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April 5, 2014

California Air Resources Board
1001 I Street,
Sacramento, CA 95812

Re: Comments on Proposed 15-Day Amendments to the
California Cap on Greenhouse Gas Emissions and
Market-Based Compliance Mechanisms Section
95923

Ladies and Gentlemen,

Latham & Watkins LLP has been practicing law in California since its founding in 1934 and is currently the largest law firm in the state by number of attorneys. Latham represents a number of clients who are key stakeholders in California's cap-and-trade program, and has participated in many discussions with and provided comments to the Air Resources Board ("ARB") on their behalf.

Today, we write on our own behalf to provide comments on Section 95923 of the Proposed 15-Day Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms (the "15-Day Proposal"). Proposed Section 95923 deals with consultants and advisors to entities registered in the cap-and-trade program.

As currently worded, the 15-Day Proposal would require any entity "employing" a "Cap-and-Trade Consultant or Advisor" to disclose the name, contact information, physical address and employer of such consultant or advisor to ARB. Section 95923(b). "Cap-and-Trade Consultant or Advisor" is defined as a person or entity that is not an employee of an entity registered with ARB and that provides the services listed in Section 95979(b)(2). Section 95923(a). Section 95979(b)(2) sets forth a long list of services and explicitly includes "legal services". Although it is possible to interpret the introductory language in Section 95979(b)(2) as limiting the types of services referenced in Section 95923(b), it is also possible to interpret such reference as one covering all legal services without limitation of the nature or the parties involved in the provision of the services. If the latter interpretation is not ARB's intent, we urge ARB to clarify the wording of proposed Section 95923(b). If, indeed, ARB is proposing to require cap-and-trade program registrants to disclose the identity of their outside counsel, we would like to object to the proposal, for the reasons set forth below.

We strongly believe that requiring the disclosure of the identity of outside counsel in connection with the cap-and-trade program is both unnecessary and potentially harmful. It is unnecessary because the provision of legal services is already highly regulated, and subject to the laws of each state and the local ethics rules of each state's bar. It is potentially harmful because confidentiality within the attorney-client relationship, including, in some cases, the existence of the relationship, is a foundational principle of legal ethics designed to encourage clients to seek legal advice. Disclosing the attorney-client relationship to a public agency could affect the privileged nature of our communications in a manner that would be detrimental to our clients.

We are grateful that ARB has already made improvements to Section 95923 by removing the previously-proposed requirement to disclose a brief description of the services provided by the advisors, but even the existence of an attorney-client relationship can be sensitive information. Although providing the name, contact information and work address of a lawyer would in some cases seem innocuous, there are many instances in which the knowledge that a particular lawyer is working for a particular client would allow competitors, regulators, and other observers to infer the purpose of the engagement to the client's detriment.

Confidential information such as the existence of an attorney-client relationship is protected by privilege, but to maintain that privilege, that information must be kept confidential and not shared with third-parties. While the information required by proposed Section 95923 is not extensive, any information shared with a party outside the attorney-client relationship creates a risk of damaging the privilege protections which are so essential to the functioning of that relationship. Once attorney-client communications have lost their privilege protections, they could be lost not only with respect to the ARB, but also with respect to competitors, other regulatory bodies, and other parties who may become adverse to the client in the future.

Fortunately, the ethical rules governing attorney-client relationships serve the same policy ends as ARB's proposed Section 95923. Typical of these rules is California Civil Code Section 6068(e), which requires an attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of his or her client." California's Rules of Professional Conduct – like those of other states – also prohibits counsel from advising "the violation of any law, rule or ruling of a tribunal". Rule 3-210, Cal. Rules of Professional Conduct. In short, the attorney-client relationship is already governed by extensive and well-developed regulations created and enforced by the legal profession. Layering disclosure requirements on top of this existing system unnecessarily complicates the attorney-client relationship and creates the potential for a conflict between the cap-and-trade regulations and the existing ethical rules governing the practice of law.

For the foregoing reasons we urge ARB not to require cap-and-trade registrants to disclose the identity of their outside counsel providing legal services in connection with the program. This can be achieved by modifying the 15-Day Proposal in a number ways, including by exempting "legal services" in Section 95979(b)(2)(R) from the types of services referenced in proposed Section 95923(a).

LATHAM & WATKINS^{LLP}

Thank you for the continued opportunity to work with you on the cap-and trade program. We remain available to answer any questions that you may have in connection with this letter.

Sincerely,

[Original Signed]

Jean-Philippe Brisson
Robert A. Wyman, Jr.

of LATHAM & WATKINS LLP