



## AIR TRANSPORT ASSOCIATION

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- 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: **End-User Exception to Mandatory Clearing of Swaps**, 75 *Fed. Reg.* 80,747  
(December 23, 2011); RIN 3038-AD10

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, “End-User Exception to Mandatory Clearing of Swaps,” 75 *Fed. Reg.* 80,747 (December 23, 2011) (“Proposed Rules”). The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”),<sup>1</sup> amended the Commodity Exchange Act, 7 U.S.C. §1 *et seq.* (“Act”) to require that swaps be cleared through a derivatives clearing organization (“DCO”), unless eligible for an exception. Section 2(h)(7) of the Act provides that transactions in which at least one of the entities is a non-financial entity that is entering into the swap transaction to hedge or mitigate commercial risk will not be subject to the mandatory clearing requirement. The Proposed Rules implement this provision of the Act.

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<sup>1</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376 (2010) (“Dodd-Frank”). Section 723(a)(3) of the Dodd-Frank Act created the end-user exception.

## **ATA**

ATA is the principal trade and service organization of the U.S. scheduled airline industry.<sup>2</sup> 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. 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 members. The Commission's proposed rules clarify their status as end-users. As commercial end-users of the swaps markets, it is likely that ATA's members will elect to forego clearing their transactions under the provisions of the end-user exception.

### ***The End-User Exception***

On December 23, 2010, the Commission proposed rules providing for the scope of the end-user exception from mandatory clearing and requiring certain reporting for end-users. The Commission proposed that a swap be deemed to be used to "hedge or mitigate commercial risk" if it meets one of three tests: (1) the swap is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise (which includes six types of risks relating to potential changes in the value of assets, liabilities, services, services, inputs, products, or commodities, as well as interest, currency, or foreign exchange rates);<sup>3</sup> (2) the swap qualifies as "bona fide hedging" for purposes of an exemption from

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<sup>2</sup> 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.; 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.

<sup>3</sup> With regard to the first test to be considered a swap that is used to "hedge or mitigate commercial risk," the types of risks relating to the conduct and management of a commercial enterprise would include the following: (i) the potential change in the value of assets that a person owns, produces, manufactures, processes, or merchandises or reasonably anticipates owning, producing, manufacturing, processing, or merchandising in the ordinary course of business of the enterprise; (ii) the potential change in the value of liabilities that a person has incurred or reasonably anticipates incurring in the ordinary course of business of the enterprise; or (iii) the potential change in the value of services that a person provides, purchases, or reasonably anticipates providing or purchasing in the ordinary course of business of the enterprise; (iv) the potential change in the value of assets, services, inputs, products, or commodities that a person owns, produces, manufactures, processes, merchandises, leases, or sells, or reasonably anticipates owning, producing, manufacturing, processing, merchandising, leasing, or selling in the ordinary course of business of the enterprise; (v) any potential change in value related to any of the foregoing arising from foreign exchange rate movements associated with such assets, liabilities, services,

position limits under the Act; or (3) the swap qualifies for hedging treatment under Financial Accounting Standards Board (“FASB”) Accounting Standards Codification (“ASC”) Topic 815, Derivatives and Hedging (formerly known as Statement No. 133). In addition, the swap must meet one of two limitations: (1) the swap is not used for a purpose that is “in the nature of speculation, investing, or trading”; or (2) the swap is not used to hedge or mitigate “the risk of another swap or securities-based swap, unless that other swap itself is used to hedge or mitigate commercial risk” as defined by this rule or the equivalent definitional rule governing security-based swaps promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934.

If an end-user is engaging in a swap transaction which meets the requirements set out above and elects to use the end-user exception from mandatory clearing, the end-user (the “electing counterparty”) or a another counterparty (the “reporting counterparty”)<sup>4</sup> will be required to report the following information to the SDR or the Commission: (1) the identity of the electing counterparty to the swap; (2) whether the electing counterparty is a “financial entity”; (3) whether the electing counterparty is a finance affiliate; (4) whether the swap is used by the electing counterparty to hedge or mitigate commercial risk;<sup>5</sup> (5) whether the electing counterparty generally expects to meet its financial obligations associated with its noncleared swap;<sup>6</sup> and (6) whether the electing counterparty is an entity that is an issuer of securities registered under section 12 of, or is required to file reports under 15(d) of, the Securities Exchange Act of 1934.<sup>7</sup>

### ***ATA Supports the Proposed Rules***

#### *Mitigation of commercial risk*

ATA supports the Commission’s broad definition of “hedge or mitigate commercial risk.” ATA agrees with the Commission that mitigation of commercial risk is broader than

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inputs, products, or commodities; or (vi) any fluctuation in interest, currency, or foreign exchange rate exposures arising from a person’s current or anticipated assets or liabilities.

<sup>4</sup> The identity and status of the counterparties to a swap transaction determines whether the end-user will be the one reporting this information to the Commission. See “Swap Data Recordkeeping and Reporting Requirements,” 75 *Fed. Reg.* 76,573 (Dec. 8, 2010).

<sup>5</sup> See *supra* note 3 and accompanying text.

<sup>6</sup> The requirement to meet financial obligations associated with noncleared swaps may be met with one of the following: (i) a written credit support agreement; (ii) pledged or segregated assets (including posting or receiving margin); (iii) a written third-party guarantee; (iv) solely the electing counterparty’s available financial resources; or (v) other means.

<sup>7</sup> If the electing counterparty falls entity is an issuer of securities registered under section 12 of, or is required to file reports under 15(d) of, the Securities Exchange Act of 1934, it must also (i) provide its relevant SEC Central Index Key number; and (ii) disclose whether an appropriate committee of the board of directors (or equivalent body) has reviewed and approved the decision not to clear the swap.

the definition of “bona fide hedging” under Commission Rule 1.3(z) and covers swaps used to hedge or mitigate a person’s business risk (defined by whether the risk relates to changes in the value of assets, liabilities, services, services, inputs, products, or commodities, or interest, currency, or foreign exchange rates) regardless of their status as hedges under accounting rules.<sup>8</sup> We also agree with the Commission that commercial risk may include trading activities that are more varied than the definition of hedging under FASB ASC Topic 815, Derivatives and Hedging (formerly known as Statement No. 133).

ATA specifically supports a broad understanding of risk mitigation which includes covering risk on an overall basis both with respect to the transactions being hedged and the kind of risk being hedged. Although various air lines may have different approaches to hedging, few if any, enter into hedging transactions on a one to one basis to their physical contracts. Rather, they view their physical fuel requirements in the aggregate and hedge on that basis. Moreover, some may engage in active portfolio management as part of their risk mitigation procedures. This may include using various complex strategies involving a number of different positions. For example, these strategies may include selling options to assist in the financing of the other positions. Overall, these strategies are consistent with the company’s hedge policy. This comports with the risk mitigation procedures used by many market end-users. In addition, insofar as air lines have off-shore operations, ATA’s members may find it useful to hedge foreign currency exposures in addition to their fuel costs. ATA’s members would want this flexibility, regardless of whether their operations off-shore are in a separate division or legal entity.

The Commission has also requested comment on whether hedging effectiveness should be taken into account in determining the availability of the end-user exemption. ATA’s members believe that hedge effectiveness should not be taken into consideration in whether a transaction is eligible for the end-user exception. Hedge effectiveness is determined after-the-fact. Accordingly, its use would lead to ambiguity with respect to whether a transaction qualifies for the exception at the time that the transaction is entered. Such ambiguity would be untenable.

*Notification of end-user transaction*

ATA does not object in concept to the Commission’s proposed notification procedure of end-user status; we recognize that the “check-the-box” approach may be the simplest means to administer the notification requirement. In most cases, the notification process will

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<sup>8</sup> See *supra* note 6.

be performed by the swap dealer (“SD”) or major swap participant (“MSP”).<sup>9</sup> End users will provide the notification only for those swaps that do not involve an SD or an MSP.<sup>10</sup>

However, it would be possible to further streamline the reporting requirement by providing that the notice be provided once as part of the ISDA master agreement with end-user counterparties. If the counterparties make any changes to the relevant information for any particular transaction under the master agreement, they would report those changes to the SDR or the Commission on an individual confirmation.

The Commission should also consider further streamlining Proposed Rule 39.6(b)(6), which provides that for companies required to file reports with the Securities and Exchange Committee under Exchange Act Section 12, a committee of the Board of Directors is required to approve the decision to enter into swap transactions using the end-user exemption. ATA suggests that the Commission make clear that the Board can delegate to senior management the day-to-day implementation of its decision under a hedge policy which the Board approves. This would provide for the appropriate review and approval by the Board of the company’s policies with respect to swap trading without burdening the Board with duties that are more typically exercised by senior management. ATA recommends that the notification provision itself be satisfied through a check-off in the ISDA master agreement with any change in a specific transaction reported on an individual confirmation.

Further, ATA requests that the Commission provide end-users with an opportunity to develop standardized systems geared toward the reporting requirements by extending the reporting date for transactions without SD or MSP counterparties. Finally, in recognition of the fact that SDRs may not be operational for a period of time, ATA suggests that the Commission key implementation of the end-use notification regime to the time when those entities become operational. Otherwise, an interim reporting mechanism would have to be developed.

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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 Cutler

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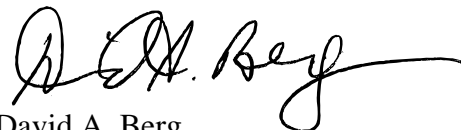
<sup>9</sup> *Id.*; see *supra* note 7; “Swap Data Recordkeeping and Reporting Requirements,” 75 *Fed. Reg.* 76,573 (Dec. 8, 2010).

<sup>10</sup> *Id.*

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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