

William J. Harrington

& bill@croataninstitute.org

April 9, 2024

CFTC FOIA Compliance Office

Commodity Futures Trading Commission

Three Lafayette Centre

1155 21st Street NW

Washington, DC 20581

FOIAsubmissions@cftc.gov

Re: Freedom of Information Act Request

“Furthermore, it will be the Commission’s policy to post the petitions for rulemaking on the Commission’s website.”¹

Dear All,

My name is Bill Harrington. I affiliate as Senior Fellow at Croatan Institute, a non-profit research and action institute.² I have pursued full-time, self-appointed, pro-bono advocacy to improve the regulation and capitalization of the flip-clause-swap-contract since January 1, 2011.³ My sole aim is to bolster the common good by ridding the United States of demonstrably damaging finance.

I submit the Freedom of Information Act (FOIA) request herein electronically per Commission specifications.⁴

¹ (<https://www.cftc.gov/sites/default/files/2019/12/2019-27103a.pdf>).

² (<https://croataninstitute.org/>).

³ (<https://www.sec.gov/comments/4-790/4-790.htm>).

⁴ *“Special Announcement—To facilitate the FOIA request process during the COVID-19 pandemic, please submit all requests electronically if possible. The CFTC cannot guarantee timely receipt of FOIA requests sent through the mail or via facsimile at this time.”*

(<https://www.cftc.gov/FOI/index.htm>).

“Reasonable Description of Records Sought”

I seek all petitions for issuance, repeal, or amendment of a rule that the Commission has received since December 17, 2008.

I will “pay for any copying, search, or review costs incurred in processing the request.”⁵

FOIA Rationale—Rulemaking Petitions NOT “Routinely Available to the Public”

However, I will not object if the Commission opts to “waive or reduce fees.” Most certainly, “disclosure of the information . . . [WILL] . . . contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”⁶ Indeed, the Commission itself repeatedly asserted the public interest in adopting “17 CFR § 13.1 - Petition for issuance, amendment, or repeal of a rule” on December 17, 2019.⁷

The Commission has “had procedures for filing rulemaking petitions since 1976.” Most recently, the Commission adopted “17 CFR § 13.1 - Petition for issuance, amendment, or repeal of a rule.”

“Any person may file a petition with the Secretariat of the Commission, by mail or electronically through the Commission website, for the issuance, amendment or repeal of a rule of general application. The petition shall be directed to Secretariat, Commodity

⁵ “Ibid.” “Each FOIA request should include a reasonable description of the records sought and an agreement to pay for any copying, search, or review costs incurred in processing the request.”

⁶ (<https://www.cftc.gov/FOI/foiarequests.html>).

⁷ “In response to ACUS’s comment, the Commission notes that it has had procedures for filing rulemaking petitions since 1976 to ensure that the public is engaged in the rulemaking process at the Commission.”

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“Providing the public with an opportunity to view and comment on petitions fosters the public’s engagement in the rulemaking process, but this goal may be accomplished without a rule.”

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“Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of the futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.”

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“Finally, it is in the public interest to make the Commission’s rulemaking procedures more efficient and understandable to the public and market participants.”

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“I strongly support these policies, which promote transparency, and aid the public’s understanding of, and participation in, the Commission’s rulemakings.”

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“The preamble to the final rule also establishes a Commission policy of posting petitions for rulemaking on the Commission’s website [emphasis added]. Each of these measures is a valuable addition to the transparency and accessibility that the public deserves when interacting with the Commission.” (<https://www.cftc.gov/sites/default/files/2019/12/2019-27103a.pdf>).

Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581, and shall set forth the text of any final rule or amendment or shall specify the rule the repeal of which is sought. The petition shall further state the nature of the petitioner's interest and may state arguments in support of the issuance, amendment or repeal of the rule. The Secretariat shall acknowledge receipt of the petition, refer it to the Commission for such action as the Commission deems appropriate, and notify the petitioner of the action taken by the Commission. Except in affirming a prior denial or when the denial is self-explanatory, notice of a denial in whole or in part of a petition shall be accompanied by a brief statement of the grounds of denial.”⁸

The preamble states that “it will be the Commission’s policy to post the petitions for rulemaking on the Commission’s website.”

“Furthermore, it will be the Commission’s policy to post the petitions for rulemaking on the Commission’s website.[Footnote]13

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“[Footnote]13 The Commission will retain its discretion whether to post petitions that contain confidential information (e.g., trade secrets, CEA section 8 material) and abusive or inappropriate language.”⁹

However, the CFTC neither posts rulemaking petitions, nor maintains a public webpage or physical facility where a member of the public may obtain rulemaking petitions, based on my repeated searches of cftc.gov since January 1, 2020. In short, rulemaking petitions, including but not limited to Section 13.1 rulemaking petitions, are not “*routinely available to the public.*”¹⁰

This request for information must turn up at least one Section 13.1 rulemaking petition. On May 26, 2020, I submitted “§ 13.1 Petition to the Secretariat for the U.S. Commodity Futures Trading Commission to Issue a Rule that Prohibits a Swap Dealer, Major Swap Participant, or Other Regulated Entity from Predicating a Swap Obligation on a Flip Clause, Walk-Away, or Variable Subordination”.¹¹

CFTC Secretary Christopher Kirkpatrick acknowledged receipt of my petition only after I shamed him into so acknowledging on June 26, 2020.¹²

My rulemaking petition is publicly available on cftc.gov owing to my ingenuity in countering what appears to be Commission suppression of public participation in rulemaking. To wit, I made the

⁸ “Ibid.”

⁹ “Ibid.”

¹⁰ “Individuals seeking non-public information or information which is not routinely available to the public must file a written request under the Freedom of Information Act.”
(<https://www.cftc.gov/FOI/cftcfoiaguide.html#major-information-systems>).

¹¹ (<https://comments.cftc.gov/PublicComments/CommentList.aspx?id=3106>).

¹² (https://croataninstitute.org/wp-content/uploads/2022/06/CFTC-WJH-2020-6-26-Sec-13.1-Rulemaking-Petition-Acknowledgment_WJHarrington_06-26-2020.pdf).

delivering submission of my rulemaking petition joint by also addressing a “*GMAC Subcommittee on Margin Requirements for Non-Cleared Swaps*” comment request. The CFTC must post responses to such comment requests on cftc.gov.

I want to read *every other* rulemaking petition for many reasons, all of which contribute “*significantly to public understanding of the operations or activities of the government.*” Importantly, the rulemaking petitions will inform public comment, including mine, on CFTC proposals such as proposed capital comparability determinations for Mexico, Japan, the EU, and the U.K., respectively.

After all, CFTC rules, comparability determinations, and policies interact with each other; precious few operate on a stand-alone basis. As such, a commenter on a Commission proposal requires all good-faith information that the Commission possesses. Sadly, Commission policy of *withholding* rulemaking petitions from the public since at least December 17, 2008, has short-changed commenters by depriving them of critical information to respond comprehensively, thereby rendering each subsequent rulemaking, comparability determination, and other Commission action *arbitrary, capricious, an abuse of discretion, and subject to legal challenge*.¹³

Best regards,

Bill Harrington

¹³ As example, please see comments submitted in response to the proposed U.K. capital comparability determination. (<https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7478>). More generally, please see all my comments submitted in response to CFTC proposals since 2015 in “*WJH CV*”; it follows p53 of my response to the proposed U.K. capital comparability determination. (<https://www.sec.gov/comments/4-790/4790-453951-1163614.pdf>).



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
www.cftc.gov

FOIA Office

April 10, 2024

Mr. William Harrington
51 5th Ave. Apt. 16A
New York, NY 10003

RE: 24-00194-FOIA

Dear Mr. Harrington:

This letter is to acknowledge receipt of your Freedom of Information Act (“FOIA”) request dated April 9, 2024, and received by the FOIA Office in the Commodity Futures Trading Commission (“Commission”) on April 10, 2024, seeking access to:

[I seek all petitions for issuance, repeal, or amendment of a rule that the Commission has received since December 17, 2008.].

If you should have any questions regarding your request, please contact me at FOIAsubmissions@cftc.gov. Please refer to the control number (24-00194-FOIA) that has been assigned when making your inquiry.

Sincerely,

LaNae Kears
Paralegal Specialist