

August 2, 2013

Submitted electronically to <http://www.arb.ca.gov>

California Air Resources Board
1001 "I" Street
Sacramento, CA 95814

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

CP Energy Marketing (US) Inc. ("CPEMUS") appreciates the opportunity to provide comments to the Air Resources Board ("ARB") on the July, 2013 Discussion Draft for Proposed Amendments to the California Cap and Trade Program.¹

1. CONDUCT OF TRADE.

CPEMUS strongly urges ARB to reconsider the proposed modifications on Conduct of Trade found in § 95921. CPEM appreciates ARB's desire to have information necessary to perform its market monitoring function. However, CPEM submits that the proposed draft regulations calls for a level of transactional detail that is beyond the scope of what is needed, creates unnecessary burdens on transactions, and potentially exposes highly confidential information. ARB already has enforcement tools at its disposal sufficient to keep a careful reign on the market. ARB already has full access to the balance of compliance instruments in various parties' accounts, will know the prices bid by all parties at auction, and will know the price paid for compliance instruments traded on CITTS. If any trade triggers a concern, ARB already has authority to request access to underlying contractual documents at that time. Requiring all parties to submit extensive documentation for routine trades, when there is no indicia of any kind of a market issue, is unnecessarily burdensome on both market participants and ARB Staff. This proposal to require such detailed information be provided through CITSS is particularly troubling given the proposed language of the CITSS User Agreement, Section 1.4, which specifies that ARB may disclose information provided by users to the public "to the extent that disclosure is not prohibited by California Law." To the extent the ARB does require filing of this information, the regulations should be modified to reflect that all information shall be

¹ Posted July 18, 2013, http://www.arb.ca.gov/cc/capandtrade/meetings/071813/ct_reg_2013_discussion_draft.pdf

maintained on a strictly confidential basis, shall be exempted from the California Freedom of Information Act to the maximum extent allowed by law, and shall not otherwise be disclosed absent compelling need and legal requirement.

With respect to the specific text, CPEM offers the following comments:

Section 95921(a)(4) New section 95921(a)(4) specifies that “an entity may not submit a transfer request to another registered entity without an existing transaction agreement with that party authorizing a transfer.” CPEM believes this provision is unnecessary. If it is included, ARB should clarify that such agreement need not be a formal written document. Many registered entities are sophisticated parties that routinely operate in energy and commodity markets, and frequently close transactions based on oral agreement (generally recorded), instant message, or other form of communication. Such transactions may rely on a master agreement for additional terms and conditions, may rely on interpretation under the Uniform Commercial Code, and/or may rely on other legal principles, such as course of dealings between the parties.

Section 95921(b)(1) New section 95921(b)(1) requires the entity entering information for a transfer request to provide the identification of the two primary account representatives and/or alternate account representatives for both the source account (§95921(b)(1)(A)) and the destination account (§95921(b)(1)(B)). CPEM submits that this is not necessary: the system already holds the identity of these persons, and checks and balances are in place to ensure that the correct persons exercise their respective obligations. Perhaps more importantly, the entity entering the transfer request for the holding account has no basis for knowing, and may not be entitled to know, who is authorized to act for the destination account. Adding this requirement adds an unnecessary level of complexity to agreements, as it would require parties to update counterparties of any changes to their internal delegations, etc.

Section 95921(b)(2) New section 95921(b)(2) requires that a transfer request must identify a specific “type” of transaction agreement, and specifies a very limited set of three generic types. The first applies to over-the-counter transactions with delivery to take place no more than three days from the date the parties enter the transaction agreement; the second when delivery will take place more than three days after the parties enter the transaction agreement or that “involve multiple transfers of allowances over time for the bundled sale of allowances with other products;” and the third for exchange-based agreements. Again, CPEM submits that this is unnecessary. If ARB elects to include this provision, CPEM believes the text of Section 95921(b)(2)(B) should be corrected as

follows: “involve multiple transfers of ~~allowances~~ compliance instruments over time and/or for the bundled sale of compliance instruments ~~allowances~~ with other products.” In addition, the draft regulations contain a new definition of the term “Spot,” which is defined as a contract for the immediate delivery of and payment for a product. CPEM requests clarification whether the transaction type for which delivery is intended to take place within 3 days is intended to refer to Spot transactions, and, if so, recommends that this section be clarified accordingly.

Section 95921(b)(3)(B) New Section 95921(b)(3)(B) requires that a transfer request for an over the counter agreement include a “Date of settlement,” and notes that, if there are financial or other terms to be settled after the transfer request is approved, the date those terms are to be settled should be entered as the settlement date. The ARB should recognize that many terms to be settled may be subject to floating dates or dates triggered by other events. As such, ARB should clarify that, if the settlement date is not fixed in the contract, an estimated settlement date may be provided, without subjecting the reporting entity to liability if the date changes.

Section 95921(b)(4)(B) New Section 95921(b)(4)(B) requires that a transfer request for an over the counter agreement with delivery to take place in the future include a “date the transaction agreement terminates.” As with the date of settlement discussed above, termination dates are often not fixed, and the agreement may extend until all parties have performed their obligations. As such, ARB should clarify that, if the termination date is not fixed in the contract, an estimated termination date may be provided without subjecting the reporting entity to liability if the date changes.

Section 95921(b)(4)(C) New Section 95921(b)(4)(C) requires that, if a transaction agreement provides for further compliance instruments transfers, the transfer request must specify whether the transfers are monthly, quarterly, annual or unspecified. ARB should clarify that a transfer request may indicate “unspecified” for transactions with other specified terms (such as biannual or biennial) without violating the regulations.

Section 95921(b)(4)(D) New Section 95921(b)(4)(D) requires that, if a transaction agreement provides for transfers of other “products” such products must be specified. ARB should clarify the definition of “products.”

2. COMPLIANCE INSTRUMENT RETIREMENT ORDER

Section 95856(h) New section 95856(h) specifies a mandatory compliance instrument retirement order under which the Executive Officer will withdraw compliance instruments from an entities' Compliance Account. CPEM believes it is appropriate for the regulations to specify a compliance retirement order to be used as a default, if no other order is specified by a covered entity, and believes that the proposed order is appropriate for that purpose. However, CPEM strongly believes a compliance entity should have the flexibility to specify a different order to meet its own business needs.

3. PROHIBITION ON TRADING

Section 95921(f)(1)(A) CPEM appreciates the clarifications made to Section 95921(f)(1), regarding general prohibitions on trading. However, we believe a further clarification may be necessary with respect to new section 95921(f)(1)(A), which provides that "An entity may not hold allowances in which a second entity has any ownership or financial interest." We ask that this section be clarified so that it would not apply to bank loans, financing and/or securitization instruments.

4. AUCTION INTENT TO BID NOTIFICATION

Section 95912(f); Section 95913(e). 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 these sections be clarified to indicate that this indication of intent does not represent a binding commitment to participate in such auctions.

5. ISSUANCE OF ARB OFFSET CREDITS

Section 95981 Section 95981, Issuance of ARB Offset Credits, has been revised to include additional specificity regarding the mechanics under which an Offset Project Operator or Authorized Project Designee may submit a request for issuance of ARB offset credits. CPEM recommends these provisions be clarified in two respects. First, CPEM understands

that, in addition to the Offset Project Operator and Authorized Project Designee, an offset Holder also may initiate a request for issuance of ARB offset credits. This fact should be made clear in the regulations. Second, CPEM understands that, regardless of whether a request is made by an Offset Project Operator, an Authorized Project Designee, or a Holder, circumstances exist in which an entity only desires to have a portion of the eligible credits from a project issued as ARB Offset Credits. ARB should clarify, and specify the mechanism for, allowing the requesting entity to specify the portion of a project for which offset credits should be issued.

6. REGISTRATION WITH ARB – ACCESS TO “ANY” INFORMATION

Section 95830(c)(1)(I) New Section 95830(c)(1)(I) provides that an entity registering with the ARB must provide names and contact information for “all persons that will either have access to any information regarding compliance instruments, transactions, or holdings; or be involved in decisions regarding transactions or holdings of compliance instruments, or both.” CPEM submits that this section is overly broad, unnecessary, and should be eliminated or clarified. As drafted, “*all* persons with *access to any* information” could cover a substantial number of persons – perhaps the majority of a company’s employee pool -- despite the fact that the vast majority of such employees only have access to minor pieces of information, and may not have access to or knowledge of the registrant’s account balances, strategies, or other information. By way of example, a records archive administrator or file clerk may have access to a transaction document regarding compliance instruments. A regulatory analyst may be asked to determine whether an early action offset will be subject to revocation. A credit analyst may review a counterparty’s credit status for a particular transaction. A computer technician may have *access* to corporate records, although it would be impermissible for them to use such access. Requiring a registrant to provide names and contact information for employees with *any* information – or even just *access to* such information, without any test of relevancy, is inappropriate. Requiring a registrant to keep such a list up to date is burdensome. CPEM does not believe that other regulators – the CFTC, FERC, the SEC, or similar bodies, require this type of information, and do not believe it is necessary or appropriate here.

7. RECOGNITION OF EARLY ACTION OFFSET CREDITS –ODS

Section 95990(e)(2)(G) New Section 95990(e)(2)(G) specifies that, for early action

offset projects developed under the Climate Action Reserve U. S. Ozone Depleting Substances Project Protocol version 1.0, each reporting period, and/or each destruction event **may** be considered an independent project. CPEM requests clarification that such projects also may be listed as a single project, with multiple reporting periods. CPEM recommends the draft language be revised as follows: “For early action offset projects developed under the Climate Action Reserve U. S. Ozone Depleting Substances Project Protocol version 1.0, each reporting period, and/or each destruction event **may either** be considered an independent project **or may be listed as a single project with multiple reporting periods.**

8. NON-DISCLOSURE OF CAP AND TRADE CONTRACTORS

Section 95923 New Section 95923 sets forth new disclosure requirements for “Cap and Trade Contractors,” which are defined as a contractor employed by an entity registered in the cap and trade program to work on cap and trade compliance if the contractor either (A) verifies the entity’s emissions as part of the ARBs Mandatory Reporting Program or (B) “Advises or consults with the entity regarding compliance with the Cap and Trade Program, and receives information from another registered Cap and Trade participant” (§95923(a)(1)(B)). This provision goes on to place obligations on the registered entity to provide information about the Contractor, including a brief description of the work to be performed by the Contractor.

CPEM requests that ARB clarify draft section §95923(a)(1)(B) in a variety of respects. First, CPEM notes that, under this provision, a non-employee under contract with a registered entity is only a “Cap and Trade Contractor” under the rules to the extent that such contractor “receives information from another registered cap and trade participant.” As drafted, a contractor may trigger this rule unintentionally, and even without any relationship to a second registered cap and trade participant, merely by performing his/her function for the original entity. For example, a contractor engaged to help negotiate the purchase of CCOs in a bilateral transaction may receive information from another participant as part of that negotiation. To correct this, CPEM recommends the phrase in draft section §95923(a)(1)(B) be modified to state “... receives information from another registered cap and trade participant, **other than in the course of performing its duty for the entity.**”

Second, CPEM notes that actions of a contractor could trigger an obligation by the registered entity for which the registered entity is unaware. For example, assume a registered entity engages a contractor to assist on compliance matters, and that contractor attests he/she is not otherwise engaged for any other registered cap and trade participant. Subsequent to that engagement, and unknown to the registered entity, the contractor provides services to another registered cap and trade participant. CPEM requests clarification that the original registered entity will not be in violation for failure to disclose the Cap and Trade Contractor to the extent that the entity did not have knowledge that the contractor engaged in actions which triggered the requirement.

Third, CPEM requests that ARB clarify that this disclosure provision does not apply to attorneys, who are subject to regulation under state bars and have ethical obligations to protect client confidentiality and are subject to strict conflict of interest rules. Outside counsel frequently advise entities regarding compliance matters, some of which may be confidential and sensitive, and such attorneys may not be permitted under state bar rules to disclose that fact to other entities, including other existing or prospective clients. Moreover, to the extent outside counsel is engaged to provide advice with respect to compliance with ARB regulations, disclosing this fact to the ARB, as would be required pursuant to draft Section 95923(b)(2), may operate as a waiver of the attorney-client privilege, rendering access to counsel ineffective.

9. DEFINITION OF “FUTURES”

Definition of Futures. The proposed draft regulations include a new definition of the term “Futures” that appears to be an incomplete version of the CFTC definition of futures promulgated by the CFTC.^[1] CPEM recommends that ARB harmonize its definition with the CFTC definition in order to avoid confusion.

^[1] See CFTC definition of “Futures” here:

http://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/glossary_f#futurescontract

10. CONCLUSION

CPEM greatly appreciates the time and effort of ARB and its staff in the ongoing efforts to update the Cap and Trade Regulations to ensure a successful program, with a robust and fair market and regulatory certainty for participants. CPEM asks that ARB give consideration to the comments set out above as it determines appropriate modifications moving forward.