

## Chapter 5.1.5.A: Auction Application Attestation (Section 95912(d)(4)(E))

### 5.1.5.A Background

As specified in [Attachment A](#) to the Notice for the Joint Auction scheduled for November 19, 2014, auction applicants must complete an attestation within the Auction Platform, as well as any jurisdiction-specific information related to this attestation. For entities registered in California, section 95912(d)(4)(E) of the California Cap-and-Trade Regulation requires entities applying to participate in an auction to submit an attestation disclosing the existence and status of any ongoing investigation or an investigation that has occurred within the last ten years with respect to any alleged violation of any rule, regulation, or law associated with any commodity, securities, environmental, or financial market for the entity participating in the auction, and all other entities with whom the entity has a direct corporate association, or indirect corporate association pursuant to section 95833 that participate in a carbon, fuel, or electricity market. The disclosure must be updated to reflect any change in the status of an investigation that has occurred since the most recent auction application attestation was submitted.

This means that an entity applying to participate in an auction (Cap-and-Trade Auction Applicant) must submit an attestation, or an update to the attestation, for each auction. Pursuant to section 95912(d), this attestation must be submitted by the end of the applicable auction application period. **For the November 19, 2014 auction, the end of the application period is 8:59 PM (Pacific) on October 20, 2014.**

When completing the auction application in the Auction Platform, California entities would select either “yes” or “no” when prompted by the Attestation module of the Auction Platform. This prompt states: *“Every entity must submit an attestation with the disclosures required by section 95912(d)(4)(E) before the deadline to apply to participate in the auction.”*

By selecting “yes,” the Cap-and-Trade Auction Applicant indicates that it understands the requirements of section 95912(d)(4)(E) and attests it will have submitted and/or updated the required attestation to ARB by the deadline to apply to participate in the auction. To facilitate the required attestation disclosure, ARB has developed an *Auction Attestation Form*, available at ARB’s webpage at [www.arb.ca.gov/auction](http://www.arb.ca.gov/auction). Entities may use this form to submit the required attestation disclosure. By selecting “no,” the Cap-and-Trade Auction Applicant indicates that it understands the requirements of section 95912(d)(4)(E) and attests that it has no updates to the disclosures since the most recent auction application attestation was submitted.

**Since the November 19, 2014 auction will be the first auction in which the revised attestation language in section 95912(d)(4)(E) is required, Cap-and-Trade Auction Applicants would select “yes” in the Auction Platform and submit the attestation disclosure to ARB by the auction application deadline.** For future auctions, if a Cap-and-Trade Auction Applicant does not have any updates to its most recently submitted attestation disclosure, the Cap-and-Trade Auction Applicant may select “no”

in the Auction Platform as described in the above paragraph to satisfy the attestation requirement.

When disclosing (and attesting to the disclosure) the types of investigations that relate to itself and its corporate associations, the Cap-and-Trade Auction Applicant must undertake its best efforts to obtain information regarding the existence and status of ongoing and past investigations as described in section 95912(d)(4)(E) and submit its attestation based on the best information available to it by the auction application deadline.

The following guidance seeks to address general questions relevant to section 95912(d)(4)(E) and the required attestation included in that section.

### **Who must submit an attestation?**

A Cap-and-Trade Auction Applicant must submit an attestation disclosing the existence and status of any ongoing investigation or an investigation that has occurred within the last ten years as specified in section 95912(d)(4)(E) as part of its auction application. An entity will not be approved to participate in an auction unless it has completed all steps required for the auction application. This attestation only applies to entities applying to participate in an auction.

### **When must this attestation be submitted?**

An attestation under section 95912(d)(4)(E) must be submitted no later than the end of an auction application period. If a Cap-and-Trade Auction Applicant has submitted such an attestation for a previous auction, it must update this attestation for each subsequent auction application if there has been a change since the previous disclosure. The *Auction Attestation Form*, described on the first page of this guidance document, provides a convenient mechanism which entities may use to submit the required attestation and disclosures. The *Auction Attestation Form* allows entities to specify whether they are submitting their first attestation, or making updates to a previously submitted attestation, or that no updates exist. The required attestation must be submitted to ARB by the end of the auction application period to the address indicated on the *Auction Attestation Form*. For auctions starting with the February 2015 auction, if a Cap-and-Trade Auction Applicant has no updates, it may satisfy the attestation requirement by selecting “no” in the Attestation module of the Auction Platform.

For the November 19, 2014 auction, ARB will accept an emailed copy of the signed attestation received by the auction application deadline (8:59 PM (Pacific) on October 20, 2014) as satisfying the timing requirement, as long as a signed hard-copy version is postmarked no later than October 20, 2014 and received at the address indicated on the *Auction Attestation Form* shortly thereafter. Cap-and-Trade Auction Applicants should email the signed form to [jagray@arb.ca.gov](mailto:jagray@arb.ca.gov).

**What type of rule, regulation, or law must be involved?**

An investigation only relates to a violation or alleged violation of “any rule, regulation or law” if it is “associated with any commodity, securities, environmental, or financial market.” Thus, a rule must be associated with one of these “markets.” Examples of rules that are associated with markets include, but are not limited to, the Commodity Exchange Act rules setting forth commodity position limits, the Securities Exchange Act rules prohibiting insider trading, rules governing trading within the European Union Emissions Trading System, and the rules adopted by Regional Greenhouse Gas Initiative states providing for allowance auction purchase limits.

Rules that apply to commodities, securities, and environmental and financial matters but that are not associated with a market would not be covered by the attestation requirement. For example, liability rules applicable to oil spills or air emissions limits would not be considered “associated with” one of the markets described in section 95912(d)(4)(E) for purposes of disclosure. Similarly, rules of general application or rules setting forth recordkeeping or other requirements not designed to regulate markets would not need to be disclosed because they are not associated with market operations or transactions.

**What types of “investigations” qualify as a disclosable investigation with respect to the Cap-and-Trade Auction Applicant?**

The attestation in section 95912(d)(4)(E) requires the disclosure of the existence and status of any ongoing investigation or an investigation that has occurred within the last ten years with respect to any alleged violation of any rule, regulation, or law associated with any commodity, securities, environmental, or financial market for the entity participating in the auction, and all other entities with whom the entity has a direct corporate association or indirect corporate association pursuant to section 95833 that participate in a carbon, fuel, or electricity market.

ARB included section 95912(d)(4)(E) because knowledge of the existence of investigations pertaining to emissions trading or related markets is vital to the oversight of the market and understanding the current and past relationships among entities. ARB uses the information provided in the attestation to aid in detecting manipulative schemes that involve transactions in related markets, as well as to identify patterns of behavior that may result in manipulative behavior in an auction. In designing the provision, ARB’s primary interest is to obtain information regarding formal investigations by regulatory agencies. ARB does not require confidential or protected information to be disclosed.

It is important to note that while different government agencies may use different terminology when referring to investigations (i.e., formal or informal), the key criteria for disclosure under the attestation in section 95912(d)(4)(E) is that there must be an investigation into an alleged violation(s) of the applicable market rules. The

following are examples of the types of investigations that would be required to be disclosed under section 95912(d)(4)(E):

- **Publicly-announced legal actions initiated by a regulatory agency with authority over alleged violations of any rule, regulation, or law associated with a commodity, securities, environmental, or financial market.** If a regulatory agency with authority over the Cap-and-Trade Auction Applicant has publicly announced that it is investigating the Cap-and-Trade Auction Applicant regarding an alleged violation(s) of the market over which the agency has authority, that investigation must be disclosed pursuant to section 95912(d)(4)(E). Publicly-announced settlements related to these alleged violations would need to be disclosed as to the status of a past investigation.

Examples of such regulatory agencies include, but are not limited to, the following:<sup>1</sup>

- **Federal and State Departments of Justice** – With respect to alleged violations of any of the markets listed in section 95912(d)(4)(E). This would include investigations by the Federal Bureau of Investigations of those alleged violations.
- **California Air Resources Board** – Environmental markets, including greenhouse gas emissions and low carbon fuels markets.
- **U.S. Environmental Protection Agency** – Environmental markets.
- **Federal Energy Regulatory Commission** – Electricity and natural gas markets. This could include investigations for alleged violations of FERC tariffs, market manipulation, etc. It could also include alleged violations of the market rules governing balancing authorities, such as the California Independent System Operator.
- **Commodity Futures Trading Commission** – Commodities markets, including derivatives and swaps.
- **California Independent System Operator** – Electricity market. See under FERC description above.
- **California Public Utilities Commission (and other public utility/service commissions)** – Electricity and natural gas markets.
- **Federal Trade Commission** – Financial markets, including antitrust and anti-competitiveness actions.

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<sup>1</sup> Descriptions following agency titles are illustrative only, and not intended to fully describe any agency's authority.

- **Internal Revenue Service** – Financial markets.
- **Securities and Exchange Commission** – Financial markets.
- **Other State, Federal, and foreign agencies with authority over commodity, securities, environmental, and financial markets.** An investigation by a governmental agency in a foreign jurisdiction with oversight over one of these markets as related to the Cap-and-Trade Auction Applicant, or a corporate association as discussed below, would constitute a disclosable investigation under section 95912(d)(4)(E).
- **Other legal actions by a regulatory agency with authority over alleged violations of any rule, regulation, or law associated with a commodity, securities, environmental, or financial market, even if not publicly announced.** This would include: subpoenas issued by a regulatory agency against the Cap-and-Trade Auction Applicant for the purposes of investigating that entity for alleged violations of market rules; notices of violation issued by a regulatory agency against the Cap-and-Trade Auction Applicant for alleged violations of market rules; corrective action letters issued by a regulatory agency to the Cap-and-Trade Auction Applicant to resolve alleged violations as described in section 95912(d)(4)(E); and the status of other legal proceedings initiated by a regulatory agency as described above. If a Cap-and-Trade Auction Applicant has only received a phone call from an agency, without any other type of formal action, that phone call would not constitute a disclosable investigation.
  - Note: An investigation does not need to result in penalties for it to be disclosable.
- **Legislative Oversight Investigation (Congress or State Legislature).** If a legislative oversight body is conducting a formal investigation against a Cap-and-Trade Auction Applicant for an alleged violation of any rules, regulations, or laws of commodity, securities, environmental, or financial markets, that investigation would be a required disclosure under section 95912(d)(4)(E). In contrast, if a legislative body issues information requests or conducts an oversight hearing wherein specific alleged violations of market rules by the Cap-and-Trade Auction Applicant, or its corporate associations as described below, are not asserted, the Cap-and-Trade Auction Applicant would not need to disclose this as an investigation under section 95912(d)(4)(E).

**What types of “investigations” would not qualify as a disclosable investigation with respect to the Cap-and-Trade Auction Applicant?**

Since ARB is interested primarily in regulatory investigations commenced by government agencies related to any alleged violation of any rule, regulation, or law associated with any commodity, securities, environmental, or financial market for the

Cap-and-Trade Auction Applicant, the following types of activities would not constitute an “investigation” for purposes of section 95912(d)(4)(E):

- **Disclosures prohibited by law.** Cap-and-Trade Auction Applicants are not required to disclose investigations where disclosure of the investigation would violate a legal requirement or court order.
- **Press inquiries.** If a journalist or media outlet (e.g., television, radio, print) has sought information about a Cap-and-Trade Auction Applicant, the attestation would not need to include such inquiry, even if the inquiry is titled an “investigation.”
- **Information requests.** If a member of the public has issued an information request regarding a Cap-and-Trade Auction Applicant, that would not constitute the type of investigation that needs to be disclosed under section 95912(d)(4)(E).
- **Surveys.** If a government agency seeks information from a Cap-and-Trade Auction Applicant through a survey, that survey would not constitute an investigation that needs to be disclosed under section 95912(d)(4)(E).
- **Certain types of subpoenas.** A governmental subpoena may or may not constitute the type of investigation that would require disclosure under section 95912(d)(4)(E). For instance, if an agency issued a subpoena to a Cap-and-Trade Auction Applicant for information about another unrelated, third-party company that is a counterparty to a transaction with the Cap-and-Trade Auction Applicant, the subpoena would not constitute an investigation into the Cap-and-Trade Auction Applicant and would not need to be disclosed under section 95912(d)(4)(E). In contrast, if an agency issued a subpoena seeking information about the Cap-and-Trade Auction Applicant as part of a formal regulatory investigation into alleged violations of market rules, that would constitute an investigation that needs to be disclosed under section 95912(d)(4)(E).
- **Investigations unrelated to commodity, securities, environmental, and financial markets.** If an investigation does not relate to a violation or an alleged violation of any rule, regulation, or law associated with a commodity, securities, environmental, or financial market, this would not constitute an investigation that requires disclosure under section 95912(d)(4)(E).
- **Past investigations that were closed without any follow-up action.** Cap-and-Trade Auction Applicants do not need to disclose past investigations initiated by an agency in which the agency has closed the matter without initiating an enforcement proceeding to prosecute a violation or alleged violation of the applicable rule, regulation, or law.

- **Phone calls.** If a Cap-and-Trade Auction Applicant receives a phone call from a regulatory agency, without any other type of formal action or follow-up, that would not constitute a disclosable investigation under section 95912(d)(4)(E).

### **Does the attestation cover corporate associations in related markets?**

Yes. As described above, the disclosure requirement relates first to the Cap-and-Trade Auction Applicant with respect to any alleged violation of any rule, regulation, or law associated with any commodity, securities, environmental, or financial market for that entity. It relates secondly to direct and indirect corporate associations of the Cap-and-Trade Auction Applicant with respect to alleged violations of any rule, regulation or law in carbon, fuel, or electricity markets. For purposes of section 95912(d)(4)(E), a direct or indirect corporate association only participates in one of these related markets if it trades, sells, or purchases for resale any natural gas, oil, electricity, or greenhouse gas emission instrument, or natural gas, oil, electricity, or greenhouse gas emission instrument derivative or swap on exchanges.

A Cap-and-Trade Auction Applicant does not need to make this attestation with respect to a direct or indirect corporate association that does not sell these products as part of its core business operations. For example, an industrial manufacturer that purchases fuel primarily as an end user, but may occasionally sell excess fuel to manage surpluses, would not be considered as “participat[ing] in a carbon, fuel, or electricity market” for the purposes of the attestation requirement in section 95912(d)(4)(E).

### **What types of “investigations” would qualify as discloseable with respect to an entity’s corporate associations?**

The same categories of disclosable and nondisclosable investigations described above for the Cap-and-Trade Auction Applicant apply to its direct and indirect corporate associations as defined in section 95833 with several additional limitations. First, the types of alleged violations are limited to those “related markets” as described in the previous response (i.e., the trade, sale, or purchase for resale of natural gas, oil, electricity, or greenhouse gas emissions instrument, or derivative or swap thereof).

Second, the attestation is intended to address known actions only. ARB understands it may not be possible for an entity to know everything about its related entities. In fact, in some situations, the Cap-and-Trade Auction Applicant may be barred from obtaining information regarding these investigations from its corporate associations due to legal restrictions on sharing such information among corporate affiliates. As such, disclosure is not required by the Cap-and-Trade Auction Applicant if it is unable to obtain information from its direct or indirect corporate associations regarding the existence or status of ongoing or past investigations due to a legal restriction on the corporate association from disclosing such information to the Cap-and-Trade Auction Applicant. In these situations, the Cap-and-Trade

Auction Applicant would indicate in its attestation disclosure that it is barred from obtaining investigation information from its corporate associations due to legal restrictions.

When disclosing (and attesting to the disclosure) the types of investigations that relate to itself and its corporate associations, the Cap-and-Trade Auction Applicant must undertake its best efforts to obtain information regarding the existence and status of ongoing and past investigations as described in section 95912(d)(4)(E) and submit its attestation based on the best information available to it by the auction application deadline.

**Section 95912(d)(4)(E) references investigations that are ongoing or that occurred within the last ten years. Is a ten year look-back required?**

Yes. Cap-and-Trade Auction Applicants must disclose the existence and status of ongoing investigations and investigations that have occurred within the last ten years. As described above, the Cap-and-Trade Auction Applicant must undertake its best efforts to obtain information regarding the existence and status of ongoing and past investigations as described in section 95912(d)(4)(E) for itself and its direct and indirect corporate associations that participate in related markets, and must submit its attestation based on the best information available to it by the auction application deadline.

**Will ARB disapprove any Cap-and-Trade Auction Applicant from participating in an auction based on the information disclosed in the attestation?**

Section 95914(a) describes situations in which the Executive Officer may cancel or restrict a previously approved application or reject a new application. One situation would be failure to satisfy the auction application requirements under subarticle 10 (i.e., section 95912(d)(4)(E)). As described in the Initial and Final Statements of Reasons for the rulemaking that included the amendments adopted by the Board as section 95912(d)(4)(E), staff does not intend to routinely deny auction participation on the basis of information in the attestation disclosure; if this were the intent, the word “may” in section 95914(a) would instead read “shall.” Staff will carefully evaluate the information in the attestation disclosure, along with any other changes to information listed in section 95912(d)(4). A decision to deny auction participation would be informed by the staff’s evaluation.