Simpson Thacher

Ninth Circuit Upholds SB 253 Scope 1 and 2 Reporting, Enjoins Scope 3 Reporting and SB 261



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On November 9, a divided panel of the U.S. Court of Appeals for the Ninth Circuit issued its decision in *U.S. Chamber of Commerce v. Sanchez*, the First Amendment challenge to California's Climate Corporate Data Accountability Act ("SB 253") and Climate-Related Financial Risk Act ("SB 261"). In effect, the court's decision upholds Scope 1 and 2 reporting requirements under SB 253, while enjoining both (i) SB 253's Scope 3 reporting requirements, which were scheduled to begin in 2027, and (ii) SB 261's requirement for in-scope entities to publish climate-based financial risk reports.

Background

SB 253 requires annual disclosure of greenhouse gas ("GHG") emissions (Scopes 1, 2 and 3) by U.S.-organized companies doing business in California with total annual revenues exceeding $1 billion (based on the lesser of the two prior fiscal years), in line with the Greenhouse Gas Protocol standards and related guidance. Non-compliance can result in fines of up to $500,000 a year. **SB 261** requires biennial disclosure of climate-related financial risks by U.S.-organized companies doing business in California with total annual revenues exceeding $500 million (based on the lesser of the two prior fiscal years), in line with the Task Force on Climate-related Financial Disclosures framework and recommendations (or an equivalent reporting requirement). Non-compliance can result in fines of up to $50,000 a year.

Both SB 253 and SB 261 have been subject to ongoing legal challenge, originally brought in 2024 in the U.S. District Court for the Central District of California by various plaintiffs. The plaintiffs allege that the laws violate their First Amendment rights by infringing on their right to remain silent and compelling them to speak on the controversial issue of climate change. On August 13, a California federal judge had denied the plaintiffs' motion for preliminary injunction of both laws, but on November 18, the U.S. Court of Appeals for the Ninth Circuit granted the motion as to enforcement of SB 261 against the plaintiffs, resulting in a pause of reporting under that law. At the time, the motion was denied as to reporting under SB 253. On January 9, 2026, the Ninth Circuit heard oral arguments to determine whether to uphold the district court's August 13th ruling denying plaintiffs' motion for preliminary injunction of SB 253 and SB 261. The arguments focused chiefly on whether the compelled disclosures required under the statutes can be considered commercial speech.

The Ninth Circuit's Decision

- **Scope 1 and Scope 2 Disclosures under SB 253:** The majority concluded that the requirement to disclose Scope 1 and 2 emissions qualifies as commercial speech: it concerns factual information, calculated using standard methodologies, about emissions from a company's own operations, which

information may be pertinent to actual or potential commercial transactions. The court reasoned that the requirements are likely to survive intermediate scrutiny because the State's interests in mitigating information asymmetries for investors and reducing emissions are substantial, that the requirements directly advance those interests, and that they are no more extensive than necessary. The court relied on, among other things, record evidence that investors rely on Scope 1 and 2 data, that the underlying data resides in company records, and that mandatory Scope 1 and 2 reporting has been associated with emissions reductions of approximately 7 to 8%. Therefore, the court affirmed the lower court's denial of a preliminary injunction as to this portion of the law.

- **SB 253 Scope 3 Disclosure:** Because Scope 3 emissions arise from "diffuse third-party conduct in the value chain," unlike Scope 1 and 2 emissions, the court found that these disclosures are insufficiently tethered to the reporting entity's own operations to qualify as commercial speech, which is generally subject to intermediate scrutiny. Instead, applying strict scrutiny, a challenged restriction must further a compelling interest and be narrowly tailored to achieve that interest. The court held that the state failed to demonstrate a compelling interest in Scope 3 reporting, and that even if such an interest had been shown, that the requirement was not narrowly tailored. The court pointed to the facts that (i) companies do not possess Scope 3 data in the way they possess Scope 1 and 2 data, (ii) permitted estimates based on industry averages or proxy data are no more reliable than estimates the State could generate itself, (iii) the link to investment decisions is too attenuated, and (iv) no study in the record examined or linked mandatory Scope 3 reporting to mandatory disclosure. Given that SB 253's Scope 3 disclosure provisions are therefore likely unconstitutional, the court remanded for the district court to determine in the first instance whether Scope 3 provisions are severable from the other requirements of SB 253.

- **SB 261 Climate-Based Financial Risk Disclosure:** The court held that SB 261, by incorporating the TCFD framework, requires companies to make predictive and normative judgments about climate-related risks and opportunities, governance, strategy and scenario impacts—effectively answering "[h]ow should climate change shape the company's future operations and economic planning?" Relying on *X Corp. v. Bonta* and *NetChoice v. Bonta*, the court held that such value-laden judgments on a "politically fraught subject" fall outside the commercial speech doctrine. Even assuming compelling interests, the court states that SB 261 fails narrow tailoring because less restrictive alternatives were available, such as disseminating existing voluntary disclosures, incentivizing disclosure, or directly regulating emissions.

- **Partial concurrence and dissent.** Judge Bennett concurred in the majority's decision as to SB 261 and Scope 3 reporting, but emphasized that he would have enjoined both statutes in full, reasoning that both compel noncommercial speech subject to strict scrutiny, which California "all but concede[d]" it could not satisfy. In his view, all of SB 253's and SB 261's disclosures are noncommercial in nature because the information the law is aiming to disclose lacks a close tether to commercial transactions. Further, he believes that a compelled disclosure should generally qualify as commercial speech only where it informs market participants about a specific product or service. He warned that the majority's approach, which he reads as equating investors' interest in companies with consumers' interest in products, could leave "no end" to the information states may compel.

Key Takeaways

- **SB 253 Scope 1 and 2 reporting proceeds.** In-scope entities should submit Scope 1 and 2 emissions under SB 253 by **November 10, 2026**.
- **SB 253 Scope 3 reporting is uncertain.** Scope 3 reporting is scheduled to begin in 2027 and likely cannot be enforced as currently drafted; its fate, including whether the remainder of SB 253 survives absent Scope 3, turns on the district court's severability determination. Companies should monitor the court's decision and any CARB response.
- **SB 261 remains enjoined.** Companies need not publish SB 261 reports while the injunction is in place. Litigation will proceed on the merits.

We will continue to monitor developments and will provide further updates as the litigation and CARB rulemaking progress. For more information on SB 253 reporting guidance, see our prior Alert here.

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