



AIR TRANSPORT ASSOCIATION

1301 PENNSYLVANIA AVENUE, NW SUITE 1100
WASHINGTON, DC 20004-1707
202.626.4000
www.airlines.org

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

February 22, 2011

Filed Electronically

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

Re: Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 75 Fed. Reg. 80638 (Dec. 22, 2010), RIN 3038-AD25.

Dear Mr. Stawick:

The Air Transport Association of America, Inc. (“ATA”) appreciates this opportunity to comment on the rules proposed by the Commodity Futures Trading Commission (“CFTC” or the “Commission”) relating to business conduct standards for swap dealers and major swap participants with counterparties (the “Proposed Rules”).¹ ATA supports the Commission’s efforts to implement the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) and to bring greater transparency to the formerly unregulated over-the-counter swaps markets. ATA is concerned, however, that, as discussed in greater detail herein, aspects of the proposed rules may have the unintended consequence of reducing, rather than increasing, market transparency for our members.

¹ *Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties*, 75 Fed. Reg. 80638 (Dec. 22, 2010) (“Proposing Release”).

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 air line industry.

ATA Comments on the Proposed Rules

As major consumers of jet fuel, the price of which is tied to the price of crude oil, ATA members rely extensively on swaps to hedge their exposure to volatile oil prices. These swaps are most frequently bilateral contracts. Upon implementation of the Dodd-Frank Act, ATA's members are likely to continue transacting swaps bilaterally, in reliance upon the end-user exemption of section 2(h)(7) of the Commodity Exchange Act, 7 U.S.C. §1 et seq. (the "Act").

The Proposed Rules establish standards for the conduct of business by swap dealers and major swap participants with their customers. These include generally a "know your counterparty" duty on the part of the swap dealer or major swap participant, a duty to verify the eligibility of the swap dealer's counterparties, a duty to provide certain disclosures to counterparties, and an institutional suitability requirement which will apply to swap dealers and major swap participants that make recommendations to counterparties. For the reasons discussed below, ATA suggests that the Commission provide greater clarity with respect to the form and timing of the required disclosure. ATA also strongly suggests that greater clarity of the institutional suitability requirement is necessary, particularly with respect to the definition of "recommendation," in order to avoid chilling swap dealers' willingness to provide ATA members with helpful market-related information.

Disclosure of Material Information

Proposed Rule 23.431 would require that swap dealers and major swap participants disclose to their counterparties certain information about a swap at a "reasonably sufficient time prior to entering the swap." The disclosures would be designed to allow the counterparty to understand and analyze the risks associated with the swap.

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; 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.

ATA supports efforts to provide market participants with enhanced information about the swaps transactions in which they engage. The Commission notes in the Proposing Release that Proposed Rule 23.402(g) would permit the use of standardized disclosures in a master agreement.³ In order to provide greater uniformity of such disclosures, the Commission should adopt a standardized form of risk disclosure that can be used in connection with the offer of all non-bespoke swap transactions. This would be consistent with the current practice relating to futures and options trading.⁴ ATA believes that such standardized risk disclosure is appropriate for those entities that qualify for the exemption from mandatory clearing under section 2(h)(7) of the Act and would reduce the uncertainty surrounding the content of such disclosures.

ATA also suggests that the Commission provide further guidance on the appropriate timing for providing such disclosure. Proposed Rule 23.431 requires that disclosure be provided to the counterparty at a “reasonably sufficient time prior to entering the swap.” Although the Proposed Rule contemplates that disclosure could be made as part of the master agreement, if there is a minimum time that the disclosure must be made prior to entering into a specific transaction that would require individualized disclosure, the Commission should specify that period. Greater clarity on this requirement would assist both swap dealers and major swap participants and their counterparties in understanding the rules governing their relationship.

Institutional Suitability Requirements

Proposed Rule 23.434 would require swap dealers and major swap participants to use reasonable due diligence to collect information to determine that any swap or trading strategy involving swaps recommended to a counterparty is suitable for that counterparty. The proposed Rule specifies that a swap dealer or major swap participant will have met its obligations if (i) it has a reasonable basis to believe that the counterparty is capable of independently evaluating the risks of the recommended swap or strategy; (ii) the counterparty affirmatively indicates that it is exercising independent judgment in evaluating the recommended swap or strategy; and (iii) the swap dealer or major swap participant⁵ has a reasonable basis to believe that the counterparty has the capacity to absorb potential losses from the recommended swap or strategy.

While we appreciate the Commission’s efforts to harmonize this suitability requirement to those imposed under other regulatory regimes, ATA is concerned with certain aspects of the proposed requirement. In particular, the Commission should clarify that a swap dealer or major swap participant could rely on a counterparty’s representation at the outset of the relationship that it will always exercise its own independent judgment in evaluating a

³ Proposing Release at 80642.

⁴ See Commission Rule 1.55.

⁵ We note that proposed Rule 23.434(b)(1)(iii) refers to swap dealers but does not refer to major swap participants. We assume for purposes of this comment that this subsection was intended to apply to both swap dealers and major swap participants.

recommended swap or strategy. We believe that obtaining such a representation on a transaction-by-transaction basis would be burdensome for both parties, where their trading is part of an established, on-going relationship.⁶

We are also concerned that the requirement that an institutional customer represent to a swap dealer or major swap participant that it is capable of absorbing any losses associated with a recommended swap or strategy may result in a burdensome analysis that must be undertaken with respect to each transaction entered into during an on-going trading relationship. We suggest that the Commission provide guidance by way of clarification that a swap dealer or major swap participant could meet this requirement by obtaining a representation at the outset of its relationship with an institutional customer that the customer has in place (i) a hedging policy and (ii) policies and procedures to review for compliance with such policy.

Finally, we believe that the Proposing Release is somewhat ambiguous about the circumstances in which a swap dealer or major swap participant could rely on an institutional customer's representations to meet its suitability obligations. The Proposing Release states "[t]o the extent that a swap dealer or major swap participant cannot rely on a counterparty's representations...it would need to undertake a suitability analysis as set forth in the rule."⁷ We believe that, absent some red flag clearly indicating that the customer's representations were not reliable, swap dealers and major swap participants should presumptively be able to rely on them. At a minimum, we hope the Commission will provide greater clarity as to the situations in which it would expect a swap dealer or major swap participant not to rely on such representations.

Exclusion for General Transaction, Financial, or Market Information

Proposed Rule 23.434(c)(2)(i) provides that the institutional suitability requirement does not apply when a swap dealer or major swap participant provides general transaction, financial or market information. The Commission in the Proposing Release explained that a "recommendation would include any communication by which a swap dealer or major swap participant provides information to a counterparty about a particular swap or trading strategy that is tailored to the needs or characteristics of the counterparty, but would not include information that is general transaction, financial, or market information."⁸

ATA's members, which are frequent users of the OTC swaps markets, have on-going, established relationships with swap dealers. In turn, swap dealers, may have a general

⁶ We note that a blanket representation of this kind would be consistent with the Supplemental Material issued by FINRA with respect to its recently-enacted suitability rule. *See* FINRA Rule 2111.07, effective Oct. 7, 2011 (providing that an institutional customer may indicate that "it is exercising independent judgment on a trade-by-trade basis, on an asset-class-by-asset-class basis, or in terms of all potential transactions for its account").

⁷ Proposing Release at 80647.

⁸ *Id.* at 80647

understanding of the customer's trading strategies and portfolio. Swap dealers often provide generalized information about transactions, financial or market information that is informed by this knowledge. Because this generalized market information may be offered with the Swap Dealer's knowledge of the counterparty's trading in mind, it is particularly useful.

ATA's members are sophisticated users of the OTC swaps markets and do not understand these on-going interactions and communication, often termed "market color," to constitute "recommendations." However, a swap dealer that has a pre-existing relationship with a counterparty and is familiar with the counterparty's portfolio and market strategies may become reluctant to provide this type of market information for fear being deemed to have made a "recommendation" and thereby triggering the suitability obligation. The threatened loss of this market information would be a detriment to the markets, generally, and to ATA's members specifically.

In order to avoid this result, the Commission should clarify in the final rules that a "recommendation" means a specific proposal to follow or refrain from following a particular course of action, swap or trading strategy, which is the primary basis for the counterparty's action or refraining from taking an action. This, or a similar definition of recommendation, would clearly exclude from its meaning communications that include a range of possible outcomes or market information even if it is informed by the swap dealer's knowledge of the trading or characteristics of the counterparty.

Conclusion

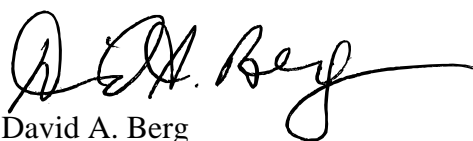
ATA commends the Commission on its efforts to implement the provisions of the Dodd-Frank Act and we support the Commission's efforts to bring enhanced transparency and accountability to the OTC swaps markets.

We appreciate the opportunity to present our views on these important issues and would be happy to discuss our comments at greater length with the staff. Please feel free to contact the undersigned at 202-626-4234 or Paul M. Architzel of Wilmer Cutler Pickering

David A. Stawick
February 22, 2011
Business Conduct Standards
Page 6

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". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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

Cc: Phyllis J. Cela
Peter Sanchez