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November 10, 2014

Kevin M. O'Neill
Deputy Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Treatment of Certain Communications Involving Security-Based Swaps That May Be Purchased Only By Eligible Contract Participants
File No. S7-09-14; RIN 3235-AL41

Dear Mr. O'Neill:

GFI Group Inc. ("**GFI**")[1] submits this letter in connection with the proposal by the Securities and Exchange Commission (the "**Commission**") to adopt Rule 135d (the "**Proposed Rule**") under the Securities Act of 1933 (the "**Act**").[2] While GFI supports the adoption of the Proposed Rule, GFI believes that the scope of the Proposed Rule should be expanded in order for the Securities and Exchange Commission (the "**Commission**") to more effectively facilitate the trading of security-based swaps ("**SB swaps**") on security-based swap execution facilities ("**SBSEFs**"). A more detailed explanation of GFI's position on this matter is set forth below.

I. Background

Section 5 of the Act provides generally that no person may offer or sell a security unless such security is registered with the Commission or an exemption from registration is available. Section 4(a)(2) of the Act provides an exemption from registration for transactions made by an issuer not involving a public offering. However, and as the Commission noted in the Proposing Release, the operation of SBSEFs, which will post bids, offers or prices, could affect the

[1] GFI and its affiliates provide competitive wholesale market brokerage services in a multitude of global over-the-counter and exchange-listed cash and derivatives markets for credit, fixed income, equity, financial, and commodity products.

[2] *See* Securities Act Release No. 33-9643 (September 8, 2014) (the "**Proposing Release**").

availability of the exemptions from the registration requirements of the Act for SB swaps whose quotes are publicly available because SBSEFs and other trading venues may not be able to limit participant access to their trading platforms.

The Commission has proposed to adopt Rule 135d to address this issue. Under the Proposed Rule, the publication or distribution of price quotes relating to SB swaps that are traded on SBSEFs and which may be purchased only by eligible contract participants ("**ECPs**") would not be deemed to constitute an offer, an offer to sell, or a solicitation of an offer to buy or purchase such SB swaps for purposes of Section 5 of the Act.

II. Discussion

While GFI supports the adoption of the Proposed Rule, GFI also believes that the scope of the Proposed Rule should be expanded to ensure that the registration requirements of Section 5 of the Act do not unnecessarily impede the trading of SB swaps on SBSEFs and other regulated trading markets. In particular, GFI recommends that the Commission revise the Proposed Rule to provide that SB swaps between ECPs are exempt from all provisions of the Act other than Section 17(a) thereof.[3]

We believe that the limitations of the Proposed Rule may be illustrated through the following examples:[4]

Example 1

Assume that an ECP informs a registered broker-dealer that is acting as a wholesale interdealer broker (an "**IDB**") that it desires to purchase an SB swap and requests that the IDB determine (without disclosing the ECP's identity) whether there is contra-side trading interest. Further assume that the IDB contacts other ECPs, some of whom that do not have pre-existing relationships with the IDB, to determine their interest in taking the other side of the proposed transaction. During the course of these communications, the IDB is asked to provide its views on market activity in general and other market color, such as its opinion on the potential depth of the market for the relevant SB swap. After the IDB finds a willing counterparty, the IDB executes the transaction by executing the transaction on an SBSEF.[5]

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[3] GFI made a similar recommendation in response to the Commission's proposal to adopt Rule 239. *See* letter from Scott Pintoff, General Counsel, GFI, to Elizabeth Murphy, Secretary, Commission, dated July 25, 2011 (the "**2011 Letter**"). Because the issues raised by the Proposed Rule and the issues raised by Rule 239 overlap, the comments made by GFI in the 2011 Letter are incorporated by reference herein. A copy of the 2011 Letter is attached for your convenience.

[4] GFI notes that the methods of execution reflected in the following examples are currently utilized in the marketplace today. GFI believes that these methods of execution would be permissible under the Commission's proposed rules for SBSEFs. *See* Securities Exchange Act Release No. 34-63825 (February 28, 2011) (the "SBSEF Proposal").

[5] Under the Commission's SBSEF Proposal, an IDB that acts in this manner may fall within the Commission's proposed interpretation of the definition of SBSEF. Accordingly, while the IDB may arrange the transaction in the

Example 2

Assume an SBSEF operates a risk mitigation service that is designed to assist market participants in managing their risk exposures by identifying offsetting risk requirements and executing new offsetting trades among those participants. As a part of this service, the SBSEF establishes a curve and price for all trades based on a survey of market participants and displays this information to market participants. Thereafter, these participants provide the SBSEF with data about their positions and their acceptable risk tolerances, and the SBSEF suggests a set of proposed transactions for each participant using a proprietary algorithm. If the proposed transactions are accepted by all market participants, then they will enter into the new trades suggested by the SBSEF through the SBSEF's trading platform.

Example 3

Assume an SBSEF operates a matching session that enables market participants to buy or sell SB swaps based on the midpoint between the bid and the offer for such swaps. The midpoint will be disseminated to market participants, and may be derived from information submitted by market participants or, for more illiquid SB swaps, by the SBSEF based on its knowledge of market conditions and indicative trading interest. Thereafter, market participants may inform the SBSEF that they have an interest in trading the relevant SB swap at the midpoint, but do not indicate whether they desire to purchase or sell such swaps. The SBSEF then gathers all relevant trading interest and effects offsetting transactions between market participants based on time priority.

III. Conclusion

The transactions effected under the above examples would not fall within the scope of the exemption that would be provided by the Proposed Rule. While certain components of the transactions set forth in these examples may fall within the scope of the exemption provided under Section 4(a)(2) of the Act, the availability of this exemption is not clear. Further, as the Commission noted in the Proposing Release, it will not be possible to determine the characteristics of the SBSEF market until the Commission has adopted its final SBSEF rules.[6] We also believe that it will not be possible to predict with confidence how the SB swap markets will evolve even after such rules become effective.

As discussed in the Proposing Release, the legal uncertainty that would arise from determining whether transactions in SB swaps that are effected on SBSEFs are exempt from Section 5 of the Act may unnecessarily impede the operation of, and the trading of SB swaps on, SBSEFS, which could, in turn, potentially impede price discovery for SB swap transactions. Accordingly, we believe that the Commission should exempt transactions in SB swaps between ECPs from all provisions of the Act other than Section 17(a) thereof. This would resolve such

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over-the-counter market, it must execute the transaction on an SBSEF in order to avoid having to register as an SBSEF in its own right.

[6] *See* Proposing Release at footnote 44.

legal uncertainty and thus support the Dodd-Frank Act's goal of encouraging the trading of SB swaps on SBSEFs and other regulated trading markets.

We acknowledge that the Commission has not previously adopted rules which generally exempt transactions in over-the-counter derivatives from Section 5 of the Act. However, we believe that such an exemption, if it is limited to transactions between ECPs, is justified in this case. The SB swap market is not commoditized, and it appears that SBSEFs will have the flexibility under the Commission's proposed SBSEF rules to offer a variety of trading mechanisms to market participants. In order to make such flexibility meaningful, we believe that it is necessary for the Commission to remove the regulatory uncertainty that would otherwise exist under Section 5 of the Act by expanding the scope of the Proposed Rule in the manner described above.

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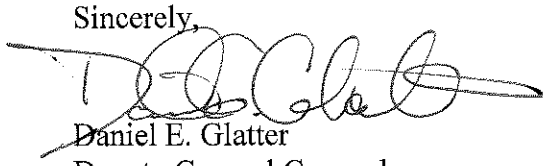
GFI appreciates the opportunity to submit these comments on the Proposed Rule. If the Commission has any questions concerning the matters discussed in this letter, please contact me at (212) 968-2982 or GFI's outside counsel, Ross Pazzol of Katten Muchin Rosenman LLP, at (312) 902-5554.

Sincerely,



Daniel E. Glatter
Deputy General Counsel

Enclosure (2011 Letter)

cc: Honorable Mary Jo White
Honorable Luis A. Aguilar
Honorable Daniel M. Gallagher
Honorable Kara M. Stein
Honorable Michael S. Piwowar
Stephen Luparello, Director, Division of Trading and Markets
Heather Seidel, Associate Director, Division of Trading and Markets
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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.

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[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

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[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

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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.

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[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