

GUIDANCE FOR REGISTERING AS A VOLUNTARILY ASSOCIATED ENTITY

Note: This document is provided to describe regulatory requirements in a user-friendly format. It does not have the force of law, does not establish new requirements, and in no way supplants, replaces, or amends any of the legal requirements of the Cap-and-Trade Regulation (Regulation). Any omission or truncation of regulatory requirements in this guidance does not relieve entities of their legal obligation to fully comply with all requirements of the Regulation.

Introduction

The Cap-and-Trade Program (Program) is a key element of California's strategy to reduce greenhouse gas (GHG) emissions. It complements other measures to ensure that California cost-effectively meets its goals for GHG emissions reductions. The Regulation establishes a declining limit on major sources of GHG emissions throughout California, and it creates a powerful economic incentive for significant investment in cleaner, more efficient technologies. The Program applies to emissions that cover approximately 80 percent of the State's GHG emissions. The Program is designed to provide covered entities who are required to participate the flexibility to seek out and implement the lowest cost options to reduce emissions.

Since the beginning of the Program, the California Air Resources Board (CARB) has allowed for other market participants, such as traders, brokers, offset providers, and financial institutions, to participate in the market as voluntarily associated entities (VAE). These VAEs, if they meet registration, corporate disclosures, and other regulatory requirements, help provide liquidity in the market and facilitate the buying and selling of allowances between emitters and counterparties. CARB recognizes that greater market participation through the inclusion of these VAEs also makes it less likely for one entity or a group of particular registrants to control and affect the price of allowances.

To register as a VAE in the Program, an individual or entity applicant must comply with registration requirements, including those found in sections 95814, 95830, 95833, and 95921 of the Regulation.

These requirements are in place to ensure that CARB is able to best monitor which entities and individuals are attempting to participate on a voluntary basis in the Program, and to ensure effective enforcement oversight of these entities. CARB takes its role as the market operator and regulator very seriously and conducts the necessary due diligence in assessing all applicants – including VAEs – to ensure CARB maintains effective and consistent Program oversight. If an application raises questions among CARB program staff, CARB will act in the best interest of protecting the integrity of the Program when determining whether an applicant qualifies for registration. To that end, CARB program staff may request additional supplemental documentation to assist in evaluating the applicant's market activity and interest, to determine compliance with

registration requirements, and/or to assess control and ownership factors outlined by section 95921 of the Regulation.

This guidance document is intended to provide VAEs with a better understanding of these requirements and how CARB staff apply them.

Registration Requirements

Pursuant to section 95814(a)(5), “[a]n entity registering as a voluntarily associated entity must be located in the United States, according to the registration information reported pursuant to section 95830(c).” This provision is intended to ensure that entities registering as VAEs have a business presence and the ability to be subject to the enforcement jurisdiction of CARB in the event of any violation of the Regulation. A VAE (sometimes called general market participant (GMP)) is any entity or individual that intends to purchase, hold, sell, or voluntarily retire compliance instruments, and is eligible to apply because it is not a covered entity or opt-in covered entity registered pursuant to section 95811 or 95813 of the Regulation. These VAEs may include non-governmental organizations, private individuals, traders, brokers, individuals, and offset providers.

To ensure CARB maintains a clear understanding of decision making and control over VAE accounts and their activities in the Program, CARB staff looks to section 95830(c) as a whole to determine whether a potential VAE is “located in the United States.” CARB staff must evaluate all registration information, including control, ownership, management, and operational aspects to ensure its monitoring capabilities and regulatory conformance by market participants registered in the Program.

For instance, section 95830(c)(1) requires entities to disclose the following information:

- (A) Name, physical and mailing addresses, contact information, entity type, date and place of incorporation, and ID number assigned by the incorporating agency;
- (B) Names and addresses of the entity’s directors and officers with authority to make legally binding decisions on behalf of the entity, and partners with over 10 percent of control over the partnership, including any individual or entity doing business as the limited partner or general partner;
- (C) Names and contact information for persons controlling over 10 percent of the voting rights attached to all the outstanding voting securities of the entity;
- (D) A business number, if one has been assigned to the entity by a California state agency;
- (E) A Government issued taxpayer or Employer Identification Number, or for entities located in the United States, a U.S. Federal Tax Employer Identification Number, if assigned;
- (F) Identification of the qualifications for registration pursuant to sections 95811, 95813, or 95814;
- (G) Disclosure of all other entities with whom the entity has a direct corporate association or indirect corporate association that must be reported pursuant to

section 95833(d), and a brief description of the association. Entities qualifying as voluntarily associated entities under section 95814(a)(1)(B) must complete this disclosure before they may hold allowances;

- (H) An applicant that is a member of a direct corporate association may apply for a consolidated entity account to include other associated registered entities from within the direct corporate association. To do so, the applicant must identify each associated registered entity that will be assigned to its account, and each associated registered entity must provide an attestation signed by its officer or director to confirm that it seeks to be added to the consolidated entity account. The applicant must be able to demonstrate that it has the controlling ownership or authority to act on behalf of all members of the direct corporate association. The applicant cannot be an entity that is a subsidiary to or controlled by another associated entity within the direct corporate association;
- (I) An applicant that is a member of a direct corporate association and seeks to apply for its own separate entity account, rather than apply for a consolidated entity account, must provide an allocation of the holding and purchase limits among the separate accounts established for any of its corporate associates per the requirements of section 95833(d)(1)(E). All members of a direct corporate association must separately confirm the allocation of holding and purchase limits;
- (J) Names and contact information for all employees of the entity with knowledge of the entity's market position (current and/or expected holdings of compliance instruments and current and/or expected covered emissions);
- (K) An entity registering as an opt-in covered entity must identify the first year it intends to be subject to a compliance obligation, and the year must match the year for which the Executive Officer approved the entity as an opt-in covered entity pursuant to section 95813(b); and
- (L) Information required pursuant to section 95923 for individuals serving as Cap-and-Trade Consultants and Advisors for entities participating in the Cap-and-Trade Program.

An entity must be incorporated in the United States to qualify as being "located in the United States" under section 95814(a)(5). Additionally, CARB staff review VAE applications to determine if the entity is employing at least one U.S. based individual to serve as an account representative, so that it is clear that the entity's decision-making and control are located within the U.S. A VAE may be eligible to register within the Program if it can demonstrate all of the following indicia of location, which will be verified by CARB staff:

- Physical and mailing address(es) within the United States
- Valid incorporation within a U.S. State
- Location of directors and officers within the United States
- Persons controlling over 10 percent of voting rights within the United States
- Location of employees within the United States
- Business number issued within California

- Government-issued tax identification number in the United States

More nuanced cases will depend on the specific incorporation information and location of individuals (directors, officers, employees with knowledge of market position, persons controlling over 10 percent of voting rights) who have the ability to make decisions for the VAE with respect to the Program. CARB staff evaluate registration information to determine if the VAE satisfies enough of the indicia of location contained in section 95830(c)(1) to qualify for being “located in the United States” under section 95814(a)(5).

A U.S.-registered subsidiary of a foreign-based entity may qualify for registration as a VAE if it can demonstrate that it is “located in the United States.” When assessing registration applications, CARB staff must evaluate all required elements of section 95830(c)(1), including the physical business address within the United States, the state of incorporation information (e.g., business filings with an applicable Secretary of State’s Office of a U.S. State), as well as the location of an entity’s directors or officers, employees with knowledge of market position, and tax identification number.

CARB staff may need to request additional application information, including but not limited to, copies of management agreements, incorporation documents, financial disclosures, and corporate bylaws to enable a full assessment of the control and ownership structure for an applicant, and to track individuals with decision-making and legally binding authority. CARB staff may also request supplemental information to assess an entity’s interest and activity in the market, including a brief description of planned market activities, the amount of initial funds planned for investment, and the source of these funds (e.g., personal, pension-related, loan).

The supplemental registration materials enable CARB staff to confirm that entities conform to the conduct of trade requirements and general prohibitions on trading, including the prohibition of beneficial holdings pursuant to section 95921 of the Regulation. An entity cannot acquire allowances and hold them in its own holding account on behalf of another entity whether the entity is registered or unregistered in the Program. An example of such prohibited behavior includes when a second entity or unregistered party, pursuant to an agreement, has control over the holding or planned disposition of instruments while the instruments reside in the first entity’s account.

There are some exemptions in the Regulation from the beneficial holdings prohibition. These include:

- Provisions in agreements specifying a date to deliver a 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.
- An entity may purchase and hold compliance instruments for later transfer to members of a direct corporate association.
- Voluntary retirements of compliance instruments pursuant to section 95922(d).

CARB must be able to confirm that a VAE applicant has direct control over their current and future holdings and is not in violation of the beneficial holdings prohibition. Some situations ultimately may not violate the beneficial holdings prohibition but likely will require CARB to request additional information before confirming—for example, if a registered entity is in a financing arrangement where allowances in the registered entity's general account are collateral and the secured party has an established CITSS account to take control and possession over the registered entity's allowances in an event of default. This confirmation may require CARB staff to reach out with additional questions and request additional materials.

Corporate Association Related Requirements

The Regulation also requires participating entities to disclose certain information related to their corporate associations, Cap-and-Trade Consultants and Advisors, and employees who have access to the entities' market positions pursuant to sections 95830(c)(1)(G)-(I) and 95833 of the Regulation. Additional information regarding the requirements for disclosing corporate associations and guidance on determining whether an entity has any corporate associates can be reviewed in CARB's Corporate Disclosure Guidance. This information can be disclosed to CARB as part of the application process by completing the Corporate Associations and Structure Disclosure Form (Form #3). Entities registered as VAEs that intend to hold only offset credits are eligible to apply a disclosure exemption and would indicate the use of this exemption on Section 3.0 of Form #3. If the exemption applies, eligible VAEs are not required to disclose any direct or indirect corporate associations.

Review Process

While CARB does not have a set time for completing account application review, the review process of a VAE account application does generally take three or more weeks, and can take up to a few months, based on additional management review and whether the information disclosed in the application can be validated. CARB cannot approve an applicant until it can verify all registration information. Applications that appear to be incomplete, or require additional due diligence and review, may extend the review process and those applications will not be approved until CARB has sufficient and reasonable assurance that the VAE applicant meets all requirements, and the registration information has been confirmed. Further, pursuant to section 95830 of the Regulation, an entity or individual applicant may be denied registration based on information provided, or if CARB has determined that the applicant has provided false or misleading information, withheld material information, does not comply with section 95834 of the Regulation, or if an individual is already registered and has a user account under the same or a different name.

Individuals applying for an individual VAE account are ineligible if the individual is a director or officer with authority to make legally binding decisions for another registered entity, controls over 10 percent of the voting rights, or is an employee of a registered entity. Cap-and-Trade Consultants and Advisors applying for individual market participant accounts have additional requirements and should refer to section 95814 for complete detail.

CARB may periodically audit an account to ensure that registered entities continue to meet eligibility and Program requirements. If it is determined that a registered entity has omitted material facts from a submittal and has submitted any information whereby CARB staff determine that the entity no longer meets registration requirements, CARB may suspend or revoke the account pursuant to section 96012 of the Regulation. For example, if it appears that the entity has changed its address and is no longer physically located in the U.S., or that there are no longer any officers or directors, and/or account representatives physically located in the U.S., then CARB may move to suspend or revoke the account. In addition, CARB has the authority to revoke VAE accounts that are inactive for two or more years.