AIR TRANSPORT ASSOCIATION

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VIA E-MAIL

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

Re: **Prohibition of Market Manipulation**, 75 FR 67657 (November 3, 2010); RIN No. 3038-AD27

Dear Mr. Stawick:

The Air Transport Association of America, Inc. ("ATA") appreciates this opportunity to comment on the rules proposed (the "Proposed Rules") by the Commodity Futures Trading Commission ("CFTC" or "Commission") prohibiting the use or attempt to use any manipulative device in connection with any swap, futures contract or contract of sale of a commodity in interstate commerce.[1] Section 753 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") was intended to expand and clarify the Commission's authority to prosecute and punish market manipulation and deceptive practices. ATA supports this expanded authority and the Commission's efforts to enforce section 753's provisions, including proposing these rules. Nevertheless, we also believe that the Commission should consider whether its complete reliance on past precedent in interpreting "market manipulation" under proposed Rule 180.2 needlessly narrows the potential reach of the amended anti-manipulation provision of section 6(c)(3), anchoring its interpretation to a past standard which has proven remarkably difficult to enforce.

1 "Prohibition of Market Manipulation," 75 *Federal Register* 67657 (Nov. 3, 2010).

ATA

ATA is the principal trade and service organization of the U.S. scheduled airline industry.[2] 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 while withstanding the inherently cyclical nature of the airline industry.

As major consumers of jet fuel, the price of which is tied to the price of crude oil, ATA members rely on the orderly and proper functioning of the U.S. energy markets. U.S. airlines face significant challenges managing the risks associated with increased volatility in the energy markets. A period of excessive price volatility, which began in 2004, occurred during the period of rapid expansion of speculative interest in the energy markets. During this same period, the price of crude oil spiked to unprecedented levels before precipitously declining. These failures of price integrity in the futures market have had, and continue to have, a severe, negative effect on air service.[3]

ATA members need access to fair, orderly exchange-traded and over-the-counter derivatives markets to hedge the risks associated with their substantial consumption of jet fuel. Accordingly, ATA members have a significant interest in the CFTC's efforts to implement the mandates of the Dodd-Frank Act, including in particular the new mandates intended to improve the markets' price integrity.[4]

The Commission's Broad Anti-Manipulation Mandate

One of the primary purposes of the Commodity Exchange Act[5] (the "Act") is "to deter and prevent price manipulation or any other disruptions to market integrity."[6] Three tools are available to effect this purpose. First, the Commission can use its enforcement authority to sanction market participants that manipulate the price of futures, swaps or commodities. Second, the Commission is required to set and enforce

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2 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, Inc.; 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.

3 As we noted in our December 2, 2010 letter commenting on the Commission's proposed rules on Position Reports for Physical Commodity Swaps, U.S. airlines spent nearly $58 billion on jet fuel in 2008, an increase of $16 billion from 2007 spending, and jet fuel surpassed labor as the largest cost category for most airlines.

4 Public Law No. 111–203, 124 Stat. 1376 (2010).

5 Section 3 of the Act, 7 U.S.C. § 1, et. seq.

6 Section 3 of the Act, 7 U.S.C. § 5.

speculative position limits for physical commodities.[7] Finally, self-regulatory organizations under the Commission's jurisdiction are required to list for trading on their markets only products that are not readily susceptible manipulation.[8] It is important that all three tools be used together to create an effective regulatory regime to prevent illegitimate, manipulative behavior that impairs the price discovery mechanism of the markets. In particular, these rules, which are aimed at schemes to manipulate the markets, must complement the Commission's rules to implement the Dodd-Frank Act's mandate to prevent excessive speculation, which also disrupts the orderly and proper functioning of the energy markets.

The Proposed Rules

<u>*Proposed Rule 180.1*</u>

Proposed Rule 180.1 would implement new Section 6(c)(1) of the Act and make it unlawful for any person, in connection with a swap, contract for sale of a commodity in interstate commerce, or contract for future delivery to intentionally or recklessly: (1) use or attempt to use "any manipulative device, scheme, or artifice to defraud;" (2) make or attempt to make a false or misleading statement of material fact, or to omit to state a material fact necessary to make the statements not false or misleading; (3) to engage or attempt to engage in a practice that would operate as a fraud or deceit upon any person; or (4) to deliver or cause to be delivered a false or misleading report concerning crop or market information that affects or tends to affect the price of a commodity in interstate commerce. It is important to note that both proposed Rule 180.1 and 180.2 are not substitutes for, but in addition to, the current anti-manipulation provisions of section 9(a)(2) of the Act.

The Commission noted in proposing Rule 180.1 that it is modeled, in part, on Securities and Exchange Commission Rule 10b-5. Furthering the mandate given to the Commission by the Dodd-Frank Act, proposed Rule 180.1 would expand the Commission's authority in several important ways. First, proposed Rule 180.1 rather than prohibiting only actual or attempted manipulation of the market – which has been very difficult to demonstrate – prohibits the use of "any manipulative device, scheme, or artifice to defraud." Second, under proposed Rule 180.1, the Commission would not have to prove specific intent to defraud to demonstrate a violation. Instead, the Commission proposes to incorporate the concept of scienter, well developed in the securities law context, as the requisite mental state to show a violation of the rule. Finally, fraudulent, manipulative, or deceptive conduct need only be reasonably calculated to influence participants in the markets to be captured by the rule.

Although the Commission relies upon the substantial body of precedent under Securities and Exchange Commission Rule 10b-5, it also notes that proposed Rule 180.1

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[7] Section 4a of the Act, 7 U.S.C. § 6a.

[8] *See, e.g.*, § 5(d)(3) of the Act.

is similar to the anti-manipulation authority granted to the Federal Energy Regulatory Commission ("FERC")[9] and to the Federal Trade Commission ("FTC")[10] in connection with energy commodities. ATA supports the Commission's effort to adopt a rule that mirrors the anti-manipulation rules of FERC[11] and the FTC. It will provide needed certainty to market participants to be subject to the same standards of conduct by all three regulators that oversee the energy markets. ATA also supports the Commission's proposal to adopt the "scienter" mental state, which includes recklessness, as a necessary element in establishing a violation of the prohibition on manipulative conduct. The scienter standard should enable the Commission to police and punish a broader array of potentially manipulative conduct than is reachable under the section 9(a)(2) anti-manipulation provision.

Proposed Rule 180.2

Proposed Rule 180.2 would implement new section 6(c)(3) of the Act and make it unlawful to directly or indirectly manipulate or attempt to manipulate the price of a swap, contract for sale of a commodity in interstate commerce, or contract for future delivery. In proposing Rule 180.2, the Commission reaffirmed its commitment to combat any attempts to affect the price of a swap, commodity, or futures contract in a manner that interferes with the operation of the fundamental market forces of supply and demand.

The Commission stated in its release that the conduct prohibited by new section 6(c)(3) was already prohibited by section 9(a)(2). However, section 6(c)(3) as amended is broader than both its prior version and section 9(a)(2) by its inclusion of the word "indirectly," making it unlawful to indirectly manipulate or attempt to manipulate prices. Neither section 9(a)(2) nor former section 6(c) includes the word "indirectly."

ATA supports this wording and believes it is important that the Commission give effect to Congressional intent and recognize that, rather than simply restating the Commission's existing authority to prohibit manipulation, new section 6(c)(3) expands that authority. The Commission should explicitly make clear that proposed Rule 180.2 is broader than the prior precedent and applies to conduct that indirectly results in a price that does not reflect the bona fide forces of supply and demand.

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[9] See sections 315 and 1283 of the Energy Policy Act of 2005, Public Law 109-58 §§315, 1283, 119 Stat.594 (2005).

[10] See Energy Independence aand Security Act of 2007, Public Law 110-140 §§811, 812 (2007).

[11] 18 C.F.R. 1c.1(a) ("It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, (1) To use or employ any device, scheme, or artifice to defraud, (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity."

Conclusion

ATA strongly supports the Commission's efforts to combat manipulation in the markets under its supervision. As noted above, consumers and hedgers, including ATA members, suffer significant harm when manipulation causes prices of those markets to become disconnected from fundamental market forces. In particular, ATA supports the expanded enforcement powers available to the Commission under proposed Rule 180.1. Use of the scienter mental state requirement and expansion of the range of prohibited conduct will create an increased deterrence against unlawful manipulative behavior. ATA also urges the Commission to give full effect to Congressional intent and employ proposed Rule 180.2 to prohibit market manipulation through indirection.

ATA supports the Proposed Rules. We also want to emphasize that prosecuting manipulation after the fact is just one of several tools available to the Commission to prevent and deter trading practices that interfere with price integrity. Although punishing manipulative conduct after it occurs may have a deterrent effect on potential future wrongdoers, by the time charges are brought against a wrongdoer, the harm of the manipulation has already occurred. Moreover, too narrow a focus on manipulation leaves unaddressed the on-going, corrosive effects on the price integrity of the markets caused by excessive speculation. Consequently, in addition to supporting strong enforcement tools to combat market manipulation, ATA urges the Commission to adopt and enforce speculative position limits that deter excessive speculation in the energy markets.

Please feel free to contact me with any questions.

Respectfully submitted,

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AIR TRANSPORT ASSOCIATION OF AMERICA