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- David A. Berg
Vice President, General Counsel and Secretary

February 7, 2011

Filed Electronically

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

Re: **Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants**, 75 *Fed. Reg.* 76,666 (December 9, 2011); RIN No. 3038-AC96

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 rules, “Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants,” 75 *Fed. Reg.* 76,666 (December 9, 2011) (“Proposed Rules”). The Proposed Rules implement Section 731 of the Dodd-Frank Wall Street Reform and Consumer Protection Act¹ and establish reporting, recordkeeping, and daily trading records requirements for swap dealers (“SDs”) and major swap participants (“MSPs”). ATA generally supports the Proposed Rules because this data will provide greater transparency, assist the Commission in its oversight and surveillance of over-the-counter markets, including enforcing SDs’ and MSPs’ compliance with the Commission’s rules and determining the level of, and enforcing, speculative position limits. However, ATA recommends that the Commission reconsider the cost-benefit analysis of various of the specific requirements, including the proposed phone recordation, retrieval and storage obligation.

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

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.

ATA's Interest in the Proposed Rules

Many members of ATA actively participate in the over-the-counter markets in order to hedge their price exposure to jet fuel. As major consumers of jet fuel, the price of which is tied to the price of crude oil, fluctuations in the price of crude oil significantly impact market volatility and the profitability of our member airlines. Reporting, recordkeeping, and daily trading records rules will affect SDs and MSPs, which typically are the counterparties to our members' hedging transactions.

The Reporting, Recordkeeping, and Daily Trading Records Rules

The Commission proposed rules providing for reporting, recordkeeping, and daily trading records requirements for SDs and MSPs on December 9, 2010.³ Proposed Commission Rule 23.201 would require SDs and MSPs to retain full and complete transaction and position information for all swap activities, including all documents on which trade information is originally recorded, in a manner that is identifiable by transaction and counterparty.⁴ The Proposed Rules also require retention of basic business records, including, among others, minutes from meetings of the entity's governing body; organizational charts; audit documentation; certain financial records; records of complaints against personnel; and marketing materials. Finally, the recordkeeping rules would also require maintenance of all records relating to information required to be submitted to a swap data repository, reported on a real-time public basis, and relating to large notional swaps.

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 Proposed Commission Rules 23.204 (address reporting swap information to swap data repositories) and 23.205 (real-time public reporting of swap transactions and pricing data) incorporate requirements set out in other Commission proposed rules and are not addressed in this comment letter.

⁴ This is a broad requirement and includes "retention of all documents customarily generated in accordance with market practice that demonstrate the existence and nature of the transaction." Proposed Rules, at 76,668. Further, this recordkeeping requirement covers all transactions executed on a swap execution facility ("SEF") or designated contract market ("DCM") or cleared by a derivatives clearing organization ("DCO"), although the SEF, DCM or DCO's procedures should be sufficient for compliance with this provision. *Id.*

Proposed Commission Rule 23.202 would require maintenance of daily trading records, including records of trade information related to pre-execution, execution, and post-execution data and information relating to cash or forward transactions that are related to swaps. Further, the rule provides that this information must be sufficient to conduct a comprehensive and accurate trade reconstruction for each swap, and that SDs and MSPs must maintain each transaction record as a separate electronic file identifiable and searchable by transaction and counterparty. Notably, Proposed Commission Rule 23.202(a)(1), which addresses pre-execution trade information recordkeeping, requires records of all oral and written communications that lead to the execution of a swap, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media, including recordings of telephone calls and other communications created in the normal course of its business.⁵

Proposed Commission Rule 23.203 prescribes the form and manner in which records must be retained, and prescribes the required retention period. SDs and MSPs would have to keep records at their principal place of business⁶ for the life of the swap or the period in which the entity holds the position on its books (whichever is shorter), plus five additional years.⁷

ATA Supports the Proposed Rules

ATA generally supports the Commission's Proposed Rules on reporting, recordkeeping, and daily trading records requirements for SDs and MSPs. The Proposed Rules will increase the quantity and quality of information available to the Commission and market participants, thereby expanding the level of transparency in over-the-counter markets. ATA believes that, as stated in the Proposed Rules, reported information should be kept and provided using unique identifiers to enable the Commission to use the data for regulatory purposes, oversight and surveillance of the markets, and enforcement of SDs' and MSPs' compliance with the Commission rules.⁸ Further, this approach will assist the Commission with establishing and enforcing meaningful speculative position limits as mandated by section 4a(3) of the Commodity Exchange Act ("the Act"). Finally, the Proposed Rules will provide the Commission with the transaction-related data necessary to conduct a thorough analysis of market liquidity. As explained in greater detail in ATA's separate comment on the Commission's proposed rulemaking on "Real-time Public Reporting of Swap Transaction Data,"⁹ we are concerned that the real time reporting requirement, unless tailored to provide

⁵ The proposed rule would not establish an affirmative new requirement to create recordings of all telephone conversations if the complete audit trail requirement can be met through other means. *Id.* at 76,669.

⁶ If the principal place of business is located outside of the United States, the SD or MSP would have to provide the requested records at a place designated by a representative of the Commission within 72 hours of receiving the Commission's request. *Id.*

⁷ This requirement is consistent with current Commission Rule § 1.31. *Id.*

⁸ As the Commission states in the Proposed Rules, "the Commission's enforcement success in cases involving market manipulation and false reporting often has correlated directly with the existence of high quality recordings of voice communications and of electronic communications between the persons involved," whereas the Commission's capabilities are "limited" where such information is not available. *Id.*

⁹ See "Real-time Public Reporting of Swap Transaction Data," 75 *Fed. Reg.* 76,140 (Dec. 7, 2011).

greater delays for less liquid markets, will result in increased prices or reduced liquidity, impairing the ability of ATA's members to hedge their price exposure. The records that are required to be kept under the Proposed Rules will enable the Commission to develop a more nuanced approach to real-time reporting.

Further, ATA is concerned about Proposed Commission Rule 23.202(a)(1), which, as described above, requires that all pre-execution phone communications be recorded and kept and that they be searchable by party and transaction and time stamped to the minute. The Commission's cost-benefit analysis assumes that the additional cost of the recordation and record maintenance requirements "would be minimal because the information and data required to be recorded is information and data a prudent swap dealer or major swap participant would already maintain during the ordinary course of its business."¹⁰ However, it may be that the current telephone recording systems in use by SDs or MSPs do not meet all of the proposed rule's requirements, and that telephone recording systems that are compliant with all of these requirements would impose a significant additional cost to dealers. Although ATA's members recognize that there may be benefits from this requirement, we are uncertain that those benefits outweigh the costs of purchasing new, or upgrading existing, telephone phone recording and retrieval systems. In this regard, we are generally concerned that the cost of complying with all of the various rules proposed by the Commission will erect unnecessarily high barriers to entry for SDs and MSPs, foreclosing all but the largest firms from acting as SDs. This would reduce sell-side competition and potentially increase the cost of transacting for hedgers, such as ATA's members. We ask that the Commission conduct a more rigorous cost-benefit analysis of these requirements, bearing in mind that although the incremental cost of each new requirement may not be significant, they must also be viewed in their totality.

Conclusion

ATA appreciates the opportunity to comment on the Proposed Rules and commends the Commission on its efforts to implement the provisions of the Dodd-Frank Act.

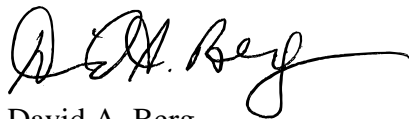
We would be happy to discuss our comments above at greater length with the staff. Please feel free to contact Mr. David Berg, Vice President and General Counsel, Air Transport Association of America, Inc., at (202) 626-4234 or Paul M. Architzel of Wilmer

¹⁰ *Id.* At 76673.

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Cutler Pickering Hale and Dorr LLP, outside counsel to ATA, at (202) 663-6240, if you have any questions regarding our comments.

Respectfully submitted,

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

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