Please note that the comments expressed herein are solely my personal views

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581
United States
www.cftc.gov

Chris Barnard
Germany

14 December 2016

- 17 CFR Parts 1 and 23
- RIN Number 3038-AE54
- Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants

Dear Mr. Kirkpatrick.

Thank you for giving us the opportunity to comment on your proposed rule and interpretations concerning the Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants.

You are publishing for public comment proposed rules and interpretations (proposed rule) addressing the cross-border application of certain swap provisions of the Commodity Exchange Act (CEA). Specifically, the proposed rule defines key terms for purposes of applying the CEA's swap provisions to cross-border transactions and addresses the cross-border application of the registration thresholds and external business conduct standards for swap dealers and major swap participants, including the extent to which they would apply to swap transactions that are arranged, negotiated, or executed using personnel located in the United States.

I have already commented on the advisory issued by CFTC staff on November 14, 2013 (the Staff Advisory), regarding the applicability of certain CFTC regulations to the activity in the United States of swap dealers (SDs) and major swap participants (MSPs) registered with the CFTC that are established in jurisdictions other than the United States.[1]

[1] Please see my comment letter at:
http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59780&SearchText=

Concerning jurisdiction, Section 722(d) of the Dodd-Frank Act amends Section 2 of the CEA by adding at the end the following:

> (i) APPLICABILITY.—The provisions of this Act relating to swaps that were enacted by the Wall Street Transparency and Accountability Act of 2010 (including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities—
> (1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or
> (2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this Act that was enacted by the Wall Street Transparency and Accountability Act of 2010.

As I have stated in my previous comment letter, I would support substance over form with regard to the swaps provisions of the CEA. Economic implications are just as important as legal considerations, as confirmed and intended by Section 2(i) of the CEA, and therefore I would recommend that for transactions arranged, executed, or negotiated by personnel or agents located in the United States of non-U.S. SDs (whether affiliates or not of a U.S. person) regularly using personnel or agents located in the U.S. to arrange, negotiate, or execute swaps with non-U.S. persons (the Covered Transactions), the non-U.S. SD generally would not be required to comply with the transactional requirements. This is reasonable and would satisfy the "direct and significant"[2] test under CEA section 2(i). Generally the transactional requirements should not apply to Covered Transactions with non-U.S. persons who are not guaranteed or conduit affiliates of U.S. persons. However they should apply to Covered Transactions with non-U.S. persons who are guaranteed or conduit affiliates of U.S. persons; again, this is reasonable and would satisfy the "direct and significant" test under CEA section 2(i).

Yours sincerely

C.R.B.

Chris Barnard

[2] I.e. direct and significant risk to U.S. firms, markets and commerce from such transactions.