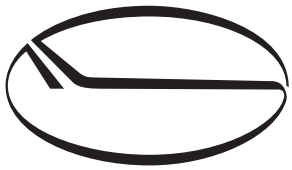

January 11, 2010

Via Electronic Submittal

Mary D. Nichols
Chair
California Air Resources Board
1001 I Street
Sacramento, CA 95812

Re: Preliminary Draft Regulation for a California Cap-and-Trade Program

Dear Ms. Nichols:

The Air Transport Association of America, Inc. ("ATA")[1] is pleased to have this opportunity to comment on the Preliminary Draft Regulation for a California Cap-and-Trade Program (the "PDR") issued by the California Air Resources Board ("ARB") on November 24, 2009. ATA is the principal trade and service organization of the U.S. airline industry, and ATA's airline members and their affiliates transport more than 90 percent of all U.S. airline passenger and cargo traffic. In this capacity, ATA regularly comments on federal and state regulatory developments that may affect the airline industry. We appreciate the opportunity to comment on the PDR, and in particular, to address the proposed regulation of transportation fuels.

I. Introduction

As the leading voice of the major scheduled air carriers in the United States, ATA is actively engaged on all aspects of the environmental impacts of aviation on the environment. We take our role in controlling greenhouse gas (GHG) emissions very seriously. We believe it is particularly important for policymakers to be aware of our strong record in this regard and the need to calibrate measures carefully to ensure they reinforce, rather than impede our continuing efforts to improve.

[1] The members of ATA are: ABX Air, Inc., Air Tran 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., Midwest Airlines, Inc., Southwest Airlines Co., United Airlines, Inc., UPS Airlines, US Airways, Inc.; associate members are: Air Canada, Air Jamaica Ltd., Mexicana.

As ATA has emphasized in past comments to ARB regarding the implementation of the Global Warming Solutions Act of 2006 (AB 32),[2] California does not have the authority to regulate aircraft emissions or activities associated with the operation of aircraft. In this regard, ATA is supportive of the PDR to the extent the draft does not propose to regulate fuel for aircraft, or otherwise seek to regulate aircraft emissions. However, we are concerned that the placeholder in the PDR for the potential addition of other fuels appears to leave open the possibility that aircraft fuel could be added to the regulation in the future. In order to affirmatively recognize the lack of authority over aircraft and aircraft emissions, ARB should specifically exclude aircraft fuel from regulation under the PDR.

In addition to ATA's comments regarding the regulation of fuel for aircraft, we would also like to address the regulation of transportation fuels more generally, as airline-owned ground service equipment (GSE) fleets will be impacted by regulation of transportation fuels under the PDR. In particular, ATA supports continuing with the phase-in approach to implementing AB 32 by beginning with the regulation of stationary sources in 2012 and incorporating transportation fuels into the regulation later – at the earliest 2015 as previously suggested by ARB – rather than a broad scope that would begin regulating all entities in 2012. ATA's comments also address the proposed alternatives for calculating the surrender obligation for transportation fuels.

II. Aviation's Strong Record and Continued Commitment to Address Climate Change

As noted in Section I, ATA recognizes that ARB is not proposing to regulate aircraft fuel under the PDR and we appreciate this implicit recognition that California does not have the authority to regulate aircraft or aircraft emissions. As discussed in detail below, this is dictated by important federal preemption provisions intended to avoid a patchwork of state and local regulation that would impede air transport. Moreover, as aviation is a small contributor of GHG emissions attributed to climate change and has a strong record and continued commitment to addressing climate change, aircraft GHG emissions should not be of particular regulatory concern. Indeed, the sector's record with respect to GHG emissions is remarkable and unmatched by other industry sectors. Most notably, commercial airlines have a strong record of improving fuel efficiency – and thus reducing GHG emissions – while continually driving economic growth. At the national level, commercial aviation accounts for about 2% of GHG emissions,[3] but drives 5.2% of gross domestic product.[4] In California, as of 2006, aviation

[2] *See e.g.,* ATA Comments on Proposed California 1990 Statewide Greenhouse Gas Emissions Level and 2020 Emissions Limit, December 5, 2007; *see also* ATA Comments on Draft Scoping Plan, August 1, 2008.

[3] The United States Environmental Protection Agency's (EPA's) inventory reports commercial aviation's contribution to the total GHG emissions in 2006 was 2.04 percent. EPA, *Inventory of Greenhouse Gas Emissions and Sinks: 1990 -2006* (April 15, 2008) (hereinafter *EPA GHG Inventory 1990-2006)* at pages ES-4 and 21 ("in 2006, total U.S. greenhouse gas emissions were 7,054.2" teragrams of carbon dioxide

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emissions accounted for only 0.7% of all GHG emissions and those emissions were already 26% below 1990 levels.[5] During the period (1990-2006),[6] commercial aviation substantially increased its contribution to the California economy. For intra-California operations, revenue passenger miles grew 21% since 1990, while cargo (measured in revenue ton miles) increased 426%.[7] In other words, even as the amount of service commercial aviation has provided in California has increased substantially, our GHG emissions have decreased in absolute terms.[8]

Commercial aviation has been able to deliver these substantial economic benefits and concurrent emissions reductions by continually reinvesting in technology and fuel efficient operations. And the aviation industry is dedicated to building upon this already strong record. ATA members have joined the world's airlines, aircraft manufacturers, airports and air navigation service providers in proposing adoption of a "global sectoral approach" to aviation and climate change at the international level, to be adopted under U.S. federal law and policy, which will ensure that aviation GHGs are further and appropriately addressed under a single uniform regulatory treatment of aviation emissions. This proposal includes, among other things, a commitment to an annual average fuel efficiency improvement of 1.5 percent through 2020 and to carbon neutral growth thereafter.[9] Further, recognizing that improving fuel efficiency with today's carbon-based fuel supply can only take us so far, ATA and its airlines are making extensive resource commitments to stimulate the development of commercially viable, environmentally friendly alternative fuels. As a framework for doing this, ATA is a founding and principal member of the Commercial Aviation Alternative Fuels Initiative (CAAFI), a consortium of airlines, government, manufacturers, fuel suppliers, universities, airports and other stakeholders who hold the various keys to research, development and responsible

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equivalent (Tg CO_2 Eq)) and Table 2-15 at pp. 2-22 & 2-23 ("Commercial Aircraft – Domestic" account for 143.6 Tg. CO_2 Eq.)

[4] FAA Air Traffic Organization, "The Economic Impact of Civil Aviation on the U.S. Economy" (October 2008) (based on 2006 activity).

[5] All California emissions data are from the California Air Resources Board (ARB).

[6] Comparisons of 1990 data are to 2006 because that is the most recent year included in the latest ARB GHG Inventory.

[7] All economic activity data is from Air Transport Association of America, Inc., Economics Department, derived from the U.S. Department of transportation T-100 Database.

[8] When interstate and international emissions are included, compared to 1990, GHG emissions in 2006 from commercial aviation have declined 12 percent in absolute terms, while passenger miles and cargo ton-miles have increased 75 percent and 127 percent, respectively. (ARB excluded interstate and international aviation emissions from the Inventory). It is also worth noting that commercial aviation's relative share of all California GHG emissions has declined since 1990.

[9] For more on our proposal, see the web link at http://www.airlines.org/government/issuebriefs/Climate-Change-Commitment-Global-Sectoral-Approach.htm.

implementation of alternative jet fuels. To achieve our goals, however, government policies and programs must be complementary to our efforts.

III. The PDR Should Specifically Exclude Fuel for Aircraft From Regulation

As discussed in Section I, ATA supports ARB's decision not to include aircraft fuel in the PDR. The decision to omit aircraft fuel from the PDR is consistent with California's lack of authority to regulate aircraft emissions and operations. We are concerned, however, that while aircraft fuel is currently omitted from the list of regulated transportation fuels under the PDR, there is a placeholder for the insertion of additional transportation fuels at a future date.[10] In order to affirmatively recognize the state's lack of authority to regulate aircraft emissions, ARB should specifically exclude aircraft fuel from regulation under the PDR, as it did when it adopted a low carbon fuel standard (LCFS).[11]

The basis for this is federal law precluding states from regulating aviation emissions under both the Clean Air Act (CAA) and federal aviation laws. Section 233 of the CAA explicitly preempts any states and their political subdivisions from "adopt[ing] or attempt[ing] to enforce any standard respecting emissions of any air pollution from any aircraft or engine thereof unless such standard is identical to a standard" established by the U.S. Environmental Protection Agency (EPA). 42 U.S.C. § 7573. Further, federal aviation law also independently preempts state or local agencies from regulating aviation operations. Courts have long held the Federal Aviation Act of 1958 creates a "uniform and exclusive system of federal regulation" of aircraft that preempts state and local regulation. *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973); *see also American Airlines v. Department of Transp.*, 202 F.3d 788, 801 (5th Cir. 2000) (aviation regulation is an area where "[f]ederal control is intensive and exclusive") (quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 3030 (1944)). This pervasive federal regulatory scheme extends not only to aircraft in flight, but also to aircraft-related operations on the ground.[12] In addition, the Airline Deregulation Act (ADA) precludes states from "enact[ing] or enforce[ing] a law, regulation, or other provision having the force and effect of law related to a price, route or service." 49 U.S.C. § 41713(b)(1).

In light of the federal preemption of regulation of aircraft emissions and operations, it is beyond the power of the state of California to regulate fuels for aircraft as a means to regulate

[10] *See* PDR *at* § 95820 (c)(4).

[11] *See* Section 95480.1(d) of the Final [Low Carbon Fuel Standard] Regulation Order, available at: http://www.arb.ca.gov/regact/2009/lcfs09/lcfsfro.pdf.

[12] *See e.g.*, 49 U.S.C. § 40103(b)(2)(B)-(C); *Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles*, 979 F.2d 1338, 1341 (9th Cir. 1992) (Federal Aviation Act preempts any regulatory "interference" with the "operations of aircraft" on the ground); *City of Houston v. FAA*, 679 F.2d 1184, 1195 (5th Cir. 1982) (FAA has regulatory authority "not only [over] the corridors of air traffic, but the use of airports as well").

aircraft GHG emissions. In order to appropriately recognize ARB's inability to regulate aircraft emissions, fuel for aircraft should be specifically excluded from regulation under the PDR.

IV. ARB Should Maintain the Phase-In Approach for Incorporation of Transportation Fuels

ATA supports the proposed phase-in approach for transportation fuels that was initially laid out in the Scoping Plan.[13] Under the phase-in approach, transportation fuel deliverers would not be subject to regulation for transportation fuel GHG emissions until 2015, at the earliest. In the PDR, ARB has solicited comment on the possibility of incorporating all sources, including transportation fuels, into the cap-and-trade regulation in 2012. ATA does not support the inclusion of transportation fuels at the beginning of the program in 2012, and believes that it is necessary to continue with the initially-proposed phase-in approach for transportation fuels.

Maintaining a phase-in approach for transportation fuels is the better approach for several reasons. First, a phase-in approach will allow for a smoother implementation of a highly complex, administratively burdensome regulation. By initially implementing the regulation with the narrower-scope stationary sources, ARB will begin the program with a more manageable number of regulated entities while still addressing a large percentage of California GHG emissions.

Second, a phase-in approach for transportation fuels will provide the opportunity for other jurisdictions that may be considering regulation of fuels or transportation to explore with California a more harmonized treatment of transportation fuels. Transportation fuels are produced, delivered, and used on a regional and national level and are best addressed at those jurisdictional levels. In fact, consideration of a harmonized approach is taking place through the Western Climate Initiative (WCI), of which California is a founding member. The WCI has specifically addressed the issue of when to regulate transportation fuels determining that it is appropriate to regulate transportation fuels in a second compliance period beginning in 2015. Including transportation fuels in the second compliance period would enable the implementation of complementary policies that would allow for greater opportunities to reduce emissions.

Third, continuing with the phase-in approach for transportation fuels will allow for more time to better address the complexities associated with calculating the carbon emissions associated with transportation fuels.[14] ARB should not attempt to prematurely determine this

[13] As operators of ground service equipment vehicles that consume gasoline, diesel, and alternative fuels that will be subject to the cap-and-trade program proposed in the PDR, ATA members will be impacted by the PDR and therefore, offer these comments regarding the appropriate phase-in of transportation fuels.

[14] This issue is discussed in more detail below, but for these purposes it is sufficient to note that the proper method for calculating transportation fuel emissions and determining allowance

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issue with the current lack of consensus among policymakers and the science and research community.

Finally, fourth, a later implementation date for transportation fuels is also warranted given the severe economic situation facing consumers and transportation-related businesses.

Given the factors identified above, maintaining the phase-in approach is the better approach for regulating transportation fuels. ARB should recognize the benefits of smoother implementation of the cap-and-trade program, the efficiency and effectiveness of addressing transportation fuels on a more regional level, and the need to develop further consensus on the right approach for calculating transportation fuel emissions.

V. ARB Should Take a Consistent Approach to Calculating GHG Emissions and Determining the Associated Surrender Obligation for All Regulated Entities

ARB is soliciting comment in the PDR on alternative methods of calculating the surrender obligation for transportation fuels in order to best address lifecycle GHG emissions and encourage low-lifecycle GHG fuel use choices. While ATA understands the ARB's desire to encourage low-lifecycle GHG emissions choices and accurately calculate actual GHG emissions, ARB should not single out or unfairly treat transportation fuels under the proposed cap-and-trade program. ARB should take a consistent approach toward calculating GHG emissions from all covered sources.

By considering the lifecycle GHG emissions associated with transportation fuels, but failing to consider similar lifecycle emissions from other sources, the transportation fuels sector will bear a disproportionate burden under the proposed cap-and-trade program. Specifically, if a lifecycle requirement is imposed on transportation fuels, mobile sources may be required to not only surrender allowances for the GHG emitted from combustion, but also to surrender allowances for the GHG emissions associated with fuel production. This approach will unfairly penalize the transportation sector and discourage development of innovative low carbon emitting transportation fuels. It should also be noted that ARB has already made a determination to address lifecycle issues for transportation fuels in the LCFS, so these issues do not need to be addressed here.

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surrender obligations is unsettled, as demonstrated by the PDR's consideration of four different approaches for calculating transportation fuel emissions.

VI. ARB Should Provide for a Larger Percentage of Offsets to be Used in Meeting Compliance

The current ARB proposal has a very stringent offsets limit of 3.9%. This will significantly increase the cost of compliance for regulated entities, and, in turn increase costs for all consumers of fuel and electricity. Businesses will be impacted by these increased costs of doing business within the State of California. As long as the environmental benefits of offset projects meet established criteria, there should be no limit.

We respectfully request that ARB considering placing no limit on offsets, or at least a much higher limit than the current proposal.

VII. Conclusion

ATA and our airline members are and will remain focused on improving fuel efficiency and reducing emissions, as well as on continuing our strong record of environmental improvement more generally. Based on the principles discussed in Section II, above, ARB is precluded from regulating aircraft emissions and therefore, we believe that the PDR should specifically exclude fuel for aircraft from the definition of transportation fuels as ARB has done in the LCFS. With respect to transportation fuels in general, ARB should continue with the phase-in approach to the cap-and-trade program and not begin the regulation of transportation fuels until 2015. Finally, with respect to calculating the allowance surrender obligation for transportation fuels, ARB should take a consistent approach across sectors and ensure that transportation fuels are not treated unfairly when compared with other emissions sources. We thank you for the opportunity to provide comment on the PDR.

Sincerely,

Kevin Welsh
Environmental Affairs Regulatory Manager
Air Transport Association of America, Inc.