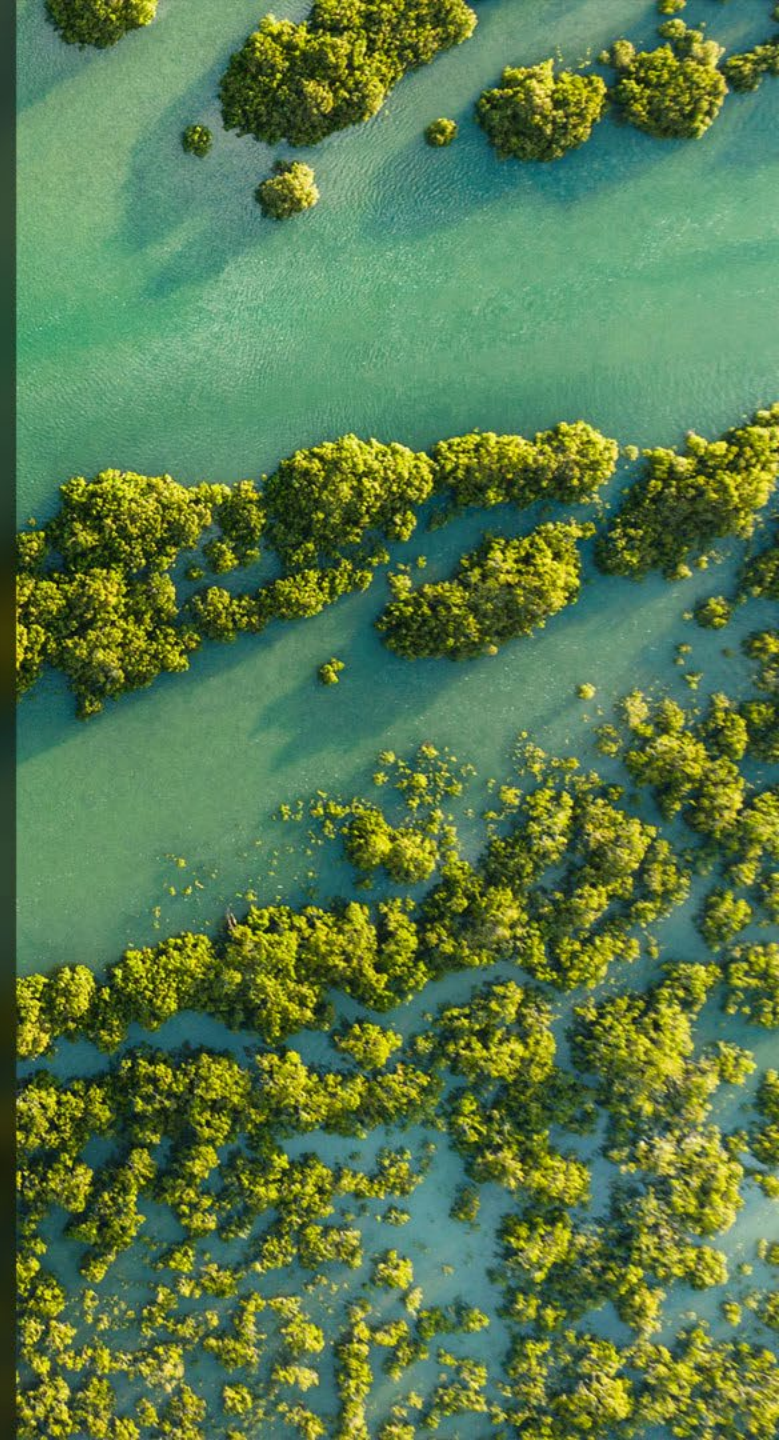


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From Cookies to Climate: When Disclosures Meet Disputes

SEPTEMBER 26, 2024



Agenda

PART I: FROM COOKIES ...

- CCPA Mandatory Disclosures
- California Invasion of Privacy Act & Wiretapping
- Class Actions & Mass Arbitrations

PART II: ...TO CLIMATE

- California Climate Accountability Package:
 - SB 253 & SB 261
- Impacts on Companies Doing Business in California
- Implementation, ESG & Preemption Issues



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From Consumer Protection to Environmental Protection

- Mandatory disclosure requirements
- Business impact
- Regulatory oversight
- Private litigation

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Mandatory Cookie Disclosures

A network diagram consisting of numerous white nodes connected by thin white lines, set against a dark blue background. The nodes are scattered across the right side of the image, with some forming a dense cluster and others being more isolated. The lines represent connections between the nodes, creating a complex web-like structure.

Mandatory Cookie Disclosures

- U.S. state laws, including the California Consumer Protection Act (CCPA), require companies to make disclosures about online tracking technologies present on their websites and mobile apps
- Businesses that use online data for targeted advertising are required to provide opt-out rights
- Websites must also respond to “Opt-Out Preference Signals,” including the Global Privacy Control signals

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Case Studies

- Statements made in website online privacy policies that state: “We do not sell personal data” or “We use cookies to provide product recommendations and tailor our products and services”
- Companies with websites that have “Do Not Sell” opt-out forms and cookie banners/pop-ups
- Integration with consent-management technology tools, CRM systems and marketing affiliates

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California Invasion of Privacy Act & Wiretapping



California Invasion of Privacy Act (CIPA) & other Wiretapping Litigation

- Plaintiffs allege that the use of session replays, chatbots and other marketing and customer-support technologies and tools violate anti-wiretapping laws
- Industries targeted include: healthcare, financial services, retail and hospitality and other consumer-facing industries
- Special concerns related to “unfair and deceptive” practices claims

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Case Studies

- “Reject all” or “Necessary only” options on cookie banners
- Legal oversight over continuous monitoring of online tracking technologies on websites
- Third-party risk and procurement process for service providers and marketing agreements

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Class Actions & Mass Arbitrations



Antidiscrimination Class Action & Mass Arbitration

- California Unruh Civil Rights Act and other state and federal antidiscrimination law claims against women-only events, products and services targeting customer audience groups, and targeted advertising based on profiling
- Class action litigation
- Mass arbitration demands

Case Studies

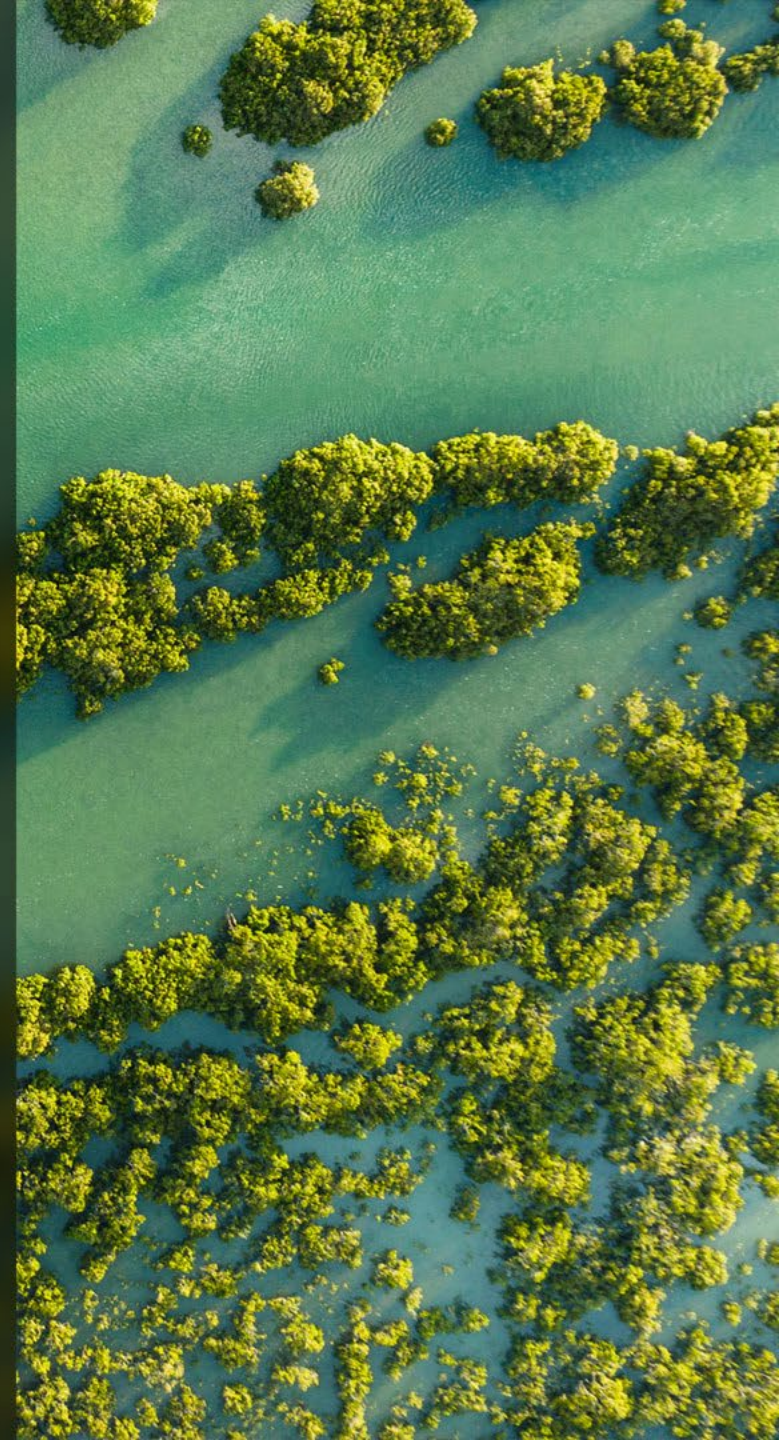
- New mandatory disclosures related to “profiling”, “automated decisionmaking” and “artificial intelligence”
- Antidiscrimination cases challenging targeted advertising and offering of products or services, discounts and loyalty programs based on race and ethnicity, age and gender



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California Climate Accountability Package: SB 253 & SB 261



California Climate Accountability Package

SB 253 (Wiener): California Climate Corporate Data Accountability Act

Requires large companies (>\$1B) doing business in California to annually disclose their Scope 1, Scope 2 and Scope 3 GHG emissions and to obtain third-party verification/assurance

SB 261 (Stern): California Climate-Related Financial Risk Act

Requires that large companies (>\$500M) undertake biennial reporting and web publication of climate-related financial risks and measures adopted to reduce and adapt to these risks

The two laws are likely to capture 5,000-8,000 newly reporting companies.



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SB 253: Climate Corporate Data Accountability Act

Applies to a public or private corporation, partnership, LLC or other U.S. business entity that has at least \$1B in global annual revenues and “does business in California”

“Doing business in California”

Senate floor analysis adopts California Tax Code definition:

- “[E]ngaging in any transaction for the purpose of financial gain within California,”
- “[B]eing organized or commercially domiciled in California, or”
- “[H]aving California sales, property or payroll exceed specified amounts” by year: e.g., for 2022, respectively:
 - \$690,144 (or CA sales 25% of total)
 - \$69,015 (or CA property 25% of total)
 - \$69,015 (or CA payroll compensation 25% of total)

SB 253: Climate Corporate Data Accountability Act

Scope of Mandatory GHG Reporting

- Scope 1 Emissions: All direct GHGs from sources entity owns or directly controls, regardless of location (e.g., fuel combustion)
- Scope 2 Emissions: Indirect GHGs from consumed electricity, steam, heating or cooling purchased/acquired by entity, regardless of location
- Scope 3 Emissions: All indirect upstream/downstream GHGs (other than Scope 2) from sources that entity does not own/directly control
 - *e.g.*, GHGs associated with production and transport of raw materials, purchased goods/services, 3rd party transport of product, business travel, employee commutes, processing and use of sold products, end of life disposal
- GHG disclosures must be publicly available (e.g., website publication)
- Scope 1 and 2 due beginning 2026; Scope 3 due beginning 2027
- Administrative penalties up to \$500,000/reporting year

SB 253: Climate Corporate Data Accountability Act



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Proposed June 2024 Amendments (SB 219)

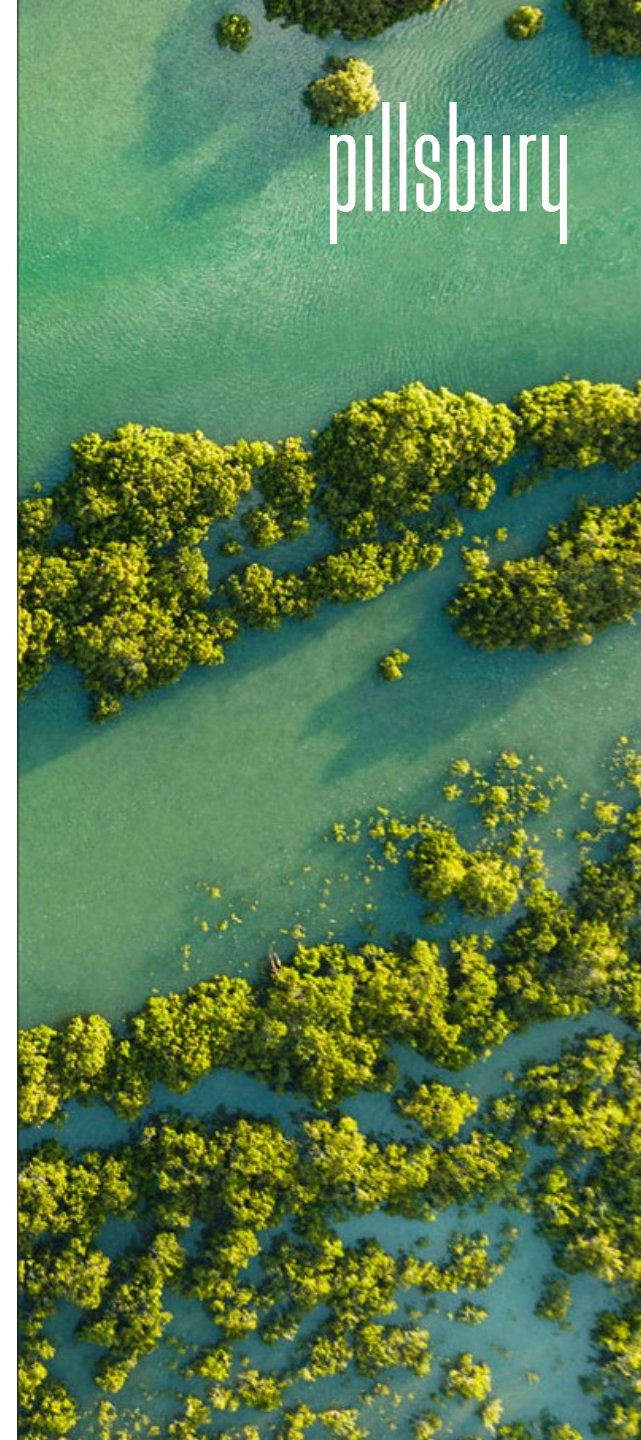
- Postpone first Scope 1 and 2 emissions reporting from 1/1/26 to 1/1/28
- Postpone first Scope 3 emissions reporting from 7/1/27 to 7/1/29
- Proposed new CARB regulation deadline of July 1, 2025
- Wide support from Legislature, environmental groups and most regulated entities
- August 2024 amendments retained additional time for CARB regulations, removed 2-year extensions for first corporate reporting, and allow CARB to set schedule for first reporting of Scope 3 emissions
- First reports of Scope 1 and 2 emissions still due Jan. 1, 2026; Scope 3 deadline is TBD
- Amendment bill approved by Legislature, awaiting Governor's signature

Impacts on Companies: SB 253

Public Disclosure of Climate Data

Problems Defining Scope 3 Emissions

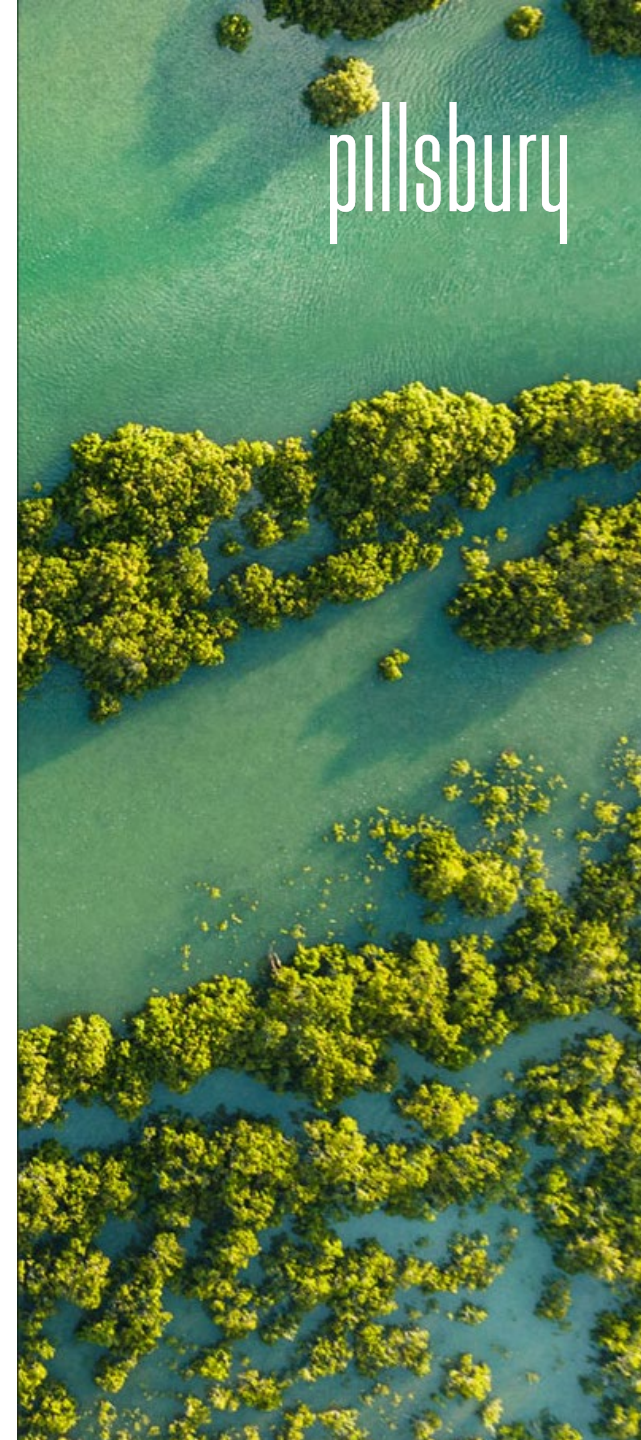
- **World Resources Institute/Greenhouse Gas Protocol:** NGO that maintains Corporate Accounting & Reporting Standard, Corporate Value Chain (Scope 3) Accounting & Reporting Standard
- GHG Protocol standards are themselves undergoing revision, debate
- GHG Protocol not a government agency or subject to U.S. legal oversight
- Theoretically, no limit to how far removed emissions can be from reporter's actual products/services
- Impossible to gather accurate/timely data from all possible sources
- Inaccuracy of GHG Protocol average industry estimates used to fill data gaps—can dramatically overstate or understate company's real GHG emissions
- Double/multiple counting problem
- **Scope 3 will be a moving target for years to come.**



Impacts on Companies: SB 253

Public Disclosure of Climate Data

- Effectively a **national** (global?) requirement—any > \$1B U.S. entity will have **some** transaction that creates value in CA
- Some private companies will face GHG reporting for the first time, ramp-up challenges
- Burdens to track GHG emissions from own operations, power use and remote third parties
- Will impose significant continuing costs, require multiple consultants and divert resources away from any actual reduction of GHGs
- Potential (probable) lack of complete/accurate climate data
- Filling data gaps with industry average data can help or harm
- Advocates pushing for all future GHG data to be company-specific
- Many of CA's requirements go well beyond SEC requirements, which (unlike SB 261) cannot be used as an alternative to the CA disclosure requirements



SB 261: Climate-Related Financial Risk Act

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Applies to a public or private corporation and all other types of business entities that has at least \$500M in global annual revenues and “does business in California”

Requires biennial preparation of climate-related financial risk report

- Must disclose (a) company’s financial risks associated with climate change, and (b) measures adopted to reduce and adapt to those risks
- “Climate-related financial risk” = “material risk of harm to immediate and long-term financial outcomes due to physical and transition risks” (*e.g.*, risks to supply chain, delivery of goods/services, consumer demand, investments, shareholder value, financial markets or overall economic health)
- Following format provided in Final Report of Recommendations of the Task Force on Climate-Related Financial Disclosures (June 2017)

SB 261: Climate-Related Financial Risk Act

- Risk report must be submitted to CARB and published on company's public website
- Company may rely on risk disclosures reported under other climate reporting regimes "consistent" with SB 261 (*e.g.*, ISSB standards, possibly SEC regulations)
- Risk report may be consolidated at parent company level for subsidiaries and affiliates
- CARB must prepare a public report on risk disclosures
- Administrative penalties up to \$500,000/reporting year
- Starts in 2026

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Impacts on Companies: SB 261

Public Climate Risk Reporting

- Will also capture many first-time reporting companies
- \$500 million threshold will capture some smaller private companies who may be challenged to gather information and report on all possible risks
- Likely will not align completely with the risk disclosure requirements coming from SEC—company will have to choose which regime to follow (and future possibility of preemption)
- Imposes new and permanently continuing cost burdens associated with engaging consultants and continuously updating risk analyses as new climate data and studies become available



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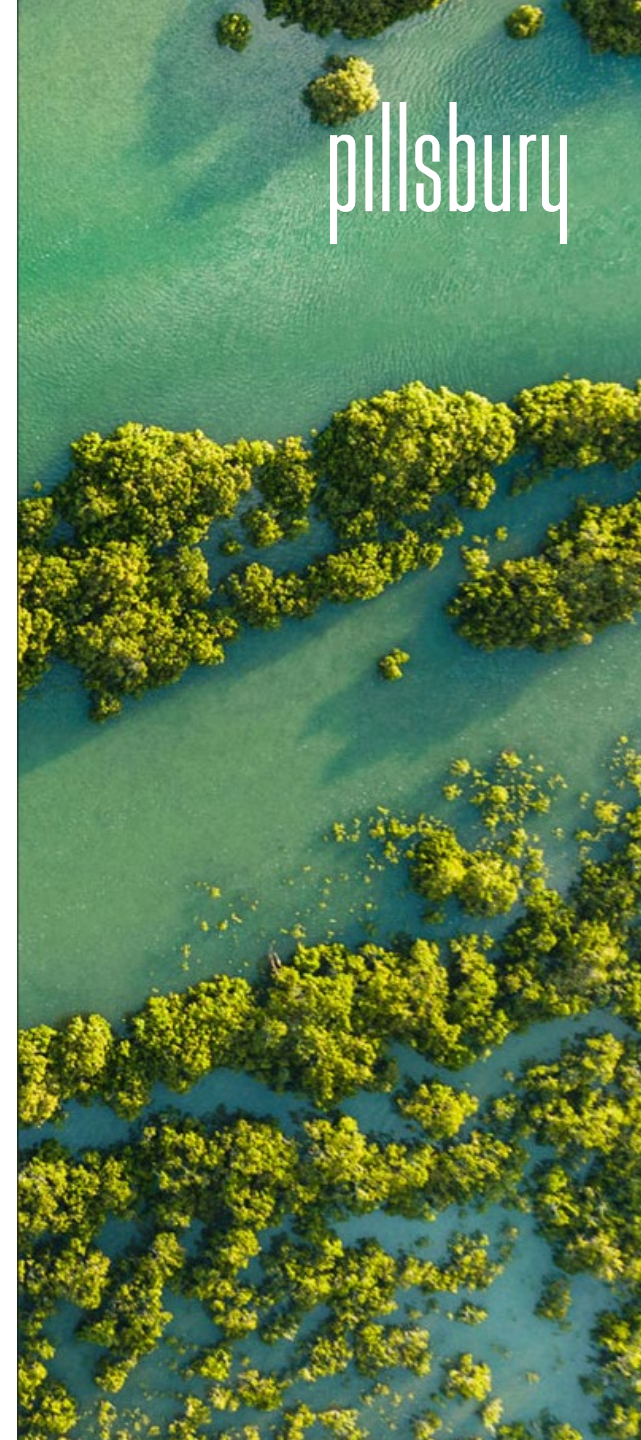
Implementation Next Steps: SB 253 & 261

- **January 1, 2025:** CARB must adopt SB 253 regulations
- **January 1, 2026:** First biennial climate-related financial risk report due
- **January 1, 2026:** Scope 1 and 2 annual reporting due, in conformance with GHG Protocol standards. Must engage assurance vendor to verify (limited).
 - Also, CARB must create digital platform for public access to reporting
- **January 1, 2027:** Scope 3 annual reports due 180 days after Scope 1 & 2
- **2030:** Reasonable assurance required for Scope 1 & 2; limited assurance for Scope 3
 - Also, CARB must reassess and potentially amend Scope 3 report deadlines
- **2031:** Penalties apply to Scope 3 misstatements if no reasonable basis
- **2033:** CARB may survey/assess available GHG accounting and reporting standards, done every 5 years
- More legislation?

Outlook & Recommendations

2025 is coming **soon**. Many major companies will need to start preparing now for FY 2025 reporting.

- Get agreements in place with climate accounting/ reporting vendors
- Begin inventory of your enterprise's carbon emissions (Scopes 1-3)
- Consult with counsel on potential areas of exposure for your company



Today's Presenters



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Advises in high-stakes regulatory defense matters, complex security incident investigations, new & emerging data strategies & cross-border M&A and tech transactions.

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