



April 4, 2014

California Air Resources Board  
1001 "I" Street  
Sacramento, CA 95814  
*Submitted electronically to <http://www.arb.ca.gov>*

**Re: Comments of CP Energy Marketing (US) Inc. on Proposed Regulatory Amendments to ARB Cap-and-Trade Regulations**

CP Energy Marketing (US) Inc. (“CPEM”) respectfully provides comments on the Air Resources Board’s (“ARB”) proposed modifications to the Cap-and Trade Regulations,<sup>1</sup> as published March 21, 2014.<sup>2</sup> CPEM greatly appreciates the efforts of the ARB and its Staff in continuing to work with industry participants to create consistent and fair regulations that allow for a well-functioning market.

CPEM limits its comments herein to four areas where we believe additional clarification is required. To the extent ARB declines to modify the proposed regulations to reflect these comments, CPEM asks that specific responses be included in the Final Statement of Reasons.

**1. Section 95914(c)(3): The Obligation of a Participant to “Ensure Against” a Consultant or Advisor Transferring Information Should Be Deleted.**

Section 95914(c)(3) includes a series of requirements to help ensure that a Cap-and-Trade Consultant or Advisor (“**Consultant/Advisor**”) does not improperly share auction information. Section 95914(c)(3)(A) specifies that, if an entity participating in an auction has retained the services of a Consultant/Advisor regarding auction bidding strategy, then “the entity *must ensure against* the Consultant or Advisor transferring information to other participants or

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<sup>1</sup> “California Cap on Greenhouse Gas Emissions and Market Based Compliance Mechanisms,” California Code of Regulations, Title 17, Subchapter 10, Climate Change, Article 5, Sections 95800, et seq., (“**Cap-and-Trade Regulations**”).

<sup>2</sup> Notice of Public Availability of Modified Text and Availability of Additional Documents and Information, accessed at <http://www.arb.ca.gov/regact/2013/capandtrade13/capandtrade15daynotice.pdf>

coordinating the bidding strategy among other participants.” Section 95914(c)(3)(B) specifies that the entity will inform the Consultant/Advisor of the prohibition against sharing information with other participants, and ensure that the Consultant/Advisor has read and acknowledged the prohibition under penalty of perjury. Section 95914(c)(3)(C) specifies that the Consultant/Advisor themselves must provide information to the Executive Officer, including “Assurance under penalty of perjury that the advisor is not transferring to or otherwise sharing information with other auction participants.”

CPEM applauds the ARB’s proposal as set forth in Section 95914(c)(3)(C) to place the onus on the Consultant/Advisor to assure that they are not inappropriately sharing information and to be liable for their actions. As part of this change, however, the ARB should also remove Section A, which requires that the participating entity itself must “ensure” against improper action by the Consultant/Advisor. The participating entity itself does not have any ability to “ensure” the actions of the Consultant/Advisor. The participating entity can ensure that the Consultant/Advisor executes a document acknowledging the prohibition, as required by Section 95914(c)(3)(B), and can provide appropriate training, etc. – but the participating entity does not have the ability to “ensure” the actions of a non-employee, and should not be held liable if, despite the participating entity’s diligent efforts, the Consultant/Advisor acts with malfeasance and shares information.

Given the addition of Section 95914(c)(3)(C), which strengthens the ARB’s ability to proceed directly against a Consultant/Advisor in the event such Consultant/Advisor inappropriately shares information, Section 95914(c)(3)(A) is simply not necessary. To the extent the ARB declines to delete this section, CPEM requests that Staff acknowledge in the Final Statement of Reasons that a participating entity will not be liable under Section 95914(c)(3)(A) for acts of a Consultant/Advisor beyond the participating entity’s ability to control.

**2. Sections 95833 and 95912(d)(5): Identification of Corporate Associations Should Be Limited To Entities Subject to Cap & Trade Requirements.**

ARB proposes to dramatically expand the definition of a Corporate Association in Section 95833(a)(1) by specifying that such corporate associations exist “regardless of whether the

second entity is subject to the requirements of this Article.” CPEM submits that this change is unnecessary, extremely burdensome, and can result in unintended and unfair consequences.

CPEM appreciates the ARB’s desire to understand the existence of affiliations among entities that may be participating in the Cap-and-Trade market. However, many participating entities may be part of large corporate families, including entities that are not controlled by, or under common control with, the participating entity, and the ARB must consider the consequences of this change on its regulatory regime. For example, Section 95912(d)(4) provides that an entity whose auction information changes within 30 days prior to an auction may be denied participation in the auction. CPEM understands that a corporate merger of two entities with compliance requirements immediately before an auction could cause the ARB some concern. However, placing an entity’s opportunity to participate in an auction in jeopardy because of merger activity of a distant affiliate – perhaps operating in a different industry, on a different continent, and over whom the participating entity has no control, but which could change the participating entity’s list of corporate associations – seems patently inappropriate.

CPEM respectfully requests that the ARB decline to adopt the proposed change to Section 95833(a)(1). To the extent the ARB adopts this change, CPEM asks that Staff explain, in its Final Statement of Reasons, (1) how information about corporate association not related to entities subject to the Cap-and-Trade requirements will be used by the ARB; and (2) the specific circumstances under which a participating entity may be denied participation in an auction due to changes in corporate associations.

3. **SECTION 95912(4)(E): The Requirement for Attestation of Non-Public Investigations Must Be Modified**

ARB has revised Section 95912d(4)(E) to require that an auction participant provide information about the existence and status of ongoing investigations related to the entity seeking to participate in an auction as well as related to any entity in a corporate association:

“An attestation disclosing the existence and status of any ongoing investigation or an investigation that has occurred within the last ten years with respect to any alleged violation of any rule, regulation, or law associated with any commodity, securities, environmental, or financial market for the entity participating in the auction, *and all other entities with whom the entity has a corporate association, direct corporate association, or indirect corporate association pursuant to section 95833 that participate in a carbon, fuel, or electricity market.* The attestation must be updated to reflect *any change in the status of an investigation* that has occurred since the most recent auction application attestation was submitted.”

(Emphasis supplied). CPEM submits that it may not be possible for some entities to meet this requirement, both because the auction participant may not have such information, and because provision of such information may violate a variety of laws or other agreements.

By way of example, consider a series of affiliations based on the following hypothetical corporate structure: “**Multinational A**” is a large multinational company that includes subsidiaries that own power utilities in Europe, and therefore participates in an electricity market. Multinational A purchases 75% of “**Company B**”, a Brazil mining company. Company B purchases fifty percent of “**Company C**,” an otherwise privately-held California company engaged in manufacturing with Cap-and-Trade compliance obligations that wishes to participate in an auction. Multinational A and Company C do not share any employees, officers or directors.

Under this scenario, CPEM submits that Multinational A has no duty to disclose to Company C whether Multinational A is or has been subject to any investigation regarding any “alleged violation,” nor is it likely to do so. Moreover, disclosure by Multinational A of such information to Company C, and/or by Company C to the ARB, may be directly contrary to other disclosure laws. For example, if Multinational A were traded on the New York Stock Exchange, disclosure of an alleged violation, or of a change in status of an investigation of an alleged violation, could be deemed a violation of the Fair Disclosure Regulations promulgated by the Securities and Exchange Commission pursuant to Regulation FD.<sup>3</sup>

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<sup>3</sup> See, e.g., Securities and Exchange Commission Final Rule: Selective Disclosure and Insider Trading, 17 CFR Parts 240, 243 and 249.

CPEM also notes that many investigations are expressly undertaken pursuant to confidentiality agreements, information restrictions or other form of regulatory “gag” orders placed on the entity subject to the investigation by a regulating body. As such, a requirement that Multinational A inform Company C, or for Company C to inform the ARB of an investigation, may be impermissible even if no publicly traded companies are involved.

CPEM also requests that the ARB eliminate the term “alleged” from this regulation, or provide specific guidance as to when an “alleged” violation must be reported. Specifically, the ARB should confirm that there is no duty to report situations in which the investigation at issue is (1) generic and not specific to the entity in question; or (2) is preliminary in nature, such as through receipt of a staff questionnaire that does not represent action by any regulatory body.

Given these concerns, CPEM requests that the ARB modify its regulations to specify that the attestation requirement only applies to the participating entity itself, and not to any corporate associations. Alternatively, as an intermediate solution, the ARB could modify its regulations to limit the attestation requirement to the participating entity and known investigations of direct corporate associations, where allowable by law:

“An attestation disclosing the existence and status of any **known** ongoing investigation or an investigation that has occurred within the last ten years with respect to any **alleged** violation of any rule, regulation, or law associated with any commodity, securities, environmental, or financial market for the entity participating in the auction, and all other entities with whom the entity has a ~~corporate association~~, direct corporate association ~~or indirect corporate association~~, pursuant to section 95833 that participate in a carbon, fuel, or electricity market **in the U.S. or a Linked Jurisdiction, where such disclosure can be made without violating law.** The attestation must be updated to reflect **public information concerning** any change in the status of an investigation that has occurred since the most recent auction application attestation was submitted.”

In the event ARB declines to make either of these proposed changes, CPEM respectfully requests that Staff specify in the Final Statement of Reasons that an entity seeking to participate in an auction will not be liable, nor prohibited from auction participation, to the extent such entity fails to disclose the existence of investigations of which the entity is unaware and/or where such disclosure would be in violation of law or regulatory requirement.

4. **Section 95912(f); Section 95913(e): The Phrases “Intent to Participate” and “Intent to Bid” Should Be Clarified.**

New Section 95912(f) specifies that an entity that “intends to participate” in an auction must inform the Auction Administrator at least 30 days prior to an auction of its intent to bid in an auction. Similarly, new Section 95913(e) provides that an entity must inform the reserve sale administrator at least 20 days prior to a reserve sale of its “intent to bid.” CPEM requests that the ARB clarify that this indication of intent does not represent a binding commitment to participate in such auctions. For example, an entity may, more than 30 days prior to an auction, intend to participate, but prior to such auction find an over-the-counter transaction under which it can purchase the compliance instruments required at a fixed price, thereby avoiding auction risk, and rendering its auction participation unnecessary. CPEM recommends that Section 95912(f) be revised, as set forth below, with a corresponding change to Section 95913(e):

Auction Intent to Bid Notification Requirements. An entity that intends to participate in an auction must inform the Auction Administrator at least 30 days prior to an auction of its intent to bid in an auction, otherwise the entity may not participate in that auction. **Informing the Auction Administrator of an intent to bid does not commit the entity to participate in the auction.**

In the event ARB declines to make these changes, CPEM respectfully requests that Staff specify in the Final Statement of Reasons that an entity seeking to participate in an auction or reserve sale will not be in violation to the extent it evidences an “intent” to participate, but does not ultimately choose to do so.