of this section, "financial or pecuniary gain" means engaging in a transaction with the primary purpose or objective of earning a profit for the entity that engages in the transaction. The term does not include internal administrative, payroll, treasury, financing support, intercompany guarantees, or other intra-enterprise support activities that are not undertaken with a profit objective and do not directly generate profit or revenue for the entity</u>.

B. Amend the definitions of "reporting entity" and "covered entity" to clarify that the application of these definitions should be on an entity-by-entity basis, notwithstanding any unitary tax return filed by any entity, to ensure consistency with the clear language of the enabling statute and California law.

SB 253 defines a "[r]eporting entity" as a "partnership, corporation, limited liability company, or other business entity … with total annual revenues in excess of one billion dollars ($1,000,000,000) and that does business in California. Applicability shall be determined based on the *reporting entity's* revenue for the prior fiscal year." Similarly, SB 261 defines "[c]overed entity" as a "corporation, partnership, limited liability company, or other business entity … with total annual revenues in excess of five hundred million United States dollars ($500,000,000) and that does business in California. Applicability shall be determined based on the *business entity's* revenue for the prior fiscal year."

As stated in the Staff Report: Initial Statement of Reasons: "Per Health and Safety Code sections 38532 and 38533, each of these types of regulated entities must meet each of the following criteria:

(1) The entity is a corporation, partnership, limited liability company, or other business entity formed under the laws of the state, the laws of any other state of the United States or the District of Columbia, or under an act of the Congress of the United States;
(2) The entity has total annual revenues exceeding the applicable monetary thresholds set by Health and Safety Code sections 38532 or 38533; and
(3) The entity does business in California."

Staff also recognized that the statutory language explicitly calls for an entity-by-entity analysis, making it clear at the November 18 public workshop that "parent-subsidiary relationships **do not** determine which entities are regulated."[3] But in stark contradiction with both the statute and Staff's statements, Staff have indicated at both the very same November 18 workshop and in an FAQ published on its website that "if a parent company and its subsidiaries file California taxes as a unitary business, then the revenue of the subsidiaries counts towards the revenue of the parent company as part of its gross receipts."[4]

Under California law, it is well settled that a parent company and its subsidiaries are separate and distinct legal entities.[5] The general rule is that, because a parent and a subsidiary are separate

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[3] CARB, *SB 253/261/219 Public Workshop: Update on California Corporate Greenhouse Gas Reporting and Climate-Related Financial Risk Disclosure Programs* (slide presentation), Slide 26 (Nov. 18, 2025), https://ww2.arb.ca.gov/sites/default/files/classic/SB%20253%20261%20Nov%20Workshop%20slides%20%28Updated%29.pdf.

[4] CARB, *California Corporate Greenhouse Gas Reporting and Climate-Related Financial Risk Disclosure Programs: Frequently Asked Questions About Regulatory Development and Initial Reports*, FAQ 15 (updated Nov. 17, 2025), https://ww2.arb.ca.gov/sites/default/files/classic/FAQs%20Regarding%20California%20Climate%20Disclosure%20Requirements_Nov.pdf.

[5] *See Sonora Diamond Corp. v. Super. Ct.*, 83 Cal. App. 4th 523, 540 (2000) ("We start with the firm proposition that neither ownership nor control of a subsidiary corporation by a foreign parent corporation, without more, subjects the parent to the jurisdiction of the state where the subsidiary does business.").

legal entities, the subsidiary's inclusion in the scope of a law does not automatically make the parent covered or liable.[6]

Both statutes here explicitly define "reporting entity" and "covered entity" as a specific business entity that meets the enumerated criteria. We are aware of no relevant legal basis to suggest that one entity must be bound by a law based on another entity's revenues or activities *simply because they file a unitary tax return*. Rather, unitary filing is only relevant for the limited purpose of tax apportionment computations. Unitary filing does not dissolve the separate corporate entity of each member entity.

Thus, nothing supports consolidating parent and subsidiary revenue for determining which entities are in scope for SB 253 and SB 261 simply because the entity chose or was required to file tax returns on a unitary basis.

In the same vein, CARB should not attribute one entity's California activities to another for purposes of determining whether that entity is "doing business in California," again, because the entity chose or was required to file tax returns on a unitary basis. Staff have not suggested that they intend to do so (and any decision to do so would raise due process issues, as the determination as to whether an entity is "doing business in California" is a jurisdictional question). It would nonetheless help to clarify this point in the regulations. To that end, we

[6] *See id.* at 541 (only "when the acts of the parent may be found to trespass the boundaries of legitimate ownership and control of the subsidiary" is the parent exposed to the "power of the state in which the subsidiary does business."). *See also United States v. Bestfoods*, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." (cleaned up; citations omitted)). There are very limited circumstances in which this distinction may be disregarded, for example, when the corporate form is abused, is used for inequitable conduct, or when a subsidiary merely serves as an agent for its parent. *See, e.g., Sonora Diamond* , 83 Cal. App. 4th at 538 ("Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. … A corporate identity may be disregarded—the 'corporate veil' pierced—where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation."); *id.* at 541 ("[T]he case law identifies one situation when the acts of the parent may be found to trespass the boundaries of legitimate ownership and control of the subsidiary and expose the parent to the power of the state in which the subsidiary does business. Thus, where the nature and extent of the control exercised over the subsidiary by the parent is so pervasive and continual that the subsidiary may be considered nothing more than an agent or instrumentality of the parent, notwithstanding the maintenance of separate corporate formalities, jurisdiction over the parent may be grounded in the acts of the subsidiary/agent.").

propose that the definition of “covered entity” set forth in section 96072(a)(5) be revised as follows:

> “Covered entity” means a corporation, partnership, limited liability company, or other business entity formed under the laws of the state, the laws of any other state of the United States or the District of Columbia, or under an act of the Congress of the United States with total annual revenues in excess of five hundred million United States dollars ($500,000,000) and that does business in California. The entity’s revenue amount shall be determined by the lesser of the entity’s two previous fiscal years of revenue. “Covered entity” does not include a business entity that is subject to regulation by the Department of Insurance in this state, or that is in the business of insurance in any other state. <u>The revenues, in-state sales, and other activities of a subsidiary will not be attributed to its parent for purposes of determining whether an entity is a “covered entity,” notwithstanding any unitary tax return filed by them.</u>

We similarly propose that the definition of “reporting entity” set forth in section 96072(a)(11) be revised as follows:

> “Reporting entity” means a corporation, partnership, limited liability company, or other business entity formed under the laws of this state, the laws of any other state of the United States or the District of Columbia, or under an act of the Congress of the United States with total annual revenues in excess of one billion United States dollars ($1,000,000,000) and that does business in California. The entity’s revenue amount shall be determined by the lesser of the entity’s two previous fiscal years of revenue. <u>The revenues, in-state sales, and other activities of a subsidiary will not be attributed to its parent for purposes of determining whether an entity is a “reporting entity,” notwithstanding any unitary tax return filed by them.</u>

Thank you for the opportunity to provide comments on these important issues impacting many of our clients.

Very truly yours,

Davis Wright Tremaine LLP

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