



AIR TRANSPORT ASSOCIATION

DAVID A. BERG, ESQ.
Vice President & General Counsel
202-626-4234
dberg@airlines.org

January 3, 2011

VIA E-MAIL

David A. Stawick
Secretary, Commodity Futures Trading Commission
3 Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Process for Review of Swaps for Mandatory Clearing, 75 Fed. Reg. 67,277 (Nov. 2, 2010); RIN No. 3038-AD00

Dear Mr. Stawick:

The Air Transport Association of America, Inc. (“ATA”) appreciates the opportunity to comment on the Commodity Futures Trading Commission’s (“Commission”) proposed “Process for Review of Swaps for Mandatory Clearing,” 75 *Fed. Reg.* 67,277 (Nov. 2, 2010) (“Proposed Rules”). The Proposed Rules would require derivatives clearing organizations (“DCOs”) to submit to the Commission all swaps that they intend to clear in order to determine whether the DCO is eligible to offer to clear such swaps and whether clearing is required for the swap. The Proposed Rules would also establish the procedures under which the Commission may initiate independent review of swaps that have not been accepted for clearing by a DCO and, after making a determination that a swap is required to be cleared, to stay that requirement upon request of a counterparty or the Commission’s own initiative. The Commission is proposing these rules to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,¹ which requires that the Commission make a determination as to which swaps should be subject to mandatory clearing.²

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111–203, 124 Stat. 1376 (2010) (“Dodd-Frank Act”).

² *Id.* at § 723(a)(3); Commodity Exchange Act (“Act”) § 2(h), 7 U.S.C. § 2(h). The rules also implement the Dodd-Frank Act’s requirement that the Commission determine which DCOs which will be able to offer clearing services for such swaps. Dodd-Frank Act § 745(b); Act § 5c(c)(5)(C)(iii); 7 U.S.C. § 7a-2(c)(5)(C)(iii).

ATA

ATA is the principal trade and service organization of the U.S. scheduled airline industry.³ It is the nation's oldest and largest airline trade association and its members account for more than 90 percent of the passenger and cargo traffic carried by U.S. airlines. Since its founding in 1936, ATA has encouraged governmental policy decisions that foster a financially stable U.S. airline industry capable of meeting the nation's travel and shipping needs and competing in the global economy while withstanding the inherently cyclical nature of the airline industry.

ATA's Interest in the Proposed Rules

ATA's members are among the largest consumers of jet fuel in the nation. ATA's members are adversely affected by price volatility in the oil markets, and most (if not all) of ATA's members hedge their price risk using over-the-counter swaps. As commercial end-users of the swaps markets, ATA's members will enjoy the choice of whether to clear their transactions under section 2(h)(7)(B) of the Act, regardless of whether the Commission has determined that the swap is otherwise subject to the mandatory clearing requirement. Although as commercial end-users of swaps ATA's members are not required to submit their swap transactions for clearing, they have the option to do so and therefore have an interest in the procedures proposed by the Commission for determining which swaps may be offered for clearing by DCOs.

The Proposed Swap Review Process

The Commission has proposed a comprehensive review process for swaps that the DCO plans to accept for clearing. The factors the Commission must consider when reviewing a DCO's swap submission include: (A) The existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data; (B) The availability of rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded; (C) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the DCO available to clear the contract; (D) The effect on competition, including appropriate fees and charges applied to clearing; and (E) The existence of reasonable legal certainty in the event of the insolvency of the relevant DCO or one or more of its clearing members with regard to the treatment of customer and swap counterparty positions, funds, and property.⁴ In order for the Commission to make a

³ The members of the association are: ABX Air, Inc.; AirTran Airways; Alaska Airlines, Inc.; American Airlines, Inc.; ASTAR Air Cargo, Inc.; Atlas Air, Inc.; Continental Airlines; Delta Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corporation.; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Airlines, Inc.; UPS Airlines; and US Airways, Inc. Associate members are: Air Canada and Air Jamaica.

⁴ Proposed Regulation 39.5(b)(3)(ii)(A)-(E); Proposed Rules at 67,278, 67,281.

determination based on these factors, proposed Regulation 39.5(b) would require the DCO to submit to the Commission four basic categories of information:

1. *Eligibility statement.* A statement of the DCO's eligibility to clear the swap, and, if the Commission determines that the swap is required to be cleared, the DCO's ability to comply with the DCO Core Principles;⁵
2. *Swap statement.* A statement with swap information relating to the factors the Commission is required to take into account when reviewing a swap and making a "quantitative and qualitative assessment;"
3. *Additional swap information.* Various information on the submitted swap, the DCO, and the swap market, including, but not limited to, product specifications, participant eligibility standards, pricing sources, models and procedures, risk management procedures, measures of market liquidity, analysis of the effect of a clearing requirement on the market, applicable rules, manuals and procedures, and the terms and trading conventions on which the swap is currently traded;⁶ and
4. *DCO member feedback.* A description of the DCO's notice of the submission to its members and a summary of any member opposition to the submission.⁷

Notice of swap submission to DCO members.

The fourth category of required information in the DCO's submission is member feedback, including a "summary of any opposition to the submission expressed by the members," and a copy of the notice to members.⁸ As the Commission notes in the *Federal Register* release, the Dodd-Frank Act requires that a DCO provide its members with such notice.⁹ However, the decision by a DCO whether or not to apply to the Commission to offer swap clearing services for particular swaps potentially impacts all market participants, not just clearing members. Accordingly, ATA respectfully requests that the Commission, under its section 8a(5) general rule-making authority and DCO Core Principle (L)(iii)(V), require a DCO in its submission to the Commission to provide a description of how the DCO has notified market participants of its consideration and of any opposition expressed by such market participants.

⁵ Proposed Regulation 39.5(b)(3)(i); Proposed Rules at 67,278; *id.* at 67,281. The core principles were added to the CEA by the Commodity Futures Modernization Act of 2000 ("CFMA").

⁶ Proposed Regulation 39.5(b)(3)(iii)-(x); Proposed Rules at 67,278; *id.* at 67,281.

⁷ Proposed Regulation 39.5(b)(3)(xi); Proposed Rules at 67,278-79; *id.* at 67,281.

⁸ Proposed Rules at 67279.

⁹ *Id.*

The Dodd-Frank Act recognizes the significant benefit to be derived from greater public participation in the decision-making processes of registered entities.¹⁰ This general policy is reflected in DCO Core Principle (O), which requires DCOs to establish governance arrangements which are transparent, and which permit consideration of the views of both owners *and market participants*. Because market participants will be substantially affected by the decisions made by a DCO in its offering of clearing services, particularly if clearing of such transactions is mandatory, it is critical that they be included in the DCO's process for considering its clearing offering. Although, as discussed below, the Commission will accept public comment on the DCO's submission, by that time the DCO may have made important, and sometimes irreversible, decisions with regard to its proposed clearing offering. Accordingly, it is likely that providing for input from market participants earlier in the process will provide market participants with a more meaningful voice. This is vitally important in light of the mandatory nature of the clearing requirement.

Public comment process.

The Proposed Rules provide that, after the Commission receives all of the swap submission information from the DCO, the Commission would begin its 90-day review of the submission by "post[ing] the submission on the Commission's Web site for a 30-day public comment period."¹¹ The Commission has requested comment on the "appropriateness and sufficiency" of providing notice of the submission on the Commission Web site rather than by notice in the *Federal Register*.

ATA recognizes that the Commission currently informs the public of, and requests comment on, rule changes and other actions by registered entities through its Web site. The Commission instituted this policy in response to the shortened time frames and limited review of certain actions by registered entities under the Commodity Futures Modernization Act of 2000. ATA applauds the Commission's efforts to streamline its review functions while at the same time maintaining the highest degree of transparency in its processes. Accordingly, ATA supports the Commission's use of its Web site to provide notice of DCO submissions and its review of swaps for mandatory clearing. However, it is possible that members of the public will not be as readily aware of these postings as of publication in the *Federal Register*. This is particularly true in light of the multiple avenues of notice attendant to publication in the *Federal Register*, including e mail notification to subscribers of Commission notices.

¹⁰ "Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest," 75 *Fed. Reg.* 63,732, 63,738 (Oct. 18, 2010) (requiring that Boards of Directors, or any committee of the Board of Directors that "may exercise delegated authority with respect to the management of a DCO, DCM, or SEF" be composed of at least 35 percent "public directors" and "not have less than two public directors").

¹¹ Proposed Regulation 39.5(b)(4); Proposed Rules at 67,279; *id.* at 67,282. In addition, a DCO may request confidential treatment for "portions of its submission." *Id.*

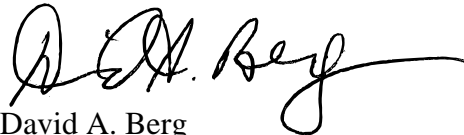
We believe that the public could be equally informed of DCO swap submissions that are posted to the Commission's Web site if, as part of the Commission's formal administrative procedures, at the time such a submission is posted, the Commission sends a notification of the swap submission to the same subscribers that receive notifications relating to *Federal Register* notices. Accordingly, interested persons that subscribe to receive such notice of *Federal Register* releases would automatically receive notice of the posting of a DCO swap submission to the Commission's Web site.

Conclusion

ATA, for the reasons discussed above, supports the proposed rules and believes they will further the goals of reducing systemic risk, protecting customers and ensuring that the derivatives markets are fair and transparent. We respectfully request, however, that the Commission modify the rules as proposed to provide that DCOs provide notice to market participants of their swap clearing submission and inform the Commission of dissenting views expressed by market participants and that if the Commission does not publish notice of such submissions in the *Federal Register*, that it include notification to subscribers to the Web site equivalent to that available for *Federal Register* notices. ATA supports the Commission's proposals regarding review of DCO clearing eligibility and swap clearing requirements, with these modifications.

Please feel free to contact me with any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D.A. Berg", with a long, sweeping horizontal line extending to the right.

David A. Berg
Vice President & General Counsel
AIR TRANSPORT ASSOCIATION OF AMERICA