ADDRESS
55 Water Street
New York, NY 10041

CONTACT
phone 212.968.4100
fax 212.968.2386

INTERNET
www.GFIgroup.com

July 25, 2011

Via Web Submission
(www.sec.gov)
Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: Release Nos. 33–9222; 34–64639; 39–2474; RIN 3235–AL16
Exemptions for Security-Based Swaps Issued by Certain Clearing Agencies

Dear Ms. Murphy:

GFI Group Inc. ("GFI")[1] submits this letter in connection with the rules being proposed by the Securities and Exchange Commission (the "Proposed Rules") that would exempt security-based swaps issued by registered clearing agencies from certain provisions of the federal securities laws.[2] As discussed in more detail below, GFI believes that the Proposed Rules should be expanded to include transactions in security-based swaps between eligible contract participants that are effected on any trading platform.

---

[1] GFI and its affiliates provide competitive wholesale market brokerage services in a multitude of global over-the-counter ("OTC") and exchange-listed cash and derivatives markets for credit, fixed income, equity, financial, and commodity products. GFI's parent company makes its headquarters in New York and employs more than 1,700 people, with additional offices in London, Paris, Hong Kong, Seoul, Tokyo, Singapore, Sydney, Cape Town, Dubai, Tel Aviv, Dublin, Calgary, Englewood, New Jersey, and Sugar Land, Texas. GFI and its affiliates provide services and products to over 2,400 institutional clients, including leading banks, corporations, insurance companies, and hedge funds. GFI intends to operate a security-based swap execution facility that will be registered as such with the Commission.

[2] *See* 76 Fed. Reg. 34920 (June 15, 2011) (the "Proposing Release"). The Commission has proposed to adopt Rule 239 under the Securities Act of 1933 (the "Securities Act"), Rules 12a-10 and 12h-1(h) under the Securities Exchange Act of 1934 (the "Exchange Act"), and Rule 4d-11 under the Trust Indenture Act. This letter focuses solely on proposed Rule 239. However, if the Commission determines to expand the scope of proposed Rule 239 in accordance with the terms of this letter, then the scope of the other proposed Rules should be expanded as well.

Commission proposed Rule 239 provides that the offer or sale of a security-based swap that is issued by an eligible clearing agency[3] will generally be exempt from the provisions of the Securities Act if the following conditions are satisfied: (1) the security-based swap is offered or sold in a transaction involving the eligible clearing agency in its function as a central counterparty with respect to such security-based swap, (2) the security-based swap is sold only to an eligible contract participant (as defined in Section 1a(18) of the Commodity Exchange Act), and (3) the eligible clearing agency makes certain information about the security-based swap publicly available.[4]

As the Commission noted in the Proposing Release, transactions involving *uncleared* security-based swaps currently occur on trading platforms that will likely register as security-based swap execution facilities ("SB SEFs"). While Section 4(2) of the Securities Act provides an exemption from registration for transactions by an issuer not involving any public offering, this exemption may not be available for transactions in uncleared swaps that are effected on such platforms.[5] As a result, the Commission has requested comment on whether it should provide additional exemptions for uncleared security-based swaps that are traded on SB SEFs or national securities exchanges with eligible contract participants.

GFI believes that the Commission should expand the scope of the Proposed Rules to include transactions in uncleared security-based swaps between eligible contract participants that are traded on a trading platform.[6] As the Commission noted in the Proposing Release, the purchaser of a security-based swap does not, except in the formal sense, make an investment decision regarding the issuer of a security-based swap. Such a decision is instead based on

---

[3] Under proposed Rule 239, an "eligible clearing agency" is a clearing agency which is registered as such under Section 17A of the Exchange Act or a clearing agency which is exempt from such registration pursuant to a rule, regulation, or order of the Commission.

[4] Such information includes (i) a statement identifying any security, issuer, loan, or narrow-based security index underlying the security-based swap; (ii) a statement indicating the security or loan to be delivered (or class of securities or loans), or if the swap is cash-settled, the security, loan, or narrow-based security index (or class of securities or loans) whose value is to be used to determine the amount of the settlement obligation under the security-based swap; and (iii) a statement of whether the issuer of any security or loan, each issuer of a security in a narrow-based security index, or each referenced issuer underlying the security-based swap is subject to the reporting requirements of Sections 13 or 15(d) of the Securities Exchange Act of 1934 and, if not subject to such reporting requirements, whether public information, including financial information, about any such issuer is available and where the information is available. Any security-based swap transaction that satisfied the foregoing requirements would remain subject to the antifraud provisions of Section 17(a) of the Securities Act.

[5] *See* 76 Fed. Reg. 40605 (July 11, 2011).

[6] Under the Commission's proposed rules for SB SEFs, a security-based swap would be required to be traded on an SB SEF only if it is subject to mandatory clearing and is available for trading on such SB SEF. GFI believes that the number of security-based swaps that will satisfy these criteria is fairly limited, and that a large number of security-based swaps will and will continue to be traded on platforms, such as certain of the trading platforms that are currently operated by GFI, that will not be required to register as SB SEFs. Accordingly, GFI is requesting that the Commission revise proposed Rule 239 to include security-based swap transactions that are effected on any trading platform, and not only on national securities exchanges and SB SEFs.

factors relating to the issuers of the reference obligation(s) and the terms of such obligations.[7] GFI believes that this analysis is applicable to all security-based swaps, regardless of whether they are cleared. Therefore, that a transaction in a security-based swap may or may not be cleared should not be dispositive of whether that transaction should generally be exempt from the requirements of the Securities Act.[8]

As the Commission has noted, the purchaser of a security-based swap will be concerned with the creditworthiness of its counterparty. For cleared security-based swap transactions, the clearing agency will become the counterparty to the purchaser of a security-based swap after novation occurs, and the purchaser will then be subject to the credit risk of that clearing agency. For uncleared transaction, the purchaser of a security-based swap will be subject to the credit risk of its counterparty.

GFI acknowledges that cleared swaps have different credit risk profiles from uncleared swaps. However, this difference should not be the decisive factor in determining whether a security-based swap generally should be exempt from the Securities Act. Registered clearing agencies are subject to Commission oversight and are required to have certain financial safeguards in place to ensure that they satisfy their obligations to participants. However, this does not necessarily mean that registered clearing agencies do not present credit risk and other concerns to their participants. In this regard, we note that the Basel Committee on Banking Supervision recently issued a proposal that would require banks to maintain capital to address their exposure to the credit risk of central counterparties ("CCPs").[9] Under this proposal, bank exposures to a qualifying CCP will receive a 2% risk weight, and banks also will be required to maintain capital against their exposure to a CCP's default fund. In addition, CCPs also present certain moral hazard, adverse selection and systemic risk concerns to their participants as well.[10]

As the Commission is aware, counterparties to uncleared swaps commonly utilize a wide variety of risk management processes to address the credit risk associated with these transactions. These processes include: conducting due diligence prior to establishing the relationship; setting and monitoring credit limits; establishing collateralization requirements; and the utilization of risk mitigation measures, such as bilateral netting and portfolio trade

---

7 The purchaser of a security-based swap will, of course, be concerned about the creditworthiness of its counterparty. This issue is discussed in greater detail below.

8 GFI's position on this matter is consistent with Securities Act Rule 240, which temporarily exempts security-based swaps from all of the provisions of the Securities Act other than the antifraud provisions of Section 17(a). *See* 17 C.F.R. § 230.240 (2011).

9 *See* Basel Committee on Banking Supervision, Consultative Document, Capitalisation of Bank Exposures to Central Counterparties (December 2010) (available at http://www.bis.org/publ/bcbs190.pdf).

10 A detailed discussion of these issues is beyond the scope of this letter. For a more detailed analysis of these issues, *see* Pirrong, The Economics of Central Clearing: Theory and Practice (May 2011), at 13-17 (available at http://www2.isda.org/attachment/MzE0NA==/ISDAdiscussion_CCP_Pirrong.pdf).

compression.[11] Thus, we do not believe that the gap between the credit risk concerns associated with cleared swaps and uncleared swaps is sufficiently wide to justify treating uncleared swaps differently from cleared swaps for purposes of the Securities Act.

Finally, and as noted above, proposed Rule 239 would require a clearing agency for a security-based swap to make certain information publicly available. GFI does not believe that it is necessary to impose a similar requirement on uncleared security-based swap transactions that are effected on trading platforms. A trading platform may or may not limit the type of security-based swap transactions that may be effected on the platform. In the former case, the platform will make information about such swaps available to its participants as a matter of commercial necessity. In the latter case, the parties will establish the terms of the transaction, and will need to learn the essential facts about the reference assets or obligor in order to do so. Thus, it would be duplicative in this scenario to require a trading platform to provide information about a security-based swap to its participants because they will have previously obtained such information on their own.

GFI recognizes that the Dodd-Frank Act seeks to encourage the clearing of security-based swaps, and that the use of central clearing for these swaps will provide a number of benefits to market participants. However, we do not believe that clearing should be the paramount consideration in determining whether to exempt security-based swaps from the Securities Act. Both Congress and the Commission have recognized that security-based derivatives do not fit neatly within the registration and prospectus delivery requirements of the Securities Act, and have taken steps to exclude such derivatives from these requirements.[12] While the Proposed Rules are consistent with past precedent, they fail to recognize that various trading platforms currently provide a robust marketplace for transactions in uncleared security-based swaps. Subjecting such transactions to the full panoply of the Securities Act would effectively ensure that such transactions would not continue to occur. Accordingly, for the reasons stated above, GFI respectfully requests that the Commission expand the scope of the Proposed Rules to include transactions in security-based swaps between eligible contract participants that are effected on any trading platform.

* * *

---

[11] *See* 2010 ISDA Market Review of OTC Derivative Bilateral Collateralization Practices (available at http://www.isda.org/c_and_a/pdf/Collateral-Market-Review.pdf). Indeed, according to this survey, over three-quarters of all derivatives of any underlying type are collateralized.

[12] *See* Securities Act Rule 238 (exempting standardized options from all provisions of the Securities Act other than certain antifraud provisions) and Section 3(a)(14) of the Securities Act (exemption for security futures are cleared by a registered clearing agency or a clearing agency that is exempt from such registration and which are traded on a national securities exchange).

GFI appreciates the opportunity to submit these comments. If the Commission has any questions concerning the matters discussed in this letter, please contact me at (212) 968-2954, or Daniel E. Glatter, Assistant General Counsel, at (212) 968-2982.

Sincerely,

Scott Pintoff
General Counsel

cc: Honorable Mary L. Shapiro
Honorable Kathleen L. Casey
Honorable Elisse B. Walter
Honorable Luis A. Aguilar
Honorable Troy A. Parades