

August 22, 2011

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: Exemptions for Security-Based Swaps Issued by Certain Clearing Agencies,
Release Nos. 33-9222; 34-64639; 39-2474 (SEC File No. S7-22-11)

Dear Ms. Murphy:

We are pleased to provide comments on the recent proposal (the "Proposing Release") of the Securities and Exchange Commission (the "Commission") to adopt rules (the "Proposed Rules") that would exempt certain transactions in security-based swaps ("SBS") issued by eligible clearing agencies from provisions of the Securities Act of 1933 (the "Securities Act"), the Securities Exchange Act of 1934 (the "Exchange Act") and the Trust Indenture Act of 1939 (the "Trust Indenture Act"). The Proposing Release is intended to facilitate implementation of various new requirements created with respect to SBS by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank").

We represent a client that has a strong interest in the development of highly liquid and efficient markets in SBS, and our comments are being provided in a representative capacity. We are generally strongly supportive of the Commission's efforts in the Proposing Release to facilitate, in a manner consistent with the requirements of Dodd-Frank, the efficient functioning of markets in SBS that are cleared through an eligible clearing agency acting as a central counterparty (a "CCP"). We would, however, like to bring to the Commission's attention certain issues raised by the Proposing Release as well as some related issues that we think will need to be addressed in the future as the requirements of Dodd-Frank begin to become effective in the SBS market.

Proposed Securities Act Exemption of Cleared SBS

The Securities Act exemption in Proposed Rule 239 for SBS cleared on an "eligible clearing agency" (as defined in the Proposed Rule) would apply only to SBS sold to an "eligible contract participant" as defined in section 1a(18) of the Commodity Exchange Act, which

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definition is incorporated into section 3(a)(65) of the Exchange Act (an "ECP"). While we would prefer that Proposed Rule 239 exempt all SBS that are cleared by an eligible clearing agency (acting as the CCP), we appreciate that the Commission may be reluctant to do so given the express Dodd-Frank requirement, contained in new Securities Act section 6(d), that SBS transactions with investors that are not ECPs be registered under the Securities Act.

If the Commission does not want to extend the Proposed Rule 239 exemption beyond what it has proposed, it should nevertheless make the process of registering SBS issued by eligible clearing agencies, which will be subject to an comprehensive regulatory regime, as simple as possible by relying wherever possible on the extensive investor protection provisions that will be in place for these SBS when the SBS clearing requirements mandated by Dodd-Frank are fully implemented.

We believe that the same factors that led the Commission to adopt Securities Act Rule 238, exempting standardized exchange-traded options from Securities Act registration requirements, are equally applicable to SBS that are cleared through an SBS clearing agency acting as CCP (*see*, Rel.Nos. 33-8171; 34-47082; December 23, 2002), and suggest that a disclosure scheme like that used for standardized options would be more appropriate for cleared SBS than traditional Securities Act registration.

Simplified Registration for Cleared SBS

If Rule 239 is adopted as proposed and SBS sold to non-ECPs will be subject to registration under the Securities Act, we urge the Commission to follow as closely as possible in implementing this requirement the approach it has taken under the Securities Act with standardized options. While those options, if issued by a registered clearing agency and traded on a registered securities exchange, are exempt from Securities Act registration under Rule 238, the disclosure requirements of Rule 9b-1 under the Exchange Act are an underlying foundation of the Securities Act exemption for standardized options. Rule 9b-1(d) requires delivery to customers of an options disclosure document containing the information specified in Rule 9b-1(c) and filed with the Commission pursuant to Rule 9b-1(b).

If Rule 238 is not available for a standardized option (for example, because the clearing agency is not registered or the option does not trade on an exchange), then a relatively simplified Securities Act registration process is available through use of Form S-20. The Commission should follow this model in connection with registration of any SBS that are registered because they might be sold to non-ECPs.

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Only some of the categories of information required to be in an options disclosure statement is required to be provided with respect to SBS under proposed Rule 239(b)(3). For transactions with SBS investors that are not ECPs, the same sorts of information contained in an options disclosure statement should be provided with respect to SBS. An Exchange Act rule for SBS comparable to Rule 9b-1 for standardized options could be adopted to accomplish this goal. Since all SBS transactions with non-ECPs are required by new Exchange Act section 7(l) to be effected on an exchange registered under section 7(b) of the Exchange Act, such a requirement would be easy to implement.

Since, as is the case with standardized options, much of the information an investor would need to be provided in order to enable that investor to make an informed investment decision about SBS cleared on a given CCP is generic (*i.e.*, not dependent upon the identity of the particular issuer whose securities or credit are the subject of the SBS), this generic information can be provided through a standardized disclosure document.

A registration statement for SBS should permit incorporation by reference of (a) the financial statements of the clearing agency that is acting as the CCP that are required to be posted on its website under proposed Exchange Act Rule 17Ad-22(c), (b) all information included in the standardized disclosure statement that we suggest be required as discussed in the preceding paragraph and (c) all information that is on file with the Commission with respect to the clearing agency that is acting as the CCP for the SBS.

If the registrant (the CCP) is an eligible clearing agency, the SBS are traded on a registered exchange (as required by section 6(l) if the investor is not an ECP), and the issuer of the security that is the subject of the SBS is a reporting company under the Exchange Act, then the Commission should provide for automatic effectiveness under Rule 462 upon filing of the SBS registration statement.

Once a CCP has an effective SBS registration statement, then any additional SBS that the Commission determines pursuant to section 3C(b) of the Exchange Act should be required to be cleared and that will in fact be cleared though that CCP should be covered automatically under that registration statement so long as the issuer of the security that is the subject of the SBS is a reporting company under the Exchange Act.

Exchange Act Exemptions

The exemptions for SBS from Exchange Act sections 12(a) and 12(g) contained in proposed Rules 12a-10 and 12h-1(h), respectively, are each limited to SBS sold to ECPs.

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There does not, however, appear to be any enhancement to investor protection that would be provided by requiring registration under the Exchange Act of SBS sold to non-ECPs if the SBS are issued by an eligible clearing agency in its role as CCP, and an SBS disclosure statement similar to a Rule 9b-1 standardized options disclosure statement (as discussed more fully above under “Simplified Registration for Cleared SBS”) is provided to investors.

Even though new Exchange Act section 6(l) requires that transactions in SBS sold to non-ECPs be effected on an exchange registered under section 6(b), there is nothing in Dodd-Frank that suggests that the Commission could not exempt such SBS from Exchange Act registration in the same manner as it has done with standardized options.

Accordingly, we suggest that the Commission make the exemption from sections 12(a) and 12(g) contained in proposed Rules 12a-10 and 12h-1(h) comparable to the exemptions for standardized options contained in Rules 12a-9 and 12h1(d). Such exemptions would, in the case of SBS sold to non-ECPs, be conditioned on the requirement that SBS disclosure statements (as discussed above) be filed with the Commission and provided to all non-ECPs that invest in the SBS and on the continued compliance by the CCP with all disclosure requirements imposed on it by section 17A and the rules thereunder or by any exemptive order of the Commission applicable to the CCP.

Public Offering of SBS on a Registered SEF or Securities Exchange

The Commission asks in question 22 of the Proposing Release whether it should consider a Securities Act exemption that would allow a public offering of SBS to ECPs on a registered SEF or national securities exchange.

Those involved in any such public offering would need to be able to offer and sell SBS to those whom they reasonably believe to be ECPs, and the availability of the exemption cannot be jeopardized if an offer or sale is made to someone that is not in fact an ECP.

Precedent for this approach exists in Rule 144A(d)(1) under the Securities Act for offers and sales limited to “qualified institutional buyers” and in Rule 2a51-1(h) under the Investment Company Act of 1940 for persons reasonably believed to be “qualified purchasers” for purposes of section 3(c)(7) under that Act. Unless the Commission is willing to allow secondary market transfers to non-ECPs at some point in time after the offering has been completed, restrictions on transfers (limiting them to ECPs only) would need to be maintained for the life of the SBS.

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Trust Indenture Act Exemption

Proposed Trust Indenture Act Rule 4d-11 would exempt from that Act any SBS offered and sold in reliance upon Proposed Securities Act Rule 239. Thus, by implication, any SBS issued in a transaction otherwise meeting all of the requirements of Proposed Rule 239 but that is sold to an investor that is not an ECP would need to be issued under an indenture qualified under the Trust Indenture Act.

We believe that the proposed Trust Indenture Act exemption should be expanded to include any SBS issued by a CCP that is an eligible clearing agency with respect to SBS. The same rationale that supports the exemption for SBS offered and sold to ECPs in reliance on Proposed Rule 239 – that the Trust Indenture Act provisions would not provide any additional meaningful protection – applies equally whether or not the holder of the SBS is an ECP.

Any investor (whether or not it is an ECP) in an SBS for which an eligible clearing agency is the CCP will, unless it is itself a member of the CCP, need to hold the SBS through a member of the CCP that will act as one of the counterparties to the CCP on that SBS. Since both direct parties to the SBS (the CCP and one of its members acting as an SBS dealer) are entities already subject to a comprehensive regulatory scheme, it is difficult to see how the investor protections contained in the Trust Indenture Act would add any meaningful investor protection. To the extent that provisions protecting SBS investors are deemed necessary, the Commission has the power to require their inclusion in the terms of the SBS pursuant to its authority over SBS clearing agencies and its authority to approve SBS for clearing under sections 17A and 3C, respectively, of the Exchange Act.

The SBS dealer that holds an SBS on behalf of a customer, in its capacity as counterparty to the CCP with respect to that SBS, should be required to enforce its contractual rights against the CCP in the same manner as it enforces those rights with respect to its own proprietary positions with the CCP. If the Commission believes that there is any investor protection shortfall here, it should be addressed in the rules governing SBS dealers and should cover all customers of an SBS dealer, not just those that are not ECPs.

Accordingly, requiring that any SBS sold to an investor that is not an ECP be issued under an indenture qualified under the Trust Indenture Act would add a large burden with little meaningful investor protection benefit. We urge the Commission to expand the exemption contained in Proposed Rule 4d-11 to cover not only SBS sold in reliance on Proposed Securities Act Rule 239 but also those sold in any transaction that meets all of the requirements of Rule 239 other than those in paragraph (b)(2) thereof (because the investor

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is not an ECP), so long as the SBS are cleared through an eligible clearing agency and the investor holds its SBS position through a registered SBS dealer.

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We appreciate the opportunity to comment on the Proposing Release and are available to discuss these comments with the Commission or its staff should that be helpful in their consideration of the Proposing Release.

Very truly yours,



Bruce Bolander

cc: Hon. Mary L. Schapiro, Chairman
Hon. Elisse B. Walter, Commissioner
Hon. Luis A. Aguilar, Commissioner
Hon. Troy A. Paredes, Commissioner
Ms. Meredith Cross, Director, Division of Corporation Finance