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February 14, 2014

By *Electronic Submission*: <http://www.arb.ca.gov/cc/capandtrade/comments.htm>

Hon. Mary D. Nichols, Chairman
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: Comments on Discussion Draft of Proposed 15-Day Amendments to the Cap-and-Trade Regulation

Dear Madam Chairman:

Calpine Corporation (hereinafter, “Calpine”) appreciates the opportunity to provide these written comments on the California Air Resources Board’s (“CARB” or the “Board”) 15-Day Discussion Draft of Potential Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation (Cal. Code Reg. tit. 17, §§ 95800 *et seq.*, “Cap-and-Trade Regulation” or “Regulation”) (collectively, “Draft 15-Day Changes” or “Discussion Draft”).

I. INTRODUCTION AND SUMMARY

Calpine has been a longtime supporter of CARB’s efforts to develop and implement an economy-wide greenhouse gas (“GHG”) mitigation program. We have actively participated in the development of the Cap-and-Trade Regulation, offering our input throughout the regulatory process on how CARB could best create a strong and workable program.

CARB has announced in its recent Proposed Update to the Climate Change Scoping Plan that “[t]he Cap-and-Trade Program will continue to be a vital component in achieving California’s longer-term climate change goals.”¹ Thus, it is increasingly clear that CARB is committed to continuing the implementation of the Cap-and-Trade Program, beyond 2020. For this reason, it is critically important that CARB continue to refine the Cap-and-Trade Regulation and thereby ensure that it will support a functional and robust market that achieves California’s GHG reduction goals.

¹ CARB, Proposed First Update to the Climate Change Scoping Plan: Building on the Framework, at 95 (Feb. 10, 2014), *available at*:

http://www.arb.ca.gov/cc/scopingplan/2013_update/draft_proposed_first_update.pdf.

Pursuant to the Board's direction in Resolution 13-44², CARB staff has continued to work to resolve remaining issues from the 45-Day Proposed Amendments to the Cap-and-Trade Regulation ("45-Day Proposed Amendments").³ As Calpine expressed in its written comments on the 45-Day Proposed Amendments⁴, we are pleased with the approach CARB staff has proposed with respect to allocating allowances to legacy contract generators and the auction purchase limit. The Draft 15-Day Changes further refine CARB's approach regarding these issues, and also propose sensible revisions to the provision regarding the prohibition on holding "on behalf of" another entity. Calpine still has concerns regarding several instances in which the Draft 15-Day Changes fail to address outstanding flaws or provide only an incomplete solution to an existing problem.

Accordingly, we urge CARB staff to make several minor technical amendments to the Draft 15-Day Changes, before proposing the formal 15-day amendments, as described below.

- A. Legacy Contracts: Calpine strongly supports and appreciates CARB's proposed resolution of the legacy contract issue. Where a counterparty to a legacy contract is itself scheduled to receive an allocation for industrial assistance, but will not face an increase in its steam or electricity costs due to the legacy contract, the emissions attributable to the generation of steam and/or power pursuant to that contract should be deducted from the counterparty's allocation and provided to the generator instead. Calpine urges CARB to proceed with the framework for addressing this important issue reflected by the Draft 15-Day Changes.
- B. Auction Purchase Limit: Calpine strongly supports and appreciates CARB's proposed revisions regarding the auction purchase limit. The Draft 15-Day Changes would increase the covered entity auction purchase limit to 20 percent (%) through 2014 and 25% thereafter. Calpine urges CARB to proceed with its proposal of this approach in formal 15-day amendments at the earliest opportunity, so these important changes will apply to the remaining auctions occurring in 2014.
- C. Prohibition on Holding "On Behalf Of" Another Entity: The Draft 15-Day Changes include additional criteria intended to clarify that forward contracts are not subject to the prohibition of an entity holding allowances on behalf of another entity. We believe these criteria were revised to clarify that the prohibition was not intended to prohibit common arrangements for delivery of allowances between parties to power sales contracts. While we appreciate these changes and agree CARB should include them in the formal 15-day

² CARB, Resolution 13-44 (Oct. 25, 2013), *available at*:
<http://www.arb.ca.gov/regact/2013/capandtrade13/res13-44.pdf>.

³ *Available at*: <http://www.arb.ca.gov/regact/2013/capandtrade13/capandtrade13isorappe.pdf>.

⁴ Letter to Hon. Mary D. Nichols, Chairman, from Cassandra Gough, re: Comments on Proposed Amendments to the Cap-and-Trade Regulation, at 3-7 (Oct. 23, 2013), *available at*:
<http://www.arb.ca.gov/lists/com-attach/109-capandtrade13-VjVWMVY7AyAKZQdp.pdf> (hereinafter, "October 2013 Comments").

proposed amendments, Calpine urges CARB to expressly clarify, in the final statement of reasons or stand-alone guidance, that the prohibition does not apply to procurement of allowances by the buyer under a power or steam sales contract, for later transfer to the seller to cover the compliance obligation associated with deliveries of electricity and steam.

- D. Limited Exemption from Holding Limit: The Draft 15-Day Changes include new language that would revise the limited exemption from the holding limit. CARB appears to have revised this language in response to comments that it left a gap in coverage by the limited exemption. However, even with these revisions, assuming the Draft 15-Day Changes should be finalized and become effective prior to October 30, 2014, covered entities' limited exemption will be significantly decreased from the limited exemption that applied up until the date when the amendments become effective. This could result in unintended violations of the holding limit among covered entities and should be fixed by CARB prior to proposing formal 15-day amendments.
- E. Changes in Auction Application Information: The Draft 15-Day Changes would allow CARB to deny participation in the auction to any entity if certain information in its auction application or accounts application should change within the 30 days before or 15 days after an auction. The proposal is unworkable with respect to changes occurring after the auction because it is unclear how CARB could enforce it without impairing the integrity of the certified auction results. Even if a change should occur before the auction, the proposal sweeps too broadly and could bar participation due to changes only affecting distantly related companies having nothing to do with the Cap-and-Trade Program or representing inconsequential personnel changes. CARB should limit this proposal to changes occurring within the 30 days prior to an auction that pertain to the entity itself or its direct corporate associations.
- F. Annual Compliance Surrender Obligation: The Draft 15-Day Changes would retain the current scheme for the retirement of compliance instruments to fulfill the annual compliance obligation. Calpine supports this proposal. Further, in response to CARB staff's solicitation of stakeholder comment on whether the 8% quantitative usage limit should apply to the annual surrender obligation, Calpine urges CARB—whatever approach CARB should take in response to input it receives from stakeholders—not to require forfeiture of the unused balance of each annual usage limit, but to instead assure that covered entities can continue to take advantage of the full 8% quantitative usage limit for the entire compliance period.

These comments are discussed in greater detail below.

II. DISCUSSION

A. CARB Should Proceed With Formal Proposal Of The Discussion Draft's Provisions Concerning Legacy Contract Generators

Calpine strongly supports CARB's approach to resolving the long-standing issue of how best to provide appropriate relief to electricity generators subject to legacy contracts entered into prior to the enactment of Assembly Bill ("AB") 32 that do not allow for recovery of GHG compliance costs for electricity and/or thermal energy delivered pursuant to the contract.

Calpine has consistently advocated for a fair resolution of the legacy contract issue⁵ and has, whenever possible, renegotiated pre-AB 32 contracts to address GHG costs. Despite Calpine's good faith efforts to bring our counterparties to the negotiating table, we have not been able to renegotiate four remaining legacy contracts to allow for the pass-through of compliance costs associated with deliveries of electricity and/ or steam from our combined heat and power ("CHP") facilities.

The Draft 15-Day Changes fairly and appropriately resolve this issue: Where a legacy contract counterparty will receive an allocation for industrial assistance, but will not experience an increase in its steam or electricity costs due to the existence of the legacy contract, the emissions attributable to generation of steam and/or power pursuant to that contract should be deducted from the counterparty's allocation and provided to the generator instead. Accordingly, Calpine supports the Draft 15-Day Changes in this regard. Calpine also appreciates CARB's additional proposed amendment to section 95870(g) to clarify that legacy contract allocations will be provided through 2017.⁶

B. CARB Should Proceed With Proposal Of The Discussion Draft's Proposed Revisions To The Auction Purchase Limit

Calpine strongly supports the proposed revisions to the auction purchase limit provision. Under the Regulation, the current vintage auction purchase limit for covered entities is 15% of the allowances offered for auction at each auction occurring in 2013 and 2014. The corresponding limit on purchases from the advance auctions conducted during the same period is 25%. There is no limit currently specified for auctions occurring after 2014. The Draft 15-Day Changes would (1) increase the current vintage auction purchase limit applicable to covered entities to 20% through 2014 and (2) establish a new auction purchase limit applicable to covered entities and electrical distribution utilities for auctions conducted from January 1, 2015 through December

⁵ See, e.g., October 2013 Comments, at 3-6.

⁶ Calpine notes that the Discussion Draft omits several formulae that should appear in section 95894(c)(1), (c)(2), (d)(1), (d)(2). While it appears from the text of the defined terms for these formulae that CARB is not proposing any revisions to the formulae compared to the 45-Day Proposed Amendments, Calpine nevertheless wanted to bring this oversight to the attention of CARB staff. This should be fixed prior to formal proposal of the 15-day amendments.

31, 2020 of 25% of the allowances offered for auction, for both the current vintage and advance auctions.⁷

Regarding the latter proposal, Calpine commented on the 45-Day Proposed Amendments that section 95911(d)(5) should more clearly indicate that the 25% auction purchase limit will apply separately to allowances from the current vintage auction and the advance (future vintage) auction. Calpine appreciate that CARB is proposing such an amendment to section 95911(d)(5) in the Draft 15-Day Changes.

As one of the largest covered entities in California, Calpine will have one of the largest compliance obligations during the first compliance period. In light of the size of Calpine and its compliance obligation during the first compliance period, we greatly appreciate CARB's proposal to increase the purchase limit to 20% for auctions conducted during 2014. This increase will assure that Calpine should be able to procure all the allowances it needs during the quarterly auctions conducted in 2014. We therefore urge CARB to proceed expeditiously with formal proposal of the proposed changes to section 95911(d)(4), so they will be effective for the remaining auctions occurring in 2014.

C. While Proposed Section 95921(f)(1) Represents An Improvement Over The Previous Draft, CARB Should Nevertheless Clarify That Its Exception Applies Specifically To Power Or Steam Sales Contracts

Section 95921(f)(1) of the Cap-and-Trade Regulation currently prohibits an entity from acquiring and holding allowances in its own holding account on behalf of another entity. As Calpine suggested when this section was initially proposed,⁸ this provision could be interpreted to prohibit an entity from ever acquiring allowances on behalf of another entity, including under common arrangements between utilities and power suppliers to account for the compliance obligation associated with dispatch pursuant to a power or steam sale contract. CARB subsequently published guidance that clarified that the prohibition was not intended to apply to such arrangements between utilities and their contractual counterparties.⁹

⁷ Draft 15-Day Changes §§ 95911(d)(4)(A), (5).

⁸ Letter to Hon. Mary D. Nichols, Chairman, from Kassandra Gough, re: Comments on Proposed Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms, at 7 (June 21, 2012), available at: http://www.arb.ca.gov/lists/capandtrade2012/9-6-21-2012_calpine_comments_re_cap-and-trade.pdf.

⁹ CARB, Regulatory Guidance Document, § 5.7.1, at 40 (December 2012), available at: <http://www.arb.ca.gov/cc/capandtrade/guidance/chapter5.pdf>. CARB stated it “views these [utility-counterparty] contracts as essentially no different than forward contracts and, accordingly, they will not be barred by the Regulation, so long as the contract does not (1) give the ultimate recipient control of compliance instruments while they are still in the account of the entity from which they will be received, and (2) does not recognize any ownership interest by the ultimate recipient in the compliance instruments while they are still in such entity’s account.” *Id.*

However, the 45-Day Proposed Amendments would have imposed additional criteria that could be interpreted to proscribe the very arrangements that CARB intended to exempt from section 95921(f)(1). The 45-Day Proposed Amendments would have established three additional restrictions on section 95921(f)(1), including, *inter alia*, “[a]n entity may not hold allowances pursuant to an agreement that gives a second entity control over the holding or planned disposition of allowances while the instruments reside in the first entity’s accounts, or control over the acquisition of allowances by the first entity. *These prohibitions do not apply to agreements that only specify a date to deliver a specified quantity of allowances and that include no terms applying to allowances residing in another entity’s account.*”¹⁰ CARB explains in the Initial Statement of Reasons that the 45-Day Proposed Amendments are “needed to clarify that the prohibition on ‘holding on behalf of’” does not apply to, *inter alia*, “forward contracts that do not contain terms applying to the compliance instruments in the first entity’s account.”¹¹

In its comments on the 45-Day Proposed Amendments, Calpine commented that these additional criteria suggest that deliveries of allowances pursuant to the terms of many common power sales contracts would be prohibited.¹² By requiring that lawful contracts “only specify a date to deliver a specified quantity of allowances and [] include no terms applying to allowances residing in another entity’s account”¹³, the 45-Day Proposed Amendments could be interpreted to outlaw many standard form contracts used by investor owned utilities (“IOUs”) to account for GHG allowance costs. Further, Calpine argued that the terms of standard IOU contracts often do not include any date-certain for transfer of a specified quantity of allowances, but instead provide the formula for determining how many allowances will be transferred and the relative time of delivery.¹⁴ Accordingly, Calpine proposed that CARB revise the 45-Day Proposed Amendments to clarify that the prohibition on entities acquiring and holding allowances on behalf of another entity does not apply to “agreements for the purchase and sale of electricity and/or steam, pursuant to which the purchaser agrees to provide compliance instruments to the seller to account for the Emissions attributable to the electricity and/or steam delivered thereunder.”¹⁵

The Draft 15-Day Changes would delete the proposed sentence that states that “[t]hese prohibitions do not apply to agreements that only specify a date to deliver a specified quantity of allowances and that include no terms applying to allowances residing in another entity’s account”, and include a new sentence that states that “[p]rovisions specifying a date to deliver a

¹⁰ 45-Day Proposed Amendments § 95921(f)(1)(B) (emphasis added).

¹¹ CARB, Staff Report: Initial Statement of Reasons, Proposed Amendments To The California Cap On Greenhouse Gas Emissions And Market-Based Compliance Mechanisms, at 207 (Sept. 4, 2013), available at: <http://www.arb.ca.gov/regact/2013/capandtrade13/capandtrade13isor.pdf>.

¹² October 2013 Comments, at 9.

¹³ 45-Day Proposed Amendments § 95921(f)(1)(B).

¹⁴ October 2013 Comments, at 9.

¹⁵ *Id.* at 10.

specified quantity of compliance instruments, or specifying a procedure to determine a quantity of compliance instruments for delivery and/or a delivery date, do not violate the prohibition.”¹⁶

Calpine appreciates CARB’s proposed revisions to section 95921(f)(1)(B) and believes that this revision was intended to respond to the situation faced by utilities and their contractual counterparties with respect to accounting for the compliance obligation associated with power and steam sales agreements. However, the Draft 15-Day Changes still do not expressly provide an exclusion of such agreements from the prohibition in section 95921(f)(1). Accordingly, Calpine requests that CARB clarify in the Final Statement of Reasons for the Draft 15-Day Changes—or in stand-alone guidance—that arrangements between parties to energy sales contracts concerning procurement and delivery of allowances are lawful, and do not violate section 95921(f)(1).

D. The Proposed Revisions To The Limited Exemption From The Holding Limit Should Be Revised So There Is No Gap In The Effectiveness Of The Full Limited Exemption

The Regulation currently provides a limited exemption from the holding limit, which is the number of allowances exempt from the holding limit calculation after they are transferred by a covered entity to its compliance account.¹⁷ The Regulation states that “[o]n June 1, 2012 the limited exemption will equal the annual emissions most recent emissions data report that has received a positive or qualified positive emissions data verification statement” and “[b]eginning in 2013 on October 1 of each year the limited exemption will be increased by the amount of emissions contained in the most recent emissions data report that has received a positive or qualified positive emissions data verified statement during that year.”¹⁸

The 45-Day Proposed Amendments would have eliminated these provisions and would instead have begun calculating the limited exemption on October 1, 2014 (based on emissions in the 2012, 2013 and 2014 emissions data reports receiving a positive or qualified verification statement).¹⁹ Calpine commented that, if this proposal should become effective at any date prior to October 1, 2014, covered entities would have *no* limited exemption and could unintentionally violate the holding limit.²⁰

In the Draft 15-Day Changes, CARB proposes to add a new subsection, stating that “[b]eginning in 2013 on October 1 of each year the limited exemption will be increased by the amount of

¹⁶ Draft 15-Day Changes § 95921(f)(1)(B).

¹⁷ Cap-and-Trade Regulation § 95920(d)(2)(A).

¹⁸ *Id.* §§ 95920(d)(2)(B)-(C).

¹⁹ 45-Day Proposed Amendments § 95920(d)(2)(B).

²⁰ October 2013 Comments, at 13-14.

emissions contained in the most recent emissions data report that has received a positive or qualified positive emissions data verified statement during that year.”²¹

While this proposal preserves the limited exemption accrued with respect to 2012 emissions, it still leaves a significant gap in the event that the Discussion Draft should be finalized and become effective prior to October 30, 2014.²² Upon the effective date of the Draft 15-Day Changes, the Cap-and-Trade Regulation would no longer provide, as it does now, that “[o]n June 1, 2012 the limited exemption will equal the annual emissions most recent emissions data report that has received a positive or qualified positive emissions data verification statement.”²³ It would only provide, as indicated in the Draft 15-Day Changes, that “[b]eginning in 2013 on October 1 of each year the limited exemption will be increased by the amount of emissions contained in the most recent emissions data report that has received a positive or qualified positive emissions data verified statement during that year.”²⁴

Once effective, the Draft 15-Day Changes would erase the preexisting limited exemption for emissions from the 2012 emissions data report, which represent 2011 emission. It is not the case that any “accrued” limited exemption based upon 2011 and 2012 emissions would remain lawful and in effect and only be supplanted by an increase to reflect 2013 emissions occurring on October 30, 2014. As a consequence, until October 30, 2014, the limited exemption would consist *exclusively* of emissions from the “most recent emissions data report” (i.e., the 2013 emissions data report representing 2012 emissions). Accordingly, if an entity has relied on the existing limited exemption from the holding limit and moved a quantity of allowances to its compliance account representing greater than 2012 emissions alone, then the Draft 15-Day Changes could immediately throw such an entity into non-compliance. Given CARB’s proposed revision that “[b]y October 30, 2014, the limited exemption will be calculated as the sum of the annual emissions data reports received in 2012, 2013, and 2014”, we do not believe it is CARB’s intent to exclude the 2012 emissions data report (representing 2011 emissions) from the calculation of the limited exemption prior to October 30, 2014.

Accordingly, to maintain the limited exemption at the levels established by the current Regulation in the event the Draft 15-Day Changes become effective prior to October 30, 2014, Calpine proposes that CARB staff make the following minor amendment to the Draft 15-Day Changes:

²¹ Draft 15-Day Changes § 95920(d)(2)(B).

²² *Id.* § 95920(d)(2)(C). The Draft 15-Day Changes would revise the date on which the limited exemption would be calculated based on 2012, 2013, and 2014 emissions data reports from October 1, 2014 (*see* 45-Day Proposed Amendments § 95920(d)(2)(B)) to October 30, 2014.

²³ Cap-and-Trade Regulation § 95920(d)(2)(B).

²⁴ Draft 15-Day Changes § 95920(d)(2)(B).

§ 95920. Trading.

...

- (d) The holding limit will be calculated for allowances qualifying pursuant to section 95920(c)(1) as the sum of:

...

- (2) Limited Exemption from the Holding Limit.

...

- (B) Beginning in 2012~~3~~ on October 1 of each year the limited exemption will be increased by the amount of emissions contained in the most recent emissions data report that has received a positive or qualified positive emissions data verified statement during that year.

E. The Revised Proposal To Bar An Entity From The Auction Due To Changes In Its Auction Application Information Remains Unworkable

Section 95912(d)(4) of the Regulation currently requires every auction participant to complete an auction participation application at least 30 days prior to each auction.²⁵ The 45-Day Proposed Amendments would have expanded the list of information that must be provided under section 95912(d)(4) and added a new provision whereby “[a]n entity with any changes to the auction application information listed in subsection 95912(d)(4) or account application information listed in section 95830 within 30 days prior to an auction, or an entity whose auction application information or account application information listed in section 95830 will change 15 days after an auction, may be denied participation in the auction.”²⁶ In turn, the account application information listed in section 95830 would have been expanded by the 45-Day Proposed Amendments to include, among other things, disclosure of the “[n]ames and contact information for all persons employed by the entity in a capacity giving them access to information on compliance instrument transactions or holdings, or involving them in decisions on compliance instrument transactions or holdings.”²⁷

In our written comments on the 45-Day Proposed Amendments²⁸, Calpine suggested that it would be unworkable for CARB to bar entities from participation for changes that occur *after* an auction has already occurred. Excluding the disqualified participant’s bids after the auction has already been conducted and the results have been certified by the auction administrator could

²⁵ Cap-and-Trade Regulation § 95912(d)(4).

²⁶ 45-Day Proposed Amendments § 95912(d)(5).

²⁷ *Id.* § 95830(c)(1)(I).

²⁸ October 2013 Comments, at 10-13.

result in changes in the reported settlement price and auction results. Such changes would seriously undermine the certainty associated with the certified auction results and the market signals they are intended to provide. In the event that a participant is not disqualified until after financial settlement has occurred, the change in settlement price could impact all parties to the auction, not just the participant who is disqualified.

Furthermore, Calpine suggested that, even if a change should occur within the 30 days before an auction, it would be unworkable for CARB to bar participation because of any changes to the auction application information in subsection 95912(d)(4) or account application information in section 95830.

The Draft 15-Day Changes remain flawed in these respects. The Draft 15-Day Changes would revise proposed subsection 95914(d)(5) to read (proposed deletions in ~~strikethrough~~ text; proposed insertions in underlined text): “[a]n entity with any changes to the auction application information listed in subsection 95912(d)(4) ~~or account application information listed in section 95830 within 30 days prior to an auction,~~ or an entity whose auction application information or account application information listed in section 95830 will change within 15 days after an auction, may be denied participation in the auction.”²⁹ The Draft 15-Day Changes would also revise proposed subsection 95830(c)(1)(I) to require disclosure of the “[n]ames and contact information for all persons employed by the entity ~~in a capacity giving them access to information on compliance instrument transactions or holdings, or involving them in decisions on compliance instrument transactions or holdings~~ who have clearance from the entity to approve, initiate, or review transaction agreements, transfer requests, or account balances involving compliance instruments in the Cap-and-Trade Program or any External GHG ETS linked pursuant to subarticle 12.”³⁰

This proposal remains problematic from a compliance and administrative perspective. It would bar entities from participation for changes to the account application information that occur *after* an auction is conducted. For instance, under the Draft 15-Day Changes, every employee who has clearance to merely *review* transaction agreements, transfer requests, or account balances involving compliance instruments in the Cap-and-Trade Program would still need to be disclosed in the account application. If a previously disclosed individual with clearance to review Cap-and-Trade Program account balances should be replaced within the 15 days following an auction, the simple act of hiring a new employee to replace that person could result in auction disqualification. Given the many individuals who may have clearance (i.e., authorization) to approve, initiate, or review such information in any company and the probability that any one of them might be replaced in any 15-day period, it seems likely that many auction participants could be susceptible to disqualification from auctions, due to circumstances that are unforeseeable and out of the control of each auction participant.

²⁹ Draft 15-Day Changes § 95912(d)(5).

³⁰ *Id.* § 95830(c)(1)(I).

Furthermore, under the Draft 15-Day Changes, if a new indirect corporate association should come into existence within the 30 days preceding an auction, or 15 days following an auction, CARB could bar the entity from participation in the auction.³¹ This is the case even though the auction participant might not know about—let alone control—the existence of the new indirect corporate association, and regardless of whether the new association has any relationship to, or involvement in, the Cap-and-Trade Program. Given the complex corporate structures of some auction participants and the limitations on their ability to either control or receive notice of changes occurring with respect to entities with whom they may have only an attenuated relationship (i.e., indirect corporate associations), it is unreasonable for CARB to bar auction participation due to such corporate changes.

For the foregoing reasons, Calpine urges CARB Staff to withdraw section 95912(d)(5) in the formal 15-day proposed amendments. If CARB decides it must finalize this section, however, the only changes that should bar participation in the auction are those affecting *direct* corporate associations also registered within CITSS which occur prior to an auction, i.e., disqualification may only be triggered by changes in auction application information that could affect computation of the holding limit or auction purchase limit or concerning the status of certain regulatory investigations. Accordingly, Calpine proposes that staff amend the Draft 15-Day Changes as follows:

§ 95912. Auction Administration and Participant Application.

...

(d) Auction Participation Application Requirements.

...

- (5) An entity with any changes to the auction application information listed in subsection 95912(d)(4) pertaining to the entity itself or any direct corporate association also registered pursuant to this article ~~or account application information listed in section 95830~~ within 30 days prior to an auction, ~~or any entity whose auction application information or account application information listed in section 95830 will change within 15 days after an auction,~~ may be denied participation in the auction.

Calpine's proposed amendments would ensure (1) the integrity of certified auction results by removing the possibility that auction participants could be barred from participation due to changes occurring after an auction and (2) auction participants are not foreclosed from participating in auctions due to changes that are beyond their control.

³¹ See *id.* §§ 95914(d)(4)(B), 95830(c)(1)(H), 95833(a)(1).

F. Compliance Instruments Surrendered To Satisfy The Annual Compliance Obligation Should Be Retired

The Regulation does not currently indicate in what order compliance instruments will be retired from covered entities' compliance accounts into CARB's Retirement Account. The Draft 15-Day Changes (and 45-Day Proposed Amendments) would mandate such a retirement order and, in so doing, create the risk of entities placing too many offset credits into their compliance accounts prior to an annual compliance obligation becoming due.

To avoid the risk of over-surrendering offset credits, CARB proposed in the 45-Day Proposed Amendments that, rather than retiring compliance instruments, CARB would determine whether a covered entity has fulfilled its annual compliance obligation "by evaluating the number and types of compliance instruments in the Compliance Account."³² Calpine commented that, because such compliance instruments would remain in the Compliance Account, even though the annual compliance obligation will be deemed fulfilled by CARB, the entity may be required to continue treating the 30% annual compliance obligation as an outstanding liability for accounting purposes.³³

The Draft 15-Day Changes reflect the retirement scheme in the existing Regulation: when a covered entity surrenders compliance instruments to meet its annual or triennial compliance obligation, CARB will transfer those allowances from the Compliance Account to CARB's Retirement Account.³⁴ Calpine supports this proposal because it adequately addresses our concern regarding the accounting implications of the 45-Day Proposed Amendments.

The Draft 15-Day Changes also note that CARB is "seeking comment on whether or not there should be an 8 percent offset usage limit on the annual surrender event."³⁵ While Calpine has no preference in this respect, if CARB imposes the 8% quantitative usage limit on the annual surrender obligation, it should not result in any reduction in the ability of covered entities to surrender offsets for 8% of the total compliance obligation in a compliance period, even if they fail to use the full 8% with respect to fulfilling any annual compliance obligation. For instance, if an entity were to surrender offsets in an amount equivalent to only 4% of its annual compliance obligation for a given year in a compliance period, the entity should still maintain the ability to surrender offsets in an amount equivalent to 8% of the total compliance obligation for the compliance period.³⁶

³² 45-Day Proposed Amendments § 95856(g)(1).

³³ October 2013 Comments, at 14-15.

³⁴ Draft 15-Day Changes § 95856(g)(1)(A).

³⁵ *Id.* at page 127.

³⁶ *See* Cap-and-Trade Regulation § 95854(b).

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California Air Resources Board
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III. CONCLUSION

Calpine appreciates CARB staff's work to resolve important issues in the Cap-and-Trade Program, including the treatment of legacy contracts, the auction purchase limit, and the prohibition on holding "on behalf of" another entity. We urge staff to make minor revisions to the Draft 15-Day Changes, before proposing them for a formal 15-day public comment period, and to then move quickly towards formal approval of these changes in the Cap-and-Trade Regulation.

* * * *

Please feel free to contact me with any questions or concerns regarding these comments. Thank you for the opportunity to submit these comments.

Sincerely,

/S/

Kassandra Gough
Director, Government and Legislative Affairs

cc: Richard Corey, Executive Officer
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