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Clerk of the Board
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: SGEN Comments on Proposed Amendments to the California Cap-and-Trade Program Regulations

These comments are submitted on behalf of Sempra Generation ("SGEN") concerning the proposed amendments to the California Cap-and-Trade Program Regulations ("Regulations") published by the California Air Resources Board ("ARB") on September 4, 2013.

Inconsistent and Burdensome Timing Requirements

There is an inconsistency between the timing requirements for updating information pursuant to section 95830(f)(1) and section 95833(e)(3), which became apparent when reviewing the proposed amendments to section 95830(c)(1)(H) and section 95833.

Pursuant to section 95830(c)(1), an entity registering for an account in the tracking system must provide certain information to ARB including, among other things: "Identification of all other entities *registered pursuant to this article* with whom the entity has a corporate association, direct corporate association, or indirect corporate association pursuant to section 95833 . . ." Section 95830(c)(1)(H) (emphasis added). Further, under section 95830(f)(1), both the existing regulation and in the proposed amendment, an entity is required to inform ARB within 10 working days if there are any changes to the information provided as part of the registration process under section 95830(c).

Section 95833 provides very broad definitions for what is considered by ARB to be an entity's direct or indirect corporate associations. The proposed amendments to that section are apparently intended to make it clear that this disclosure of direct and indirect corporate associations applies regardless of whether the direct or indirect corporate association is subject to the requirements of the Regulations. Under section 95833(e)(3), a registered entity is required to disclose within 30 days any change of information regarding its direct and indirect corporate associations.

The proposed amendment to remove the reference to "registered pursuant to this article" in section 95830(c)(1)(H) would therefore create an irreconcilable inconsistency between section 95830(f)(1), which requires any changes to the information registrants submitted pursuant to

section 95830(c) to be updated within 10 working days, and section 95833(e)(3), which requires entities to inform ARB of changes in information concerning all direct and indirect corporate associations within 30 days. In addition, this inconsistency renders both regulations confusing and the 30 day rule in 95833(e)(3) potentially superfluous.

Changes in information regarding corporate associations not themselves registered should be subject to the 30 day rule of section 95833(e)(3) and not the 10 working day rule in section 95830(f)(1). A requirement to provide information regarding any change concerning all direct and indirect corporate associations (not just those corporate associations which are also registered in the Program) within 10 working days of a change would be unduly burdensome and without a corresponding purpose with respect to the Cap-and-Trade program. Many registered entities, such as SGEN, do not have immediate access to information regarding corporate associations that have nothing to do with the registered entity's business and may even be located in other states or countries. Requiring entities to report all changes to their direct and indirect corporate associations not subject to the Regulations within 10 working days is unworkable as a practical matter, and puts registered entities at a constant risk of non-compliance. ARB should be cognizant of the business reality that many large corporate structures involve dozens (even hundreds) of affiliates and subsidiaries which operate largely independently from one another, and hence one entity may not have readily available access to information regarding the others with whom the only relationship they share is that of having the same ultimate corporate parent.

It is also unclear why ARB would need, or even want, to have this information in 10 days (versus 30 days) regarding corporate entities that are not registered, not subject to the Regulations and are not even located within California in many cases. For example, what possible reason could ARB have in needing information regarding a change in SGEN's "corporate associations" in Peru or Indiana within a ten day period versus a 30 day period? Because of the administrative burden of updating information regarding direct and indirect corporate associations not subject to the Regulations, the 30 day rule should be maintained for this sort of information update.

If section 95830(c)(1)(H) is not amended as proposed and "registered pursuant to this article" remains in the text (as it is now), section 95830(f)(1) could reasonably be interpreted to apply the 10 day rule to only those corporate associations that are themselves registered and subject to the Regulations, while changes in information regarding corporate associations that are not registered are required to be submitted to ARB within 30 days of a change pursuant to section 95833(e)(3) as is currently done. Leaving in place the phrase "registered pursuant to this article" would also make the additional amendments to section 95833, which add in numerous places the phrase "regardless of whether the second entity is subject to the requirements of this article" make more sense. Therefore, "registered pursuant to this article" should not be deleted from section 95830(c)(1)(H).

Should staff move forward with recommending the proposed change to section 95830(c)(1)(H), however, SGEN requests that ARB reconcile the code sections by adding appropriate language to make clear that registered entities are required to report information as to direct and indirect corporate associations within 30 days of a change as stated in section 95833(e)(3), not within 10 working days.

Overbroad Disclosure of Employees and Contractors

At section 95830(c)(1)(I), ARB has proposed new requirements for entities to provide information on employees or contractors involved with an entity's Program compliance. While it is understandable that ARB would need a record of the individuals that are held responsible for an entity's conduct, the language as proposed could require entities to provide information on any individual with even a minor, non-substantive administrative role in the Program.

The language of section 95830(c)(1)(I), which refers to "...all persons employed by the entity in a capacity *giving them access to information* on compliance instrument transactions or holdings . . . " is ambiguous and subject to an interpretation that is overly broad. If read literally, this phrase could be interpreted to apply to employees that would include, for example, accounts payable clerks that process requests for collateral used to post a bid guarantee, or accountants that report the value of the compliance instruments an entity holds in its CITSS account. These administrative duties are often performed by employees that are not involved in any substantive decisions related to the Program. Indeed, sometimes these types of jobs are performed by contract or temporary employees. This amendment to the Regulations would therefore impose significant administrative burdens on companies where various departments and numerous employees are involved in the administrative aspects of the Program.

Presumably, ARB is really concerned with the identity of those individuals developing an entity's compliance instrument procurement strategy, those participating in the quarterly auctions, or those involved in other substantive decision-making for a company registered in the Program. Thus, SGEN suggests the following revision to the proposed amendment to section 95830(c)(1)(I):

> Names 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.~~ that are actually involved in decision-making regarding compliance instrument procurement, the transfer of compliance instruments, or the entity's holdings of compliance instruments.

Control of an Account

The proposed language at section 95833(f)(7), if read literally, could severely limit and will unreasonably complicate the management and advisory services companies have traditionally provided to participants in existing markets. Proposed section 95833(f)(7) states:

> If a covered entity will have control of the account in the tracking system of another covered entity with which it does not have a direct corporate association, the entities will be considered to have a direct corporate association and the requirements in section 95833(f) apply.

In its Initial Statement of Reasons, staff explained that section 95833(f)(7) was added to "require covered entities who share staff for management of their tracking system accounts to be treated like direct corporate associations with a sharing of the purchase or holding limits," since this may lead to "...the potential to coordinate on market related decisions." While the Cap-and-Trade Program and carbon market are fairly new, the type of energy management services that this proposed language appears to constrain are services that are not uncommon or prohibited in

commodity markets generally. Indeed, companies routinely offer and provide services to other market participants which often include management of market positions, providing recommendations on market position valuation, analysis, and strategy, as well as establishing and maintaining various accounts on behalf of a client so the agent can procure and manage Congestion Revenue Rights, bid-in and schedule a client's generation assets in the day-ahead and real-time markets, and buy and sell gas or power. Companies that provide these services implement robust policies, procedures and compliance programs to ensure compliance with, and ensure employees are well educated on, the same conduct that appears to be at the crux of ARB's concern: compliance with antitrust laws, avoidance of conduct that unreasonably restrains competition, conflict of interest, and the obligation to keep any information obtained as part of an advisor-client relationship confidential. The duties performed by one market participant on behalf of another market participant under these arrangements are allowable by market monitors, who are authorized to observe participants' behavior in the market, to ensure that an open and competitive market is maintained and to prevent no one participant from being able to take unfair advantage of the market rules or procedures, to unduly concentrate market power, or to inhibit competition.

If approved, however, the proposed language at section 95833(f)(7) noted above would impose on both entities the requirement to treat each other as if they had a 'direct corporate association' with all of the obligations under the Regulations that this relationship entails, despite the fact that the two entities have only an agent-client relationship and are not, in fact, legally related in any generally accepted corporate entity sense. This is entirely inappropriate, as is the requirement to treat two entirely unrelated legal entities as related for the purposes of sharing purchase and holding limits. Section 95833(f)(7) should be removed from the proposed amendments.

<u>"Known" Changes to an Auction Application</u>

The proposed amendments would add section 95912(d)(5) providing that auction participation may be denied if an entity "has 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 listed in section 95830 will change within 15 days after an auction."

The addition of this section appears to be aimed at preventing entities from participating in auctions when that entity is aware of a considerable change that may occur soon before or after the auction. Given the complexities that exist in large corporations, as previously noted, program participants may not be aware if, within the panoply of affiliates, an entity is created within 15 days after an auction, or if the creation or dissolution of an entity is even contemplated.

Thus, SGEN suggests section 95912(d)(5) be removed from the proposed amendments. Should staff continue to recommend the proposed amendment, however, ARB should revise it as follows:

> An entity that <u>is aware of</u> changes to the auction application information listed in subsection 95912(d)(4) or account application information listed in 95830 within 30 days prior to an auction, or an entity whose auction information listed in section 95830 will change within 15 days after an auction, must report those changes to ARB within 30 business days of being notified on the change(s), or the entity may be denied participation in the auction.

Definition of a "Cap-and-Trade Consultant or Advisor"

SGEN agrees with ARB that the term "Cap-and-Trade Consultant or Advisor" should be defined within the Regulations, but the proposed language in section 95923(a) does not provide the clarity needed regarding the functions performed by this person or entity. SGEN therefore suggests the following revisions to section 95923(a) in order to avoid confusion when reporting the formation or termination of an advisor-client relationship:

> A "Cap-and-Trade Consultant or Advisor" is a person or entity that ~~is not an employee employed of an by entity registered in the cap-and-trade, but~~ is retained by an entity registered in the Cap-and-Trade Program, ~~for~~ to provide information or advice related to auction bidding strategy, carbon instrument transactions, or assessment of the entity's holdings of carbon instruments ~~the Cap-and-Trade Program. specifically for the entity registered in the Cap-and-Trade Program.~~ A permanent employee of the hiring entity is not to be considered a "Cap-and-Trade Consultant or Advisor."

The amendments suggested above would negate the need for "a brief description of the work performed by the Consultant or Advisor…" as proposed for section 95923(b)(2). Thus, along with the changes noted above, proposed section 95923(b)(2) should be deleted from the proposed amendments.

Requirement to Inform ARB of an Advisor

Section 95914(c)(3)(C) has been added to include the requirement that any entity that has retained the services of a "Cap-and-Trade Consultant or Advisor" must inform ARB of the advisor's retention, "and identify the advisor...and provide an attestation by the Primary Account Representative of the entity retaining the advisor…"

The notification required under section 95914(c)(3)(C) should be accepted from the Alternate Account Representative *or* the Director or Officer who is responsible for the conduct of the entity as well as from the Primary Account Representative. Therefore, section 95914(c)(3)(C) should be revised as follows:

> Any entity that has retained the services of an advisor must inform ARB of the advisor's retention, and identify the advisor, the advisor's employer, the advisor's contact information, and provide an attestation by the Primary Account Representative, the Alternate Account Representative, or Director or Officer who is responsible for the conduct of the entity.

Requirement to Inform ARB of a Client

Section 95914(c)(3)(D) has been added in the proposed amendments to impose an obligation on an "advisor" who has clients participating in the Cap-and-Trade Program to inform ARB 15 days prior to each carbon auction of the names of its clients and the advisory services being performed.

This new requirement would not only be overly burdensome to those that provide Cap-and-Trade Consultant or Advisor services, it is also duplicative of the information disclosure requirements imposed on entities under sections 95914(c)(3)(C), and 95923(b) and (c). Proposed section 95914(c)(3)(C) already specifies that "*Any entity* that has retained the services of an advisor must

inform ARB of the advisor's retention," therefore, there should be no gap in notification of an advisor-client relationship to ARB by certain entities. Section 95914(c)(3)(D) should be removed from the proposed amendments.

Proposed Contract Information Submission Requirements

SGEN appreciates the efforts ARB intends to undertake to tailor CITSS to account for all possible transfers that could potentially occur in an entity's account, but the proposed amendments to section 95921(b) are unnecessary and overly burdensome. These proposed amendments would require entities to provide information regarding transactions with an unreasonable level of detail given the very limited timeframe allowed between the "execution date" and date which the transfer must be reviewed and approved by all involved parties. This short timeframe puts transferring entities at risk of either missing a transaction completion deadline, or providing ARB inaccurate details of a transaction which could be potentially viewed as false or misleading, and therefore a violation of 95921(e)(2)(D).

It should be noted that many of the trades that represent transfers in and out of CITSS accounts are transactions which are subject to U.S. Commodity Futures Trading Commission reporting requirements. Given the role of ARB in these transactions, it is more appropriate that ARB utilize its current right to request the underlying contracts for the transactions should additional market monitoring information be desired.

The proposed amendments to section 95921(b) should be removed from consideration at this time to allow for ARB to work with market participants to determine what information would be most useful to ARB, while not putting an entity at risk of inadvertent non-compliance with the Regulations due to the limited timeframes inherent with these transactions. In addition, aside from the burdensome and confusing data entry requirement proposed, subsection (b)(3) has added the term "execution date" and removed the reference to "settlement day." These terms appear to be used in a context that is not entirely consistent with the context commonly used by entities when entering into these types of transactions and may add to the overall confusion with the proposed amendments to section 95921(b).

Proposed Definitions of Transfers/Transactions

Four new definitions pertaining to the possible transfers that could potentially occur in an entity's account have been proposed under 95802(a): "Execution Date," "Futures," "Spot" and "Over-the-Counter." As noted above, the proposed language in section 95921(b) should be removed, but if the new language proposed for section 95921(b) is not removed, the following amendments are recommended in order to be more consistent with the definition these terms have in other markets:

> Section 95802(a)(130): "~~Execution~~ Delivery Date" means a provision of a transaction agreement that requires the transfer of compliance instruments on or before a date specified in the agreement.
>
> Section 95802(a)(153) "Futures" means an agreement to purchase or sell a commodity for delivery in the future: (1) at a price that is determined at the initiation of the contract; (2) that obligates each party to fulfill the contracts at a specified price~~; (3) that is used to assume or shift price risk; and (4) that may be satisfied by delivery or offset~~.

Section 95802(a)(244) "Over-the-Counter" means the purchase or sale of a commodity ~~trading of carbon compliance instruments, contracts, or other instruments~~ not listed on any exchange.

In addition, the following definitions should be added for consistency:

"Settlement Date" means the date in which the price for the transaction was determined.

"Execution Date" means the date the parties entered into the underlying agreement of which a transaction is based.

Inconsistent Use of "Days"

Throughout the Regulations, the due date for various reporting obligations and other timing requirements are sometimes stated in terms of "business days," "working days," "calendar days," or just plain "days," and sometimes more than one of these terms is used within the same section of the Regulations. ARB should take this opportunity to amend any sections of the Cap-and-Trade Regulations that refer to timing in order to ameliorate any confusion, and consistently state the number of days in which an action is intended to be taken.

Thank you for this opportunity to comment on the proposed amendments.

Sincerely,

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