William J. Harrington
wjharrington@yahoo.com & bill@croataninstitute.org
917-680-1465

June 12, 2024

Ms. Vanessa Countryman
Secretary, Office of the Secretary
U.S. Securities and Exchange Commission
100 F St. NE
Washington, DC 20549-1090

Mr. Chris Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

[redacted]
[redacted]
S&P Global Ratings
London

Copy: Office of Credit Ratings, U.S. Securities and Exchange Commission; Supervision of Credit Rating Agencies, European Securities and Markets Authority; Credit Rating Supervision, UK Financial Conduct Authority; Executive Director for Financial Stability Strategy, Bank of England; Institute of International Bankers; International Swaps and Derivatives Association; Securities Industry and Financial Markets Association; Fitch Ratings; Moody's Investors Service; and S&P Global Ratings

Via Electronic Mail

Re: U.S. Securities and Exchange Commission Petition for Rulemaking "File No. 4-790" ("*I seek a rulemaking by the Commission that prohibits a security-based swap dealer or other entity subject to Commission regulation from predicating a security-*

based swap or other financial instrument subject to Commission regulation on a flip clause, walk-away, or variable subordination")[1]

AND

U.S. Securities and Exchange Commission Petition for Rulemaking "File No. 4-799" ("*Policy Clarification on Credit Rating Agencies*")[2]

AND

U.S. Commodity Futures Trading Commission "§ 13.1 Petition for Rulemaking of May 26, 2020" ("*prohibit a swap dealer . . . from predicating a swap obligation on a flip clause, walkaway, or variable subordination*")[3]

AND

U.S. Commodity Futures Trading Commission "Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination Submitted on Behalf of Nonbank Swap Dealers Domiciled in the French Republic and Federal Republic of Germany and Subject to Capital and Financial Reporting Requirements of the European Union (EU Swap Dealer Capital Comparability Determination)"[4]

AND

U.S. Commodity Futures Trading Commission RIN 3038-AF36 "Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (Seeded Funds and Money Market Funds Proposal)"[5]

AND

U.S. Commodity Futures Trading Commission "Global Markets Advisory Committee"[6]

Fitch Ratings Active Rating Criteria "CLOs and Corporate CDOs Rating Criteria"[7]

AND

Fitch Ratings Active Rating Criteria "Corporate Hybrids Treatment and Notching Criteria"[8]

AND

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1 **(https://www.sec.gov/rules/petitions/2022/petn4-790.pdf).**

2 **(https://www.sec.gov/rules/petitions/2023/petn4-799.pdf).**

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

4 **(https://www.cftc.gov/sites/default/files/2023/06/2023-13446a.pdf).**

5 **(https://www.cftc.gov/sites/default/files/2023/08/2023-16572a.pdf).**

6 **(https://www.cftc.gov/sites/default/files/2023/09/2023-19409a.pdf).**

7 **(https://www.fitchratings.com/research/structured-finance/clos-corporate-cdos-rating-criteria-21-07-2023).**

8 **(https://www.fitchratings.com/research/corporate-finance/corporate-hybrids-treatment-notching-criteria-12-11-2020).**

Fitch Ratings Active Rating Criteria "Non-Bank Financial Institutions Rating Criteria"[9]
AND
Fitch Ratings Active Rating Criteria "Sovereign Rating Criteria"[10]
AND
Moody's Investors Service In-Use Rating Methodology "Moody's Global Approach to Rating Collateralized Loan Obligations"[11]
AND
Moody's Investors Service In-Use Rating Methodology "Repackaged Securities Methodology"[12]
AND
Moody's Investors Service In-Use Rating Methodology "Sovereigns"[13]
AND
S&P Global Ratings In-Use Criteria "CDOs: Global Methodology and Assumptions For CLOs and Corporate CDOs"[14]
AND
S&P Global Ratings In-Use Criteria "Sovereigns Rating Methodology"[15]

[redacted],

Today's letter includes your email reply to me of 29 April 2024. Please see yellow-shaded text herein, page 10.

Your email establishes yet again that no credit rating company substantiates a prime input to credit ratings of both financial institutions and structured debt when an institution and issuer are party to a flip-clause-swap-contract — namely, "*replacement as a mitigant to counterparty risk*".

To be clear, parroting "*replacement as a mitigant to counterparty risk*" does not substantiate "*replacement as a mitigant to counterparty risk*".

No credit rating company comprehensively assesses the flip-clause-swap-contract to substantiate either "*replacement as a mitigant to counterparty risk*" or any other counterparty risk mitigant. To assess the mitigants and all credit rating criteria for the flip-clause-swap-

[9] **(https://www.fitchratings.com/research/non-bank-financial-institutions/non-bank-financial-institutions-rating-criteria-05-05-2023).**
[10] **(https://www.fitchratings.com/research/sovereigns/sovereign-rating-criteria-06-04-2023).**
[11] **(https://ratings.moodys.com/api/rmc-documents/74832).**
[12] **(https://www.moodys.com/research/Repackaged-Securities-Methodology--PBS_1345683).**
[13] **(https://www.moodys.com/research/Rating-Methodology-Sovereigns--PBC_1346995).**
[14] **(https://disclosure.spglobal.com/ratings/en/regulatory/article/-/view/sourceId/11020014).**
[15] **(https://disclosure.spglobal.com/ratings/en/regulatory/article/-/view/sourceId/10221157).**

contract, a credit rating company must dissect performance of every contract worldwide since 1990, including contracts where the company did not assign credit ratings to contract provider, end-user debt, or both. Crucially, a credit rating company must scrutinize failure to "replace or guarantee", failure to "post one-way collateralization", the role of "credit rating company confirmation or notification (RAC)" in replacement and collateralization failures, and flip clause enforceability by domicile.

No credit rating company has comprehensively assessed the flip-clause-swap-contract because **even casual examination invalidates criteria and credit ratings for every financial institution and all structured debt of an issuer party to a flip-clause-swap-contract**. Post-2006, "*replacement as a mitigant to counterparty risk*" and "one-way collateralization" both failed spectacularly, often via credit rating company connivance, aka RAC. Moreover, a slew of Lehman Brothers court cases in various domiciles muddied practical implications of flip clause enforceability.

Accordingly, every credit rating for a financial institution that provides a flip-clause-swap-contract anywhere in the world is inflated because the credit rating rests on intentionally rotten contract criteria. And every credit rating for debt issued by an end-user of a flip-clause-swap-contract anywhere in the world is inflated because the credit rating rests on the same intentionally rotten contract criteria. And every credit rating for a sovereign that permits a party to provide or use the flip-clause-swap-contract, or that backstops global financial systems as the U.S. does, is inflated because the sovereign credit ratings rest on intentionally rotten sovereign criteria that in turn embed the intentionally rotten contract criteria.

Equally, the comprehensive critiques of two S&P Global Ratings in-use criteria that I submitted to the SEC and CFTC on 28 August 2023, and that I subsequently provided to you and today's other distributees in an email of 10 October 2023, stand. The two deficient, intentionally rotten S&P Global Ratings in-use criteria are "CDOs: Global Methodology and Assumptions For CLOs and Corporate CDOs" and "Sovereigns Rating Methodology".

My critique of the two S&P Global Ratings in-use criteria and of 13 additional matters of 28 August 2023 is available at sec.gov. The SEC will enter today's materials on the same two pages. **(https://www.sec.gov/comments/4-790/4-790.htm).**
(https://www.sec.gov/comments/4-799/4-799.htm).

An Excerpt on Inflated S&P Global Ratings in My Critique of 28 August 2023 (page 15)

"Still blocked, flip-clause-swap-contract trainees? That's fine. I'll do your work yet again for the umpteenth time since 1999.

(1) S&P Global Ratings had no analytical basis to 'continue to stand behind our methodology that incorporates reliance on replacement of counterparties.'
(2) Regarding the hundreds or more past instances of non-replacement worldwide — namely, '[w]hen a swap counterparty does not replace itself' — S&P Global Ratings not only did 'not automatically downgrade our rating on the applicable security.'
(3) S&P also failed to downgrade any EU or other swap contract dealer to reflect ballooning self-exposure to flip clause activation arising from non-replacement and increased probability 'that the counterparty defaults.' {Footnote]48

"Why? Well, by this point in today's tutorial, trainees old and new alike should know the answer by heart. All together. S&P Global Ratings optimizes corporate earnings by knowingly and intentionally inflating credit ratings *for all ABS and other structured debt of issuers worldwide that are party to a flip-clause swap-contract, for all swap dealers worldwide that provide the contract, for all EU and non-U.S. sovereigns that enable issuers or dealers to enter the contract, for broader financial systems, and for other sovereigns, including the U.S. as ultimate stabilizer of financial systems worldwide."*

"[Footnote]48. Regarding 25 downgraded swap dealers — including 17 downgraded EU swap dealers — that collectively obtained 77 credit rating company permissions to unilaterally disregard replacement and other remedial obligations viz-z-viz 100-plus EU and other ABS and structured debt issuers, see Structured Credit Investors (SCI), 'Counterparty Conundrums', 2 August 2013 in Harrington, William J., 'Electronic Letter to the U.S. Securities and Exchange Commission and the European Securities and Markets Authority Re Inflated Credit Ratings of ABS and Derivative Product Companies', September 11, 2013, Appendix B, pp17-19.
(https://www.wikirating.com/data/other/20130911_Harrington_J_William_ABS_Losses_Attributable_to_Securitization_Swaps.pdf)."

An Excerpt on Credit Rating Companies Fix for Inflated Bank Ratings (questionnaire, page 30)

"*Fitch Ratings, Moody's Investors Service, and S&P Global Ratings must overhaul respective criteria / methodologies to significantly decrease recoveries for banks and swap contract dealers that are parties to flip clause-swap-contracts when assigning credit ratings to CLOs, to repackaged securities, to structured notes, and to any debt that references a second, separate obligor.*"

"Flip Clause Questions to CFTC-SEC-LSTA-SFA-DBRS-Fitch-Moody's-S&P", 28 Dec 2020

On 28 December 2020, I emailed a critique of the flip-clause-swap-contract in questionnaire form "Flip Clause Questions to CFTC-SEC-LSTA-SFA-DBRS-Fitch-Moody's-S&P" to 15 addressees and 48 people copied. The delivering email for today's letter also attaches the questionnaire.

The questionnaire's 15 addressees included your colleague Gregg Lemos-Stein, two Moody's Ratings counterparts, a DBRS Morningstar counterpart, and a Fitch Ratings counterpart. The delivering email of 28 December 2020 is in blue-shaded text herein, pages 11-12.

"Flip Clause Questions to CFTC-SEC-LSTA-SFA-DBRS-Fitch-Moody's-S&P" spotlights failure of "replacement" and indeed most flip-clause-swap-contract components since 2006. The questionnaire also memorializes failure by credit rating, CLO, structured debt, legal, regulatory, and academic practitioners to report what they know about flip-clause-swap-contract failures.

Simply put, you, your S&P Global Ratings colleagues, credit rating "competitors", most structured finance practitioners, vendors such as accountants and attorneys, and regulators know full well that replacement is a baseless, empirically discredited assumption for criteria and credit ratings.

Accordingly, your email defense of 29 April 2024, excerpted below, fails. S&P Global Ratings "*SF Counterparty Framework criteria*" is intentionally rotten criteria for the flip-clause-swap-contract. Moreover, S&P Global Ratings credit ratings for Finance Ireland RMBS, for Bluestone NZ Prime, and for all debt issued worldwide by an entity that is end-user of a flip-clause-swap-contract are inflated because "*counterparty risk . . . was analyzed in accordance with our SF Counterparty Framework criteria*", an intentionally rotten criteria for the flip-clause-swap-contract.

> "*As mentioned in the communication, according to our criteria, the replacement of a counterparty upon its downgrade is one of the assumptions in our analysis that support mitigation of counterparty risk. Upon such replacement, we believe the risks you highlight in your latest letter pertaining to the potential further effect on CLOs and sovereigns of subordinated termination payments not being made would equally be reduced. We refer you to our May 29, 208 correspondence for further detail.*
>
> *"The counterparty risk in the two transactions you highlight, Finance Ireland RMBS and Bluestone NZ Prime, was analyzed in accordance with our SF Counterparty Framework criteria."*

Regarding *CFTC arbitrary, capricious, and abuse of discretion rulemaking* on the capitalization of the flip-clause-swap-contract, please see the questionnaire, pages 1-2. Regarding widespread knowledge of flip-clause-swap-contract failures among my former Moody's colleagues, please see the questionnaire section "*Almost All Moody's Analysts Know All About All the Myriad Flip Clause Problems*", pages 5-7. Regarding widespread knowledge of flip-clause-swap-contract failures among your S&P Global Ratings colleagues, "competitors" and most other CLO and structured finance professionals and vendors, please see the section "*Financial Sector Apologists,*

Enablers, Cowering ChurchMice, and Fence-Sitters Also Know All About All the Myriad Flip Clause Problems", pages 7-11. On the same point, please see the section "*Using First-Person Journalism to Beat Back Financial Sector Apologists and Enablers and to Flush Out Cowering ChurchMice and Fence-Sitters*", pages 12-14.

Regarding two headline instances of damage that the flip-clause-swap-contract wrought, consider this excerpt from pages 3-4.

> "*The multi-billion dollars of additional losses that Lehman Brothers imposed on its already bankrupt estate via flip clauses, and the ensuing twelve years of litigation regarding the very same flip clauses, perfectly corroborate the perfect deficiency of the flip clause. In another calamity in the same global catastrophe, a single, perfectly deficient flip-clause-swap-contract helped destroy the Greek economy*."

Regarding the only responsible regulatory treatment of the flip-clause-swap-contract — namely, contract suppression — by both the U.S. Federal Deposit Insurance Company and Federal Housing Finance Agency, consider this excerpt from page 4.

> "*The non-enforceability of walkaway clauses advances the dual purposes of receivership / conservatorship — namely, preserving the assets of a covered financial company in default and limiting taxpayer losses. If walkaway clauses were enforceable, counterparties would immediately and simultaneously activate them and strip an already defaulted company of still more assets.*"

The questionnaire "*poses a total of 45 questions regarding the US swap margin rules, the flip clause, and the flip-clause-swap-contract. See questionnaire pages 15-23. (***Six questions are joint to all of you***, 10 questions are to the CFTC, four questions are to the LSTA, and* ***25 questions are joint to DBRS, Fitch, Moody's, and S&P*** *[emphasis added]*."

Page 19 of the questionnaire starts the 25 questions "*joint to DBRS, Fitch, Moody's and S&P.*" Among others, Questions 31-34 address the governance failure of credit rating companies to report overwhelming empirical evidence that replacement failed post-2006. Please see page 21.

> "*31. Do you publish studies on the global use and performance of the flip-clause-swap-contract since its first use approximately 25 years ago? If 'yes,' is the study as comprehensive as possible in that it uses data for parties to which your company did not assign and monitor credit ratings or, alternatively, does the study solely use in-house data? Does the study validate all assumptions in your flip-clause-swap-contract methodology? In addition to enforceability of the flip clause by domicile, assumptions include 'one-way collateralization', 'replacement / guarantee,' and 'rating agency confirmation, notification, or RAC.' [Footnote]53*
>
> [**WJH Note June 12, 2024:** To maintain rigorously accurate credit ratings for a financial institution that provides the flip-clause-swap-contract, a credit rating company must

track and haircut all contracts that the institution provides globally, not merely the subset of contracts with entities that issue debt rated by the credit rating company.]

"32. Also, if 'yes,' how does the 'replacement' component of your study treat the losses to a replaced counterparty such as Bear Stearns and BSFP in light of the JPMorgan guarantee? [Footnote]54

[**WJH Note June 12, 2024:** To maintain rigorously accurate credit ratings for a financial institution that provides the flip-clause-swap-contract, a credit rating company must track and haircut all contracts that the institution provides globally. In haircutting all contracts, the credit rating company must assign full loss of asset value to most contracts, namely contracts that will not be replaced. For the small remainder of contracts that *might* be replaced, the credit rating company must assign 90% loss of asset value, in line with the prices JPMorgan paid to assume the BSFP portfolio of flip-clause-swap-contracts.]

"33. Also, if 'yes,' how does your study compare losses to structured debt with flip-clause-swap-contract assets in different cases where 'replacement' failed, for example where Lehman Brothers continued to provide a flip-clause-swap-contract viz-a-viz when a propped-up counterparty such as BSFP, AIG, or Merrill Lynch entities continued to provide a flip-clause-swap-contract? [Footnote]55

[**WJH Note June 12, 2024:** To assign and maintain rigorously accurate credit ratings for both a financial institution that provides the flip-clause-swap-contract and debt of a contract end-user, a credit rating company must assess contract attributes including counterparty mitigation provisions for replacement and collateralization, domicile, size, index, and idiosyncratic parameters such as "balance-guarantee" notional.

To maintain accurate credit ratings for Finance Ireland RMBS No. 4 DAC debt, S&P Global Ratings must assume that the issuer and flip-clause-swap-contract provider BNP Paribas, London Branch are counterparties until contract maturity because as a flip-clause-swap-contract study would demonstrate, a "balance-guaranteed" contract is almost impossible to replace. Increasing the likelihood that a downgraded BNP would not replace itself, the contract may well have the weak replacement provisions that S&P routinely accepts without comment in deals such as Bluestone NZ Prime 2022-2 Trust.

To maintain accurate credit ratings for Bluestone NZ Prime 2022-2 Trust debt, S&P Global Ratings must assume that the issuer and flip-clause-swap-contract provider Bank of New Zealand are counterparties until contract maturity because the "balance-guaranteed" contract is very large, may grow larger still, and has toothless counterparty

mitigation provisions for collateralization and replacement. For full itemization of the toothless provisions, please see my critique of 28 August 2023, pages 38-41.]

"34. If you do not publish studies on the global use and performance of the flip-clause-swap-contract, why not? If you cannot validate your credit rating methodology for the flip-clause-swap-contract, how do you validate the credit rating methodologies that work in tandem with flip-clause-swap-contract methodology?"

[**WJH Note June 12, 2024:** Neither S&P Global Ratings nor any other credit rating company publishes "*studies on the global use and performance of the flip-clause-swap-contract*" because a study would discredit "replacement" and other core contract components. Big Picture? No credit rating company including S&P Global Ratings can validate either its "*credit rating methodology for the flip-clause-swap-contract"* or its *"credit rating methodologies that work in tandem with flip-clause-swap-contract methodology"*.]

Ashamed? You, your colleagues, counsel, "competitors", regulators, and all flip-clause-swap-contract enablers should be.

Regards,

Bill Harrington

----- Forwarded Message -----

From: [redacted]@spglobal.com>

To: wjharrington@yahoo.com <wjharrington@yahoo.com>; bill@croataninstitute.org <bill@croataninstitute.org>

Sent: Monday, April 29, 2024 at 09:25:49 AM EDT

Subject: S&P response to Oct 10, 2023 submission

Dear Mr Harrington,

In response to your October 10, 2023, email, our views on replacement as a mitigant to counterparty risk remain consistent with what we had communicated to you in our May 29, 2018 correspondence.

As mentioned in the communication, according to our criteria, the replacement of a counterparty upon its downgrade is one of the assumptions in our analysis that support mitigation of counterparty risk. Upon such replacement, we believe the risks you highlight in your latest letter pertaining to the potential further effect on CLOs and sovereigns of subordinated termination payments not being made would equally be reduced. We refer you to our May 29, 2018, correspondence for further detail.

The counterparty risk in the two transactions you highlight, Finance Ireland RMBS and Bluestone NZ Prime, was analyzed in accordance with our SF Counterparty Framework criteria.

Kind Regards

[redacted]

[redacted]

S&P Global Ratings

London

[redacted]

[redacted]@spglobal.com

---------- Forwarded message ---------

From: **Bill Harrington** <bill@croataninstitute.org>

Date: Mon, Dec 28, 2020 at 10:38 AM

Subject: Flip Clause Questions to CFTC-SEC-LSTA-SFA-DBRS-Fitch-Moody's-S&P

To: [redacted]

Dear All,

Attached please find the letter "Flip Clause Questions to CFTC-SEC-LSTA-SFA-DBRS-Fitch-Moody's-S&P," dated today December 28, 2020.

The letter either addresses or copies you.

For the State of New York Office of the Attorney General, the letter pertains to Moody's Investors Service Reference Number: 20-055709 Matter Identification Number: 1-208010483.

For the New Jersey Office of the Attorney General, the letter pertains to Re: Moody's File Number: 10133000.OCP.

Best regards,

Bill Harrington

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Bill Harrington

Senior Fellow
Croatan Institute
917-680-1465

William J. Harrington
51 5th Avenue, Apartment 16A
wjharrington@yahoo.com

Via Electronic Mail

December 28, 2020

Re: Deficient Accounting, Capitalization, Credit Ratings, and Regulation of EVERY Party to a Swap Contract with a Flip Clause or Other Walk-Away Provision

> "***The Bankruptcy Court detailed the 100% loss of contract values that the plaintiff-appellant (LBSF) incurred under 100% of a 'multitude' of in-the-money, flip-clause-swap-contracts in the [initial] decision*** [emphasis added]."

—William J. Harrington, "Motion for Leave to File an Amicus Curiae Brief Re: Case No. 18-1079 (Lehman vs 250 Financial Entities)," June 25, 2019, (Filed with the US Court of Appeals for the Second Circuit Re: *Lehman Brothers Special Financing, Inc. against Branch Banking and Trust Company, et al*., Case No. 18-1079-bk), page 22.

> "***The standardized market risk capital charges being adopted are generally based on existing Commission and SEC standardized market risk charges*** *for positions in foreign currencies, commodities, U.S. treasuries, equities and other instruments,* ***which, in the Commission's long experience, have generally proven to be effective and appropriately calibrated to address potential market risk in the positions. The Commission believes at this time that this approach****, in conjunction with other charges discussed herein,* ***appropriately accounts for*** *the wide variety of possible uncleared swap transactions that FCMs, FCM-SDs, and covered SDs may engage in, including* ***bespoke swap transactions involving flip clauses*** *or other unique* features. *Overtime, the Commission may consider adjusting these charges as a result of experience with their impacts on required capital in these firms and as market developments may warrant* [emphasis added throughout]."

—Commodity Futures Trading Commission, "Capital Requirements of Swap Dealers and Major Swap Participants" (September 15, 2020). 85 FR 57465, page 57475.

"***Section 706(2)(A) of the Administrative Procedure Act (APA) instructs courts reviewing regulation to invalidate any agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law*** [emphasis added].***'*** *The arbitrary-or-capricious test is used by judges when reviewing the factual basis for agency rulemaking. Courts can overturn agency rules if they find the underlying rationale or factual assertions to be unreasonable*."

—**Center for Effective Governance**

"***Please provide all information pertaining to 'swap transactions involving flip clauses' that the Commission either used or uses in establishing that it 'believes' that the 'standardized market risk capital charges' in Commodity Futures Trading Commission 'Capital Requirements of Swap Dealers and Major Swap Participants' (September 15, 2020) 85 FR 57465 are 'effective and appropriately calibrated'*** [emphasis added]. *'The standardized market risk capital charges being adopted are generally based on existing Commission and SEC standardized market risk charges for positions in foreign currencies, commodities, U.S. treasuries, equities and other instruments, which, in the Commission's long experience, have generally proven to be effective and appropriately calibrated to address potential market risk in the positions. The Commission believes at this time that this approach, in conjunction with other charges discussed herein, appropriately accounts for the wide variety of possible uncleared swap transactions that FCMs, FCM-SDs, and covered SDs may engage in, including bespoke swap transactions involving flip clauses or other unique* features.'"

—William Harrington FOIA Request to Commodity Futures Trading Commission of December 17, 2020 (CFTC Acknowledged as 21-00039-FOIA on December 18, 2020)

Dear Secretary Kirkpatrick, Edward (Manchester), Nicolas (Weill), Mr. Van Walsum, Mr. Pover, Mr. Abonamah, Ms. Wolfe, Ms. Coffey, Mr. Ganz, Mr. Klingler, Mr. Lemos-Stein, Mr. Steel, and Mr. Torgenson:

My name is Bill Harrington. I registered "Harrington Independent Flip Clause Assessments" with New York County on November 3, 2014.[1]

[1] Harrington, William J., "Electronic Letter to the US Securities and Exchange Commission Re: Fixed Income Market Structure Advisory Committee Re: Harrington Independent Flip Clause Assessments, SEC File Number 265-30, and Moody's Investors Service Violations of Moody's Compliance Commitments in Settlement with United States Department of Justice and Attorneys General of 21 States and the District of Columbia (January 13, 2017)," November 3, 2019, HTML-pages 106-109. (Available at: https://www.sec.gov/comments/265-30/26530-6383231-197808.pdf.)

I was a Senior Vice President in the Derivatives Group of Moody's Investors Service. I co-developed and co-authored Moody's Structured Finance Rating Methodology "Framework for De-Linking Hedge Counterparty Risks from Global Structured Finance Cashflow Transactions," May 25, 2006 (Moody's Hedge Framework).[2] It was the first US and the first global credit rating methodology for two parties — a swap end user and a swap provider — that make swap payments by reference to a "flip clause" (flip-clause-swap-contract).[3]

The flip clause is the global ABS sector's: 1) best practice; 2) black hole; 3) Escher-staircase-to-nowhere; 4) foundation; 5) nifty lawyering; 6) original sin; and 7) quicksand.[4]

The flip-clause-swap-contract was a root cause of the 2008 global financial catastrophe.

The flip-clause-swap-contract was an integral component of the under-capitalized structured debt that started, fueled, and pro-longed the 2008 financial catastrophe.

The flip-clause-swap-contract was a tool that financial institutions such as AIG, Bear Stearns, Lehman Brothers, and many others used to under-capitalize themselves.

The flip-clause-swap-contract was a tool that Greece, with the active assistance of Goldman Sachs, used to crash its own economy.

> ***"Every party that agreed to, guaranteed, or endorsed a flip clause generated the financial crisis. None was a blindsided casualty."***[5]

The multi-billion dollars of additional losses that Lehman Brothers imposed on its already bankrupt estate via flip clauses, and the ensuing twelve years of litigation regarding the very same flip clauses, perfectly corroborate the perfect deficiency of the flip clause. In another calamity in

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[2] See Appendix A to "Proposed Brief of Amicus Curiae SIFMA and ISDA in Support of Defendants Appellees and Affirmance in *Lehman Brothers Special Financing, Inc. versus Bank of America National Association et al.*" (Case No. 17-cv-1224-LGS, Document 87. June 16, 2017.) (Available at: https://www.sifma.org/wp-content/uploads/2017/06/LehmanBrothers061617.pdf as of December 23, 2020.)

[3] Op. cit., "Harrington Letter to the SEC FIMSAC (November 3, 2019)," in its entirety. (Available at: https://www.sec.gov/comments/265-30/26530-6383231-197808.pdf.)

[4] Harrington, William J., "Proposed Amicus Curiae Brief to the US 2nd Circuit Re: Case No. 18-1079 (Lehman vs 250 Financial Entities) - WJH V2.0 -07-30-19," June 25, 2019, page 20. (Filed with the US Court of Appeals for the Second Circuit Re: *Lehman Brothers Special Financing, Inc. against Branch Banking and Trust Company, et al*., Case No. 18-1079-bk. A clean-up revision dated July 30, 2019 is available at: http://croataninstitute.org/images/publications/20190808-Amicus-Curiae-Brief.pdf.)

[5] Harrington, William J., "Motion for Leave to File an Amicus Curiae Brief Re: Case No. 18-1079 (Lehman vs 250 Financial Entities), June 25, 2019, page 16. (Filed with the US Court of Appeals for the Second Circuit Re: *Lehman Brothers Special Financing, Inc. against Branch Banking and Trust Company, et al*., Case No. 18-1079-bk. Available at: http://croataninstitute.org/images/publications/WJH-Motion-to-File-Amicus-Brief.pdf.)

the same global catastrophe, a single, perfectly deficient flip-clause-swap-contract helped destroy the Greek economy.[6]

Clearly, the Commission is long overdue in "adjusting these [flip clause] charges as a result of experience with their impacts on required capital" of swap providers.

On May 26, 2020, I filed a § 13.1 petition to embarrass the Commission into fulfilling responsibilities to the Country and the global financial system. My § 13.1 petition seeks a rulemaking by the Commission to prohibit a swap dealer, major swap participant, or other regulated entity from predicating a swap obligation on a flip clause, walk-away, or variable subordination.[7] After much prodding on my part, the Commission finally acknowledged my § 13.1 petition (which I believe is the first such petition to be filed for any type of rulemaking) on June 26, 2020. See Appendix A to this letter (page 26, turquoise-shaded background).

When enacted, my proposed rule will belatedly align Commission rules with the Dodd-Frank-mandated protections for bankrupt entities overseen by other regulators such as the Federal Deposit Insurance Company and the Federal Housing Finance Agency. "The non-enforceability of walkaway clauses advances the dual purposes of receivership / conservatorship — namely, preserving the assets of a covered financial company in default and limiting taxpayer losses. If walkaway clauses were enforceable, counterparties would immediately and simultaneously activate them and strip an already defaulted company of still more assets."[8]

When enacted, my proposed rule will perfect the post-2008-crisis evaluation, treatment, and market rejection of the flip-clause-swap-contract.[9] On October 2, 2010, the U.S. Court of Appeals for the Second Circuit completed the penultimate step by issuing a mandate with respect to its August 11, 2020 ruling in *Lehman Brothers Special Financing Inc. v. Branch Banking & Trust Co. (In re Lehman Brothers Holdings Inc.)*, No. 18-1079, --F.3d--, 2020 WL 4590247 (2d Cir. Aug. 11, 2020).[10] In that ruling, the Court upheld the enforceability of the 200-plus flip clauses which imposed 100% losses on 100% of Lehman Brothers swap assets.

> "*Whatever the Court's decision, it will confirm US market and regulatory assessments that the flip clause is inherently and irredeemably defective. Upholding the flip clause*

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6 Ibid., pages 22-24.

7 Harrington, William J. "§ 13.1 Petition to the Secretariat for the 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," May 26, 2020. (Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?ID=62638&GUID=ba69c106-048b-4ca9-b9f8-b0b8e7b4a64f.)

8 Op. cit., "Harrington Proposed Amicus Curiae Brief in Lehman Brothers Flip Clause Case," pages 28-29. (Available at: http://croataninstitute.org/images/publications/20190808-Amicus-Curiae-Brief.pdf.)

9 Ibid., pages 29-43.

10 Kramer Levin, "Second Circuit Holds That So-Called "Flip" Clause Payments Are Protected by Section 560 of the Bankruptcy Code," *Broken Bench Bytes*, September 9, 2020. (Available at: https://www.jdsupra.com/legalnews/second-circuit-holds-that-so-called-33538/.)

will render it unacceptable to swap dealers. Striking down the flip clause will render it unacceptable to investors. Splitting the difference will exposure future parties to a decade of litigation."[11]

Almost All Moody's Analysts Know All About All the Myriad Flip Clause Problems

Moody's Hedge Framework remained operational in near-original form until November 12, 2013. Moody's most recent iteration of the successor global cross-sector methodology contains significant components of Moody's Hedge Framework, including the Collateral Provisions of Appendix 3 (which I alone developed and formatted, and which remain in original presentation) and the Model Swap Framework in Appendix 5 (which one of the addresses, my former colleague Edward Manchester, drafted to implement the work that another former Moody's legal colleague Marlow Gereluk and I did.)[12]

A third former legal colleague Nicolas Weill, also an addressee and Chief Credit Officer for Moody's Structured Finance Globally, can attest to the foregoing and to the entirety of this letter.[13]

A fourth former Moody's legal colleague Rick Michalek and I are writing a peer-reviewed article with the working title "Should Swaps be Prohibited in Securitization Transactions?"

The short answer:

"*Yes, except for swaps that conform completely and in all respects to the US swap margin rules as in effect as of this writing.*"

A swap that conforms completely and in all respects to the US swap margin rules swap would, through the daily, two-way exchange of full variation margin, defuse the flip clause and thereby make the flip-clause-swap-contract redundant.[14] Such a swap would, again through the daily,

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[11] Op. cit., "Harrington Motion for Leave to File an Amicus Curiae Brief Re: Case No. 18-1079 (Lehman vs 250 Financial Entities), page 15. (Available at: http://croataninstitute.org/images/publications/WJH-Motion-to-File-Amicus-Brief.pdf.)

[12] Moody's Investors Service, "Moody's Approach to Assessing Counterparty Risks in Structured Finance," *Cross-Sector Methodology*, June 5, 2020.
(Available at: https://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBS_1208915.)

[13] "Structured Finance Responds to Issues of Counterparty Risk and Basel II in Calls for Comment," *Inside Moody's Credit Policy*, January 2006, page 4.
(Available at: https://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBC_96515.)

[14] Op. cit., "Harrington Proposed Amicus Curiae Brief in Lehman Brothers Flip Clause Case," pages 32-34. "The daily, two-way exchange of variation margin 'defuses' the flip clause by enabling both a swap dealer and an ABS issuer to terminate a swap contract without referencing the deal's priorities of payments. Moreover, the reason for termination becomes largely irrelevant because the party that is owed payment will hold collateral with market value that is at least equal to the previous day's swap valuation. Crucially, both parties will have agreed all prior daily valuations since having entered the

two-way exchange of full variation margin, also be more expensive than a flip-clause-swap-contract.[15]

> "*As a result, the cost of issuing ABS from an SPV that is or may become party to a new swap will be significantly higher than now. Depending on the size of the swap, the additional cost may be 1%-7% of the par of securitized assets for many types of basis and interest rate swaps that are often characterized as 'plain vanilla,' and considerably more for long-dated or currency swaps.*
> *II*
> *"The Dodd-Frank Act that generated swap margin rules was intended to ensure that the two financial counterparties to a swap — in this case an ABS issuer and swap provider — were fully insulated from each other's non-performance. But this insulation will come at a cost and one can't help but look to the industry's recent dance with risk retention rules if the hope is that the music will play on and on and never stop*."
> *II*
> *"Add balance-guarantee features, such as those that were often used in pre-crisis RMBS, to a fixed-for-floating swap and the potential exposure increases. Finally, for currency swaps, which can be used in any sector and are common in re-packagings, the potential exposure could easily by 20% or higher."* [16]

Owing to the higher costs, no U.S. structured debt issuer has entered into such a new swap since the US swap margin rules took effect.[17]

During our respective Moody's tenures, Rick and I were lead analysts or voting committee members for an estimated 1,200 structured entities that were party to an estimated 1,600 flip-clause-swap-contracts.[18]

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swap, i.e., they will have established a track record of mutually accepting both the termination valuation and the means of monetizing it."
(Available at: http://croataninstitute.org/images/publications/20190808-Amicus-Curiae-Brief.pdf.)

[15] Harrington, Bill, "Existing ABS swaps also caught in swap margin net," *Debtwire ABS*, August 12, 2016; Section entitled "Margin requirements makes swap amendments prohibitively expensive?" (Available at: https://www.debtwire.com/info/existing-abs-swaps-also-caught-swap-margin-net-%E2%80%94-analysis.) Also, Harrington, Bill, "ANALYSIS: US margin rule for swaps obliges securitization issuers to overhaul structures, add resources, and rethink capital structures," *Debtwire ABS*, August 12, 2016. (Available in Appendix B to this letter, pages 27-31, green-shaded background.)

[16] Harrington, Bill, "Margin posting: swaps increase ABS issuance costs by 1%, 3%, 7% of deal size," *Debtwire ABS*, May 16, 2016. (Available upon request to the author.)

[17] Op. cit., "Harrington Proposed Amicus Curiae Brief in Lehman Brothers Flip Clause Case," pages 23 and 35-38. (Available at: http://croataninstitute.org/images/publications/20190808-Amicus-Curiae-Brief.pdf.)

[18] Appendix C to this letter, page 32, grey-shaded background, details the estimates.

Former colleagues who remain at Moody's and can attest to Rick and my bona fides regarding the flip clause include Rodrigo Araya, Fabian Astic, Greg Bauer, Kent Becker, William Black, Rudy Bunja, David Burger, Richard Cantor, Eun Choi, Jack Dorer, Marty Duffy, Elena Duggar, Katherine Frey, Yehudah Forster, Michael Friedman, Jerry Gluck, Peter Hallenbeck, David Ham, Jian Hu, Bhargav Jhani, Ivan Jiang, Lina Kharnak, Jun Kim, Elina Kolmanovskaya, Warren Kornfeld, Steve Lioce, Arnaud Lasseron, Nicholas Lindstrom, Bill May, Edward Manchester, Maria Miagkova, Leon Mogunov, Maria Muller, Jonathan Polansky, Al Remeza, Stan Rouyer, Dan Rubock, Suzanna Sava, Jody Shenn, Julien Sieler, Teresa Stock, Yu Sun, Ramon Torres, Oksana Yerynovska, and Qian Zhu.[19] Most of these people continue to vote in committees that assign a credit rating to debt issued by an entity with a flip clause in the priorities of payments. In each such instance, the committee ignores the governance failures of a party that uses a flip-clause and thereby assigns a credit rating that conflicts with Moody's global credit rating methodology.[20] A separate email will deliver this letter to each of these Moody's employees. The delivering email copies the principal authors of Moody's ESG methodology Mr. Swami Venkataraman and Mr. James Leaton.

Former colleagues now at Moody's Analytics who can attest to Rick and my bona fides regarding the flip clause include Gus Harris. Joy Hart, and Greg Schoellig. They develop, market, and use products and services that analyze deals with a flip clause in the priorities of payments. The delivering email copies Gus Harris. A separate email will deliver this letter to Joy and Greg.

Financial Sector Apologists, Enablers, Cowering ChurchMice, and Fence-Sitters Also Know All About All the Myriad Flip Clause Problems

Former colleagues now at the US Securities and Exchange Commission who can attest to Rick and my bona fides regarding the flip clause are Abe Putney and David Teicher.[21] The SEC Office of Credit Ratings actively encourages Nationally Recognized Statistical Rating Organizations

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[19] Harrington, William J., "Electronic Letter to Moody's Investors Service 'Re "General Principles for Assessing Environmental, Social and Governance Risks: Proposed Methodology Update'," pages 1-8. October 19, 2020.
(Available at: http://croataninstitute.org/documents/WJH_Comment_to_Moodys_RFC_-_General_Principles_for_Assessing_ESG_Risks_-_Oct_19_2020_1.pdf.
As of December 23, 2020, Moody's also posted the comment at https://www.moodys.com/RFC/response/ViewComments/UEJDXzEyNDM0NTQ=.)

[20] Moody's Investors Service, "General Principles for Assessing Environmental, Social and Governance Risks Methodology," *Cross-Sector Rating Methodology*, December 14, 2020, Page 26, footnote 14. "For structured transactions, we consider the impact of ESG risks that are expected to unfold within the legal final maturity of the transaction."
(Available at: https://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBC_1243406.)

[21] Harrington, William J., "Comment on SEC Proposed Rules for Nationally Recognized Statistical Rating Organizations," August 8, 2011. Search "Teicher," "swaps," "flip clause," "replacement," "hedge," "AIG," & "MLDP" & "compliance." (Available at: https://www.sec.gov/comments/s7-18-11/s71811-33.pdf .)

(NRSROs) to mask the deficiencies of the flip-clause-swap-contract in methodologies and dependent credit ratings.[22] The delivering email copies Abe and David.

The Structured Finance Association habitually mis-informs financial regulators such as the CFTC and the SEC, the US judicial system, and the public on the flip-clause-swap-contract while lobbying for the contract's reinstatement.[23]

> "*SFA is pleased about this outcome and very much appreciates the hard work by our counsel at Freshfields Bruckhaus Deringer in representing our industry as* amicus curiae *in this litigation. . . If you have questions about SFA's advocacy on this matter, please contact Jennifer.Wolfe@structuredfinance.org.*"[24]

The Loan Syndications and Trading Association (LSTA) lobbies for and otherwise supports CLO issuers that place flip clauses in priorities of payment in contravention of the US swap margin rules.[25] My estimates show that 75% of 700 US CLOs have flip clauses in the priorities of payments, yet not one of the 75% of CLOs can comply with the US swap margin rules because every single one of the CLOs lacks both the operational capabilities and the capital resources that the daily, two-exchange of variation margin requires.[26]

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[22] Op. cit., "Harrington Letter to the SEC FIMSAC (November 3, 2019)," in its entirety. (Available at: https://www.sec.gov/comments/265-30/26530-6383231-197808.pdf.)

[23] Op. cit., "Harrington Proposed Amicus Curiae Brief in Lehman Brothers Flip Clause Case," pages 22-23, and 43. (Available at: http://croataninstitute.org/images/publications/20190808-Amicus-Curiae-Brief.pdf.)

[24] Structured Finance Association, "Court Rules in Favor of Investors in Lehman 'Flip Clause' Case," August 11, 2011. (Available at: https://structuredfinance.org/news/court-rules-in-favor-of-investors-in-lehman-flip-clause-case-still-in-review/.)

[25] For a very recent instance of a CLO issuer placing a flip clause in the priorities of payment, see "S&P Global Ratings Presale: Madison Park Funding XLV Ltd./Madison Park Funding XLV LLC," July 7, 2020, Tables 11 & 12. The CLO, like the 32 other CLOs with flip clauses that Credit Suisse Asset Management manages, lacks the capability for the daily, two-way exchange of variation margin and therefore cannot comply with the US swap margin rules. (Formerly available at: https://www.standardandpoors.com/en_US/web/guest/article/-/view/type/HTML/id/2474176.)

[26] As of August 3, 2020, my research showed that 542 of 722 US CLOs have a flip clause in the priorities of payments. However, not one of the 542 CLOs has either the operational capabilities or the capital resources that the daily, two-exchange of variation margin requires. In short, none of the 542 CLOs can comply with the US swap margin rules. Even so, the respective NRSROs have assigned the same credit ratings to debt of the 542 CLOs as to debt of the 180 CLOs without a flip clause in the priorities of payment. ***Managers of the 542 CLOs with flip clauses are***: Oak Hill Advisors; Redding Ridge Asset Management (an asset management company established by Apollo Global Management); Bain Capital Credit; Pinebridge Galaxy; Credit Suisse Asset Management; Five Arrows Managers, a subsidiary of Rothschild & Co; Fortress Investment Group; BlueMountain Capital Management; Voya Alternative Asset Management; Columbia Management Investment Advisers, a subsidiary of Ameriprise Financial; Elmwood Asset Management; Anchorage Capital Group; WAMCO; Onex Credit Partners; ZAIS; Pretium Credit Management; AGL; Oaktree Capital; Ares CLO Management; Octagon Credit Investors; Gulf Stream Asset Management; AIG; Palmer Square Capital Management; Partners Group US

The LSTA advocates that its vendors such as Sidley Austin threaten financial regulators with both a reduction of appropriations and litigation to induce them to dilute regulatory and capital treatment for US CLOs, including ones that cannot comply with the US swap margin rules despite having a flip clause in the priorities of payments and also CLOs that issue combo notes.[27]

Following are people who were my principal contacts at derivative product companies (DPCs) for which I was lead Moody's analyst. Each can attest to my thoroughness in evaluating their portfolios of, or proposals to provide, flip-clause-swap-contracts: Scott Herman, former CEO of two Bear Stearns DPCs Bear Stearns Financial Products (BSFP) and Bear Stearns Trading Risk Management (BSTRM); Michael Bellacosa, successor to Scott at BSFP and BSTRM; Jason Silverstein, former Counsel to BSFP and BSTRM; Ken Fisher, former President of Merrill Lynch Derivative Products; Neville Nagarwalla, formerly of the two Lehman Brothers DPCs Lehman Brothers Financial Products and Lehman Brothers Derivative Products; and Wendy Brewer, former president of Nomura Derivative Products. The delivering email copies Jason. A separate email will deliver this letter to Scott, Mike, Ken, Neville, and Wendy.

The article by Rick and me will examine the many deficiencies of the flip-clause-swap-contract, including the competition by DBRS Morningstar, Fitch Ratings, Moody's, and S&P Global Ratings to produce *worst-in-class*, global credit rating methodologies for the flip-clause-swap-contract.[28]

> "*SPVs that issue rated ABS lack the assets to post margin and also repay notes with a probability that is commensurate with their ratings, according to Standard & Poor's. Its 'Global Derivative Agreement Criteria,' which the company uses to analyze 'derivative agreements in new and existing structured finance transactions,' is based*

Management CLO; Partners Group US Management CLO; ArrowMark Colorado Holdings; Canyon CLO Advisors; Guggenheim Partners; TCW; PGIM; GoldenTree Loan Management; and Blackstone. ***Managers of the 180 US CLOs that do <u>not</u> have flip clauses are***: Ballyrock Investment Advisors, a subsidiary of Fidelity; GC Investment Management; HalseyPoint Asset Management; Benefit Street Partners, a subsidiary of Franklin Templeton; Kayne Anderson Capital Advisors; CVC Credit Partners; Jocassee Partners; Owl Rock Capital Advisors; Neuberger Berman; and Halcyon Loan Advisors.

[27] See Appendix D to this letter, "<u>WJH Transcript of Sidley Austin / LSTA Webinar: 'End of the (Loan Regulatory) World as We Know It?</u>" May 9, 2018, pages 33-42, yellow-and white shaded background. See comments by Mr. Richard Klingler, pages 35-37, in toto, including the following. "I mean, if you want to upset a regulator, go talk to the appropriations committee on the Hill and ask that they [the regulator in question] not get the money that they want or that their framing statute be changed. That's the way to upset a regulator and the finance industry has no problem doing that." II "Beyond the initial ask . . . Do you want in some ways to get more? And can litigation and the related policy arguments help get you there? Classes of securitizations are entitled to relief from risk regulations. You should do this. It's the right thing to do. Oh, by the way, I potentially have this judicial path."
(The webinar was available at: <u>https://sidley.rev.vbrick.com/#/videos/9bb231c9-cc80-48bb-b13d-8d9505e51050</u> as of December 23, 2020.)

[28] Op. cit., "<u>Harrington Proposed Amicus Curiae Brief in Lehman Brothers Flip Clause Case,</u>" pages 23 and 35-38. (Available at: <u>http://croataninstitute.org/images/publications/20190808-Amicus-Curiae-Brief.pdf</u>.)

in part on the assumption that an 'issuer does not have the financial resources both to maintain the ratings on its obligations and post collateral to a counterparty.'"[29]

DBRS, Fitch, Moody's, and S&P are the four largest NRSROs that the US Securities and Exchange Commission "regulates." The same four companies are the only external credit assessment institutions (ECAIs) that the Eurosystem uses to designate debt as eligible collateral and assign valuation haircuts.[30]

This letter poses a total of 45 questions regarding the US swap margin rules, the flip clause, and the flip-clause-swap-contract. See pages 15-23. (Six questions are joint to all of you, 10 questions are to the CFTC, four questions are to the LSTA, and 25 questions are joint to DBRS, Fitch, Moody's, and S&P.

This letter will be available on the site of the non-profit research entity Croatan Institute, where I am a senior fellow. I will also post this letter on additional public sites, such as my LinkedIn profile.[31]

DBRS, Fitch, Moody's, and S&P have first-hand knowledge of my critiques of the companies' respective global methodologies for the flip-clause-swap-contract.[32] I have contacted each company many times, including as a research journalist for *Debtwire ABS* during the period October 2015 to November 2016.[33] Neither DBRS, nor Fitch, nor Moody's, nor S&P one of the

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[29] Harrington, Bill, "Margin posting: swaps increase ABS issuance costs by 1%, 3%, 7% of deal size," *Debtwire ABS*, May 16, 2016. (Available upon request to the author.)

[30] "Eurosystem credit asessment framework (ECAF)" tab, *European Central Bank* site, accessed December 11, 2020.
(Available at: https://www.ecb.europa.eu/paym/coll/risk/ecaf/html/index.en.html.)

[31] Available at: https://www.linkedin.com/in/williamjharrington/.

[32] Harrington, William J., "Electronic Letter to the US Commodity Futures Trading Commission Re: CFTC Letter No. 17-52, No Action, 27 October 2017, Division of Swap Intermediary Oversight ("Re: No-Action Position: Variation Margin Requirements Applicable to Swaps with Legacy Special Purpose Vehicles")," February 2, 2018. Appendix A, pages 81-91, contains my email correspondence with staff of Fitch Ratings, the CFTC, the SEC, and SFIG from 17 November 2016 to 11 January 2017. The correspondence addressed two topics **(1)** The lack of either an empirical or legal basis for the "replacement" assumption that the CFTC Letter No. 17-52 cites. (2) The Fitch public call for the CFTC to issue a no-action position. (Available at: https://www.wikirating.org/data/other/20180203_Harrington_J_William_31_Misrepresentations_in_CFTC%20_Letter_No_17-52.pdf.)

[33] Harrington, Bill, "Moody's bets Germany will support Deutsche bank derivatives above all else," *Debtwire ABS*, October 12, 2016; "Existing ABS swaps also caught in swap margin net," *Debtwire ABS*, August 12, 2016; and "US Margin Rules for Swaps Obliges Securitization Issuers to Overhaul Structures, Add Resource and Rethink Capital Structures," *Debtwire ABS,* 4 November 2015.
(Available at, respectively: https://www.debtwire.com/info/moody%E2%80%99s-bets-germany-will-support-deutsche-bank-derivatives-above-all-else-%E2%80%94-analysis; https://www.debtwire.com/info/existing-abs-swaps-also-caught-swap-margin-net-%E2%80%94-analysis; and Appendix B to this letter, pages 27-31, green-shaded background.)

responded to my detailed questions regarding its credit rating methodology for the flip-clause-swap-contract.[34]

Moody's and S&P have first-hand experience with my use of academic and journalistic tools to produce best-practice work on the flip-clause-swap-contract and place the work in the public domain. In July 2018, Croatan Institute, where I am a senior fellow, posted my Working Paper "Can Green Bonds Flourish in a Complex-Finance Brownfield?"[35] The paper addresses the use of the flip-clause-swap-contract globally.

In preparing the Working Paper, I emailed a joint questionnaire to Moody's, S&P, Obvion (a Dutch residential mortgage company and serial user of flip-clause-swap-contracts in residential-mortgage-backed security programs), the Climate Bond Initiative, and Sustainalytics (now wholly owned by Morningstar Inc., the parent company of DBRS Morningstar) on December 4, 2017.[36] Obvion, the Climate Bond Initiative, and Sustainalytics each emailed a response. Moody's and S&P did not respond.[37]

Sidebar — A Handful of Securitization and Derivative Contract Practitioners Openly Critique the Sectors' Deficient Underpinnings

The delivering email copies: Mark Adelson, Editor, *Journal of Structured Finance*; Dorian Crede, Chairman Wikirating; Norbert Gaillard, NG Consulting; Marc Joffe, Senior Policy Analyst, Reason Foundation; Gene Phillips, CEO, PF2 Securities; Joe Pimbley, Editor, *Journal of Derivatives*; Ann Rutledge, Founding Principal & CEO, Credit Spectrum Corp.; Alberto Thomas, Partner, Fideres Partners LLP; and Mayra Rodriguez Valladares, Managing Principal, MRV Associates.

An even smaller handful of research practitioners are open to critiquing the workings of the entire financial sector. The delivering email copies: Andy Green, senior fellow for Economic Policy at American Progress; Jerome Jérôme Tagger, CEO Preventable Surprises; and Hamish Stewart.

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[34] Harrington, Bill, "Margin posting: swaps increase ABS issuance costs by 1%, 3%, 7% of deal size," *Debtwire ABS*, May 16, 2016. (Available upon request to the author.) "DBRS, Fitch, Kroll, Morningstar, Moody's Investors Service and S&P each declined to comment on margin posting by ABS issuers."

[35] Harrington, Bill, "Can Green Bonds Flourish in a Complex-Finance Brownfield?" *Croatan Institute Working Paper*, July 2018.
(Available at: http://www.croataninstitute.org/publications/publication/can-green-bonds-flourish-in-a-complex-finance-brownfield.)

[36] Harrington, Bill, "Questions Posed by Bill Harrington to Spokespersons and Analysts at Obvion, Climate Bonds Initiative, Moody's Investors Service, S&P Global, and Sustainalytics via Group Email," December 4, 2017. (Posted as the LinkedIn article "GREEN STORM RMBS and ABS Flip Clause Swaps," February 28, 2018, which is available at: https://www.linkedin.com/pulse/green-storm-rmbs-abs-flip-clause-swaps-bill-harrington/.)

[37] Op. cit., "Harrington: Can Green Bonds Flourish in a Complex-Finance Brownfield?", *Croatan Institute Working Paper*, pages 6-7 and 20-21.
(Available at: http://www.croataninstitute.org/publications/publication/can-green-bonds-flourish-in-a-complex-finance-brownfield.)

I have shared my work with academicians who specialize in ethics, the financial crisis, securitizations, derivative contracts, and credit rating companies. The delivering email copies John C. Coffey, Jr., Columbia Law School; Greg Feldberg, Yale School of Management; Robert J. Jackson, NYU School of Law; Elisabeth Kempf, University of Chicago Booth School of Business; Larry Lessig, Harvard Law School; Frank Partnoy, Berkely Law; Katharina Pistor, Columbia Law School; Jessica Roth, Cardozo Law; and Nancy Wallace, Berkeley Haas.

The delivering email also copies my brother-in-law Dean Leistikow, Gabelli School of Business, Fordham University.

Using First-Person Journalism to Beat Back Financial Sector Apologists and Enablers and to Flush Out Cowering ChurchMice and Fence-Sitters

The delivering email copies Itay Goldstein, Wharton School, University of Pennsylvania; Francesco Sangiorgi, Frankfurt School of Finance and Management; and Chester Spatt, Carnegie Mellon University.

My work breaks ground as an advocacy tool that combines deep experience, rigorous research, and first-person journalism. The delivering email copies Steve Coll, Columbia Journalism School; the International Consortium of Investigative Journalists; John L. Jackson, Jr., Annenberg School for Communications, University of Pennsylvania; Joe Mathewson, Medill School of Journalism, Northwestern; Cezary Podkul, Hong Kong University; and Stephen D. Solomon, Arthur L. Carter Journalism Institute, NYU.

CreditFlux is an online publication that covers the CLO sector and, like *Debtwire ABS*, is owned by Acuris, Inc. The delivering email copies my former colleague Said Perwaiz Kadiri, Editor of *CreditFlux*.

For reasons that should be painfully obvious to the addressees, as well as to many of those copied, the delivering email copies Jesse Eisinger, author of "The CHICKENSHIT CLUB: Why the Justice Department Fails to Prosecute Executives."

I will physically mail this letter to the US Department of Justice persons and to the states and District of Columbia attorneys general to whom the CEO of Moody's Corporation must submit regular certifications pertaining to Moody's Compliance Commitments under the $864 million settlement that Moody's Corporation, Moody's Investors Service, and Moody's Analytics agreed with the US Department of Justice and the attorneys general of 21 states and the District of Columbia on January 13, 2017.[38]

[38] US Department of Justice, "Justice Department and State Partners Secure Nearly $864 Million Settlement with Moody's Arising from Conduct in the Lead up to the Financial Crisis," January 13, 2017. (Available at: https://www.justice.gov/opa/pr/justice-department-and-state-partners-secure-nearly-864-million-settlement-moody-s-arising.)

The delivering email copies Mr. Kyle Plotkin, Chief of Staff for US Senator Joshua D. Hawley of Missouri. Senator Hawley was a signatory to the Moody's settlement in his previous capacity as Missouri Attorney General.

Moody's violates the Compliance Commitments that it agreed in the settlement, as this letter documents. In many cases, the violations have been ongoing since 2016.[39] In other instances, the violations started as recently as December 14, 2020.[40] The delivering email copies Ms. Amy Winkelman, Assistant General Counsel at Moody's Investors Service and Ms. Sharon Nelles, Partner, Sullivan & Cromwell.

The delivering email copies the State of New York Office of the Attorney General and the New Jersey Office of the Attorney General. Appendix E, pages 43-44, yellow-shaded background, contains the letter to me from the State of New York Office of the Attorney General "Re: Moody's Investors Service Reference Number: 20-055709 Matter Identification Number: 1-208010483" dated November 16, 2020. Appendix F, pages 45-46, also yellow-shaded background, contains

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[39] For instance, see Moody's credit ratings of Natixis, debt of its U.S. based end users of flip-clause-swap-contracts, most other providers of flip-clause-swap-contracts globally, Navient, student loan ABS, and debt of all other U.S. based end users of flip-clause-swap-contracts in Op. cit., "Harrington Proposed Amicus Curiae Brief in Lehman Brothers Flip Clause Case," pages A-B and 51-53. (Available at: http://croataninstitute.org/images/publications/20190808-Amicus-Curiae-Brief.pdf.) Also, Moody's credit ratings of **(1)** US CLOs without flip clauses in the priorities of payment viz-a-viz **(2**) US CLOs with flip clauses in the priorities of payment but without either the operational capability or financial capacity to comply with the daily, two-way exchange of variation margin. Among other violations, Moody's ignores its methodology claim to fully assess the "four-corners" of a given CLO, i.e., to address all actions that an issuer *may take* per the governing documents as opposed to only those actions that the issuer *has taken* at time of committee vote. Also, **(3)** Moody's credit ratings of every provider of a flip-clause-swap-contract in the world viz-a-viz **(4)** similar entities that do not provide flip-clause-swap-contracts.

[40] For instance, every voting member of a Moody's committee that assigns, reviews, or otherwise assesses a credit rating to debt issued by an entity anywhere in the world with a flip clause in the priorities of payments. In each such instance, the committee ignores the ***governance*** failures of a party that uses a flip-clause and thereby assigns a credit rating that conflicts with Moody's Investors Service, "General Principles for Assessing Environmental, Social and Governance Risks Methodology," *Cross-Sector Rating Methodology*, December 14, 2020, Page 26, footnote 14. "For structured transactions, we consider the impact of ESG risks that are expected to unfold within the legal final maturity of the transaction." Likewise, every voting member of a Moody's committee that assigns, reviews, or otherwise assesses a credit rating to debt issued by an entity anywhere I the world that provides a flip clause in the priorities of payments. In each such instance, the committee ignores the ***governance*** failures of the respective entities' management. The same methodology, page 17, including footnote 4. "Boards have a critical oversight role in the area of risk management, [footnote]4 including involvement in setting and monitoring the firm's risk appetite, ensuring that a proper risk management framework is in place, and protecting the interests of all stakeholders, including creditors." "[Footnote] 4. This includes management of ESG-related risks."
(Available at: https://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBC_1243406.)

the letter to me from the New Jersey Office of the Attorney General "Re: Moody's File Number: 10133000.OCP" dated November 9, 2020.

Appendix G, pages 47-52, white-shaded background, contains the CFTC Acknowledgement of the following Freedom of Information Act request that I filed on December 17, 2020.

Questions for the CFTC, the SEC, the SFA, LSTA, DBRS, Fitch, Moody's, and S&P Global

1. Do you agree that the flip-clause-swap-contract was a root cause of the 2008 global financial catastrophe? That the flip-clause-swap-contract was an integral component of the under-capitalized structured debt that started, fueled, and pro-longed the 2008 financial catastrophe? That the flip-clause-swap-contract was a tool that financial institutions such as AIG, Bear Stearns, and Lehman Brothers used to under-capitalize themselves? That the flip-clause-swap-contract was a tool that Greece, with a big assist from Goldman Sachs, used to crash its own economy?

2. Does every structured issuer around the world still undercapitalize debt when party to a flip-clause-swap-contract?

3. Does every provider of a flip-clause-swap-contract around the world still undercapitalize its self-referencing exposure to 100% loss of contract value under each flip clause?

4. The financial sector in general, and each of your respective entities in particular, practice strict omertà regarding the deficiencies of the flip-clause-swap-contract and the global havoc that it wreaked. **If "no," please prove it.**

5. **If "yes," why practice strict omertà?** Does observation, cultivation, and enforcement of omertà regarding the flip-clause-swap-contract resemble well-known instances of people who know better and should speak out but instead hold their tongues? A current instance includes those Republicans in public office who have not recognized the success of the US Presidential election, particularly given the ongoing pandemic. Historic instances include people who did not speak out against life-threatening prejudice such as racism and anti-semitism.

6. For those of you based in the United States of America, do you love your Country? Does your work strengthen the Country or tear it down?

Questions for the CFTC

7. Please substantiate the belief that the *Capital Requirements of Swap Dealers and Major Swap Participants* "appropriately accounts for . . . bespoke swap transactions involving flip clauses." Are the CFTC letters No. 17-52 and 15-21 the best work that the Commission has produced in its "long experience" with "bespoke transactions involving flip clauses?"[41]

[41] Harrington, Bill, "U.S. Financial Regulators Balk at Examining Complex Finance," *Croatan View*, February 8, 2018. (Available at: http://croataninstitute.org/latest/news/us-financial-regulators-balk-at-examining-complex-finance.) Also, Op. cit., "Harrington Letter Re '31 Misrepresentations in CFTC Letter No. 17-52'," February 2, 2018, pages 1-79 and 92-110, respectively. (Available at:

8. If the CFTC cannot substantiate the belief, is it because the belief as unfounded as beliefs of President Trump that the coronavirus will "just disappear" and the 2020 presidential election was "rigged?"[42] **If "yes,"** are the *Capital Requirements of Swap Dealers and Major Swap Participants* "arbitrary, capricious, and an abuse of discretion?"

9. What will the CFTC provide in response to the following Freedom of Information Request that I filed on December 17, 2020?

   Please provide all information pertaining to "swap transactions involving flip clauses" that the Commission either used or uses in establishing that it "believes" that the "standardized market risk capital charges" in Commodity Futures Trading Commission "Capital Requirements of Swap Dealers and Major Swap Participants" (September 15, 2020) 85 FR 57465 are "effective and appropriately calibrated".

   "The standardized market risk capital charges being adopted are generally based on existing Commission and SEC standardized market risk charges for positions in foreign currencies, commodities, U.S. treasuries, equities and other instruments, which, in the Commission's long experience, have generally proven to be effective and appropriately calibrated to address potential market risk in the positions. The Commission believes at this time that this approach, in conjunction with other charges discussed herein, appropriately accounts for the wide variety of possible uncleared swap transactions that FCMs, FCM-SDs, and covered SDs may engage in, including bespoke swap transactions involving flip clauses or other unique features."[43]

10. In diluting its regulations to harmonize with the content-free regulations of the SEC, is the CFTC racing the SEC to the bottom in the same manner as DBRS, Fitch. Moody's, S&P Global, and other NRSROs? Do the respective races to the bottom create a circular, self-reinforcing, negative multiplier effect that harms the Country because **(1)** the NRSROs treat regulatory policy as an input to inflate all manner of credit ratings for all manner of issuers worldwide while, at the same time, and **(2)** the CFTC bases its own regulations on the same inflated credit ratings from DBRS, Fitch, Moody's, and S&P Global?[44]

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https://www.wikirating.org/data/other/20180203_Harrington_J_William_31_Misrepresentations_in_CFTC%20_Letter_No_17-52.pdf.)

[42] Wolfe, Daniel and Daniel Dale, "'It's going to disappear': A timeline of Trump's claims that Covid-19 will vanish," *CNN*, updated as of October 31, 2020. Levin, Bess "Breaking: Trump Throws Impotent Fit Over 'Rigged' Election for 38th Day Straight," *Vanity Fair*, December 15, 2020. (Available at, respectively: https://www.cnn.com/interactive/2020/10/politics/covid-disappearing-trump-comment-tracker/ & https://www.vanityfair.com/news/2020/12/donald-trump-impotent-fit-2020.)

[43] See Appendix G, pages 47-52, white-shaded background.

[44] US Commodity Futures Trading Commission, "CFTC Letter No. 17-52 Re No-Action Position: Variation Margin Requirements Applicable to Swaps with Legacy Special Purpose Vehicles," October 27, 2017, en toto. Federal Register, Vol 82, No. 200, 48394-48413, "COMMODITY FUTURES TRADING COMMISSION 17 CFR Chapter I Comparability Determination for the European Union: Margin

11. Does the CFTC welcome a new Section 13.1 Petition to issue the following rule? "*The Commission must abide by Dodd-Frank Section 939A, which 'directs each federal agency to . . . [remove] . . . all references to or requirements of reliance on credit ratings and substituting alternative standards of creditworthiness. In establishing such alternative standards, an agency must, to the extent feasible, establish uniform standards, taking into account the entities it regulates and the purposes for which such entities would rely on the alternative standards of creditworthiness'*"[45]

12. Is the widespread use of NRSRO credit ratings by the global financial sector, including by US regulators with global reach such as the CFTC and the Federal Reserve Board, a market and governance failure that both undermines and repudiates the free market system?

13. Given the CFTC and SEC race to the bottom, was the 111th United States Congress correct to strip the CFTC and the SEC of standard exemption-granting ability with respect to Title VII of the Dodd-Frank Act?[46]

Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants," October 17, 2017, page 48409. "Other differences concern corporate bonds, the most senior tranche of a securitization, and convertible bonds that can be converted only into equities listed on specific indexes, all of which are allowed under the EU margin rules but not under the Final Margin Rule. However, the EU margin rules do address the inherent risk posed by these assets by including additional safeguards when using these types of collateral. ***Regarding corporate bonds and convertible bonds, a counterparty subject to the EU margin rules must assess the credit quality of the assets using a specified internal rating or a credit quality assessment issued by a recognized External Credit Assessment Institution ("ECAI"). Regarding the most senior tranche of a securitization, a counterparty must use an ECAI's credit quality assessment to assess the tranche's credit quality*** [emphasis added]."
(Available at, respectively: https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/17-52.pdf & https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2017-22616a.pdf.)

[45] Board of Governors of the Federal Reserve System, "Other Reports to the Congress, Report on Credit Ratings," July 2011. Also, Pimbley, Joe and Bill Harrington, "Federal Reserve Trashes Dodd-Frank Restrictions on Credit Ratings," *Croatan View*, May 20, 2020.
(Available at, respectively: (https://www.federalreserve.gov/publications/other-reports/credit-ratings-report-201107.htm & http://www.croataninstitute.org/latest/news/federal-reserve-trashes-dodd-frank-restrictions-on-credit-ratings.)

[46] Op. cit., "Harrington: Can Green Bonds Flourish in a Complex-Finance Brownfield?", page 8, including footnote 27, and pages 25-27. Op. cit., "Harrington Proposed Amicus Curiae Brief in Lehman Brothers Flip Clause Case," pages 24-25. "To ensure CFTC and SEC compliance, Congress curbed the agencies' 'exemptive authority with respect to the swaps requirements of Dodd-Frank.'" Also, page 42. "Had Congress intended to protect the flip-clause-swap-contract under US bankruptcy law, Congress would have passed the Financial Choice Act of 2017. The bill would have eased the CFTC-Swap-Margin-Rule by exempting many swap contracts from margin posting."

14. Is the CFTC proud to be the regulator-of-record for the flip clause? **If "yes,"** why did the Commission disregard cross-border assessment of the flip-clause-swap-contract in recent cross-border rule-making?[47]

15. Has the Loan Syndications and Trading Association (LSTA) or a vendor such as Sidley Austin threatened the CFTC with a reduction of appropriations, litigation, or both to obtain favorable treatment for US CLOs that have a flip clause in the priorities of payment but lack the both the operational capacity and the financial resources to comply with the daily, two-way exchange of variation margin that the U.S. swap margin rules mandate.[48]

16. Will the CFTC ever opine on whether the TRIPRA exemption applies to the securitization entities of "captive finance companies?"[49]

(Available at, respectively: http://www.croataninstitute.org/publications/publication/can-green-bonds-flourish-in-a-complex-finance-brownfield & http://croataninstitute.org/images/publications/20190808-Amicus-Curiae-Brief.pdf.)

[47] Federal Register, Vol 85, No. 178, 56924-57016, "COMMODITY FUTURES TRADING COMMISSION 17 CFR Part 23 Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants," September 14, 2020, page 56926, footnote 20. "The Commission also received letters from . . . William Harrington that were not relevant to the Proposed Rule."
(Available at: https://www.cftc.gov/sites/default/files/2020/09/2020-16489a.pdf.)

[48] See Appendix D to this letter, "WJH Transcript of Sidley Austin / LSTA Webinar: 'End of the (Loan Regulatory) World as We Know It?" May 9, 2018, pages 33-42, yellow-and white shaded background. See comments by Mr. Richard Klingler, pages 35-37, in toto, including the following. "I mean, if you want to upset a regulator, go talk to the appropriations committee on the Hill and ask that they [the regulator in question] not get the money that they want or that their framing statute be changed. That's the way to upset a regulator and the finance industry has no problem doing that." II "Beyond the initial ask . . . Do you want in some ways to get more? And can litigation and the related policy arguments help get you there? Classes of securitizations are entitled to relief from risk regulations. You should do this. It's the right thing to do. Oh, by the way, I potentially have this judicial path."
(The webinar was available at: https://sidley.rev.vbrick.com/#/videos/9bb231c9-cc80-48bb-b13d-8d9505e51050 as of December 21, 2020.)

[49] Harrington, Bill, "Existing ABS swaps also caught in swap margin net," *Debtwire ABS*, August 12, 2016. "As an aside, the question of whether the securitization entities of 'captive finance companies' benefit from the TRIPRA exemption for new swaps, and thus amended ones, remains open. The CFTC still had not responded to the following question — *Does the hedging swap of an SPV of a 'captive finance company' benefit from the TRIPRA exemption from margin requirements?* — at the time of this writing. *Debtwire ABS* first posed this question more than a week ago, as previously reported (see article, 4 August)." (Available at: https://www.debtwire.com/info/existing-abs-swaps-also-caught-swap-margin-net-%E2%80%94-analysis.)

Questions for the LSTA

17. No US CLO has the financial or operational capacity for the daily, two-way exchange of variation margin. Why do 75% of US CLOs have a flip clause in the priorities of payments?

18. Of the universe of managers and underwriters of US CLOs with a flip clause in the priorities of payment, how many can articulate how a flip clause operates? If the answer is "**few-to-none**," does the answer indicate a failure of market information, governance, and capitalism?

19. Do you advocate that the 25% of U.S. issuers of CLOs without flip clauses in the priorities of payments badger NRSROs for better credit ratings and for better governance ratings viz-a-viz debt of the 75% of U.S. CLOs with flip clauses in the priorities of payments but without either the operational capacity or financial resources to comply with the daily, two-way exchange of variation margin that the U.S. swap margin rules mandate? **If "no," why not?**

20. Has your organization or a vendor such as Sidley Austin threatened the CFTC with a reduction of appropriations, litigation, or both to obtain favorable treatment for US CLOs that have a flip clause but lack the both the operational capacity and the financial resources to comply with the daily, two-way exchange of variation margin that the U.S. swap rules mandate?[50] If the answer is "**yes**," does the answer indicate a failure of market information, governance, and capitalism?

Questions for DBRS, Fitch, Moody's and S&P

21. Which persons or entities anywhere in the world have analyzed the flip-clause-swap-contract robustly since 2000?[51]

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[50] See Appendix D to this letter, "WJH Transcript of Sidley Austin / LSTA Webinar: 'End of the (Loan Regulatory) World as We Know It?" May 9, 2018, pages 33-42, yellow-and white shaded background. See comments by Mr. Richard Klingler, pages 35-37, in toto, including the following. "I mean, if you want to upset a regulator, go talk to the appropriations committee on the Hill and ask that they [the regulator in question] not get the money that they want or that their framing statute be changed. That's the way to upset a regulator and the finance industry has no problem doing that." II "Beyond the initial ask . . . Do you want in some ways to get more? And can litigation and the related policy arguments help get you there? Classes of securitizations are entitled to relief from risk regulations. You should do this. It's the right thing to do. Oh, by the way, I potentially have this judicial path."
(The webinar was available at: https://sidley.rev.vbrick.com/#/videos/9bb231c9-cc80-48bb-b13d-8d9505e51050 as of December 21, 2020.)

[51] Op. cit., "Harrington Motion for Leave to File an Amicus Curiae Brief Re: Case No. 18-1079 (Lehman vs 250 Financial Entities), in toto. Also, Op. cit., "Harrington Proposed Amicus Curiae Brief in Lehman Brothers Flip Clause Case," in toto.

22. For each year since 1995, how many parties globally have entered into how many flip-clause-swap-contracts?

23. A flip-clause-swap-contract exposes the swap provider to deep subordination of termination assets in event of its own default or non-performance. The cumulative exposure is inordinately large because flip-clause-swap-contracts are essentially ring-fenced by individual structured debt issuer. For each provider of one or more flip-clause-swap-contracts in the world, what is the aggregate, un-netted exposure to flip-clause-swap-contracts assets? Does each swap provider robustly capitalize the aggregate, un-netted exposure to flip-clause-swap-contracts assets?[52]

24. Are virtually all structured debt issuers globally that are party to a swap contract party to only a single type of swap contract, namely the flip-clause-swap-contract?

25. Does a smart contract recognize the deficiencies in law and in capitalization that a flip-clause-swap-contract embeds viz-a-viz each of the two parties?

26. Why does your company lock deal reports such as presale and new issuance reports so quickly? What other sources report the presence or absence of a flip clause in the priorities of payment?

27. Does the daily, two-way exchange of variation margin and all other components of the US swap margin rules significantly reduce the respective credit exposures of both structured debt and a swap dealer viz-a-viz a flip-clause-swap-contract? ***If "no***," please explain why not. ***If "yes***," should all debt of an issuer that is party to a flip-clause-swap-contract be downgraded? Should every swap provider of a flip-clause-swap-contract be downgraded?

28. Why is your credit rating methodology for the flip-clause-swap-contract so voluminously prescriptive? In contrast, why is your credit rating methodology for a structured debt issuer that enters into a swap with the daily, two-way exchange of variation margin so sparse as to be essentially non-existent?

29. How many credit rating methodologies work in tandem with your credit rating methodology for the flip-clause-swap-contract?

30. Regarding non-US structured debt, do your assign lower recovery rates, and where applicable higher expected losses, to debt when a flip-clause-swap-contract is present viz-a-viz debt when no flip-clause-swap-contract is present?

(Available at: http://croataninstitute.org/images/publications/WJH-Motion-to-File-Amicus-Brief.pdf & http://croataninstitute.org/images/publications/20190808-Amicus-Curiae-Brief.pdf, respectively.)

[52] Op. cit., "Harrington Motion for Leave to File an Amicus Curiae Brief Re: Case No. 18-1079 (Lehman vs 250 Financial Entities), June 25, 2019, pages 25-29 and 35.
(Available at: http://croataninstitute.org/images/publications/WJH-Motion-to-File-Amicus-Brief.pdf.)

31. Do you publish studies on the global use and performance of the flip-clause-swap-contract since its first use approximately 25 years ago? ***If "yes***," is the study as comprehensive as possible in that it uses data for parties to which your company did not assign and monitor credit ratings or, alternatively, does the study solely use in-house data? Does the study validate ***all*** assumptions in your flip-clause-swap-contract methodology? In addition to enforceability of the flip clause by domicile, assumptions include "one-way collateralization," "replacement / guarantee," and "rating agency confirmation, notification, or RAC."[53]

32. **Also, if "yes,"** How does the "replacement" component of your study treat the losses to a replaced counterparty such as Bear Stearns and BSFP in light of the JPMorgan guarantee?[54]

33. **Also, if "yes,"** how does your study compare losses ***to structured debt with flip-clause-swap-contract assets*** in different cases where "replacement" failed, for example where Lehman Brothers continued to provide a flip-clause-swap-contract viz-a-viz when a propped-up counterparty such as BSFP, AIG, or Merrill Lynch entities continued to provide a flip-clause-swap-contract?[55]

34. **If you do not publish studies on the global use and performance of the flip-clause-swap-contract, why not?** If you cannot validate your credit rating methodology for the flip-clause-swap-contract, how do you validate the credit rating methodologies that work in tandem with flip-clause-swap-contract methodology?

35. Do you train and test managers and analysts of each sector where issuers are end-users of the flip-clause-swap-contract, or place flip clauses in the priorities of payments, on the credit exposures that the flip-clause-swap-contract creates? Notable sectors where issues are end-users of the flip-clause-swap-contract include most non-U.S. structured debt and the US student loan ABS, which Navient dominates. The notable sector that places flip clauses in the priorities of payments is US CLOs.

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[53] Gaillard, Norbert J., and William J. Harrington, Efficient, commonsense actions to foster accurate credit ratings, *Capital Markets Law Journal*, Volume 11, Issue 1, January 2016, Pages 38–59, https://doi.org/10.1093/cmlj/kmv064. Regarding the respective provisions' failures, see pages 42-44, including footnotes 37, 40, 41, 42, 44, and 45, 46, and 47. Also, Harrington, William J., "Comment on SEC Proposed Rules for Nationally Recognized Statistical Rating Organizations," August 8, 2011. Search "swaps," "flip clause," "replacement," "guarantee," "hedge," "AIG," & "MLDP" & "compliance." (Available at: https://www.sec.gov/comments/s7-18-11/s71811-33.pdf .)

[54] Moody's Investors Service, "Moody's issues rating confirmation for Bear Stearns affiliate," *Announcement*, 4 June 2008. (Available at: https://www.moodys.com/research/Moodys-issues-rating-confirmation-for-Bear-Stearns-affiliate--PR_156804.)

[55] Op. cit., "Harrington Motion for Leave to File an Amicus Curiae Brief Re: Case No. 18-1079 (Lehman vs 250 Financial Entities), June 25, 2019, pages 25-29 and 35.
(Available at: http://croataninstitute.org/images/publications/WJH-Motion-to-File-Amicus-Brief.pdf.)

36. Since the US swap margin rules that mandate the daily, two-way exchange of variation margin took effect on March 1, 2017, how many US issuers of structured debt have entered into a swap that complies the US swap margin rules?

37. Alternatively, since the US swap margin rules took effect on March 1, 2017, how many US issuers of structured debt have placed a flip clause in the priorities of payment?

38. How do you assess the ***ability to pay*** interest and principal in full as due for a US issuer with a flip clause in the priority of payments, given that the flip clause contravenes applicable US law and regulations? In the ongoing, real-world instance that I document earlier in this letter, 75% of outstanding US CLOS **(1)** have flip clauses in the priorities of payments but **(2)** lack the operational and capital resources for daily, two-way exchange of variation margin, i.e., cannot comply with the US swap margin rules.[56] Do you assign lower credit ratings to the debt of these 75% of US CLOs viz-a-viz the credit ratings of otherwise similar debt of the remaining 25% of US CLOs without flip clauses in the priorities of payments? If not, are you assigning credit ratings that are inconsistent with the applicable credit rating methodologies? Are you failing to abide by applicable credit rating methodologies that purport to assess the "four-corners" of a CLO?[57]

39. How do you assess the ***governance*** of a US CLO issuer, manager, or agent that places a flip clause in the priority of payments when doing so is inconsistent with applicable US law and regulations? Do these US CLOs have lower governance scores than the remaining 25% of US CLOs that do not have flip clauses in the priorities of payments? If not, are you assigning governance scores that are inconsistent with the applicable credit rating methodologies?

40. How do you incorporate your ***governance*** assessment of a US issuer or agent such as CLO manager into the credit ratings of the associated debt? Does a higher governance score map to higher credit ratings to the issuer's debt viz-a-viz comparable debt where the issuer or agent has a lower governance score?

41. How do you assess the ***governance*** of your company and that of your competitors based on the respective credit rating methodologies and credit ratings for entities that are party to a flip-clause-swap-contract or that place a flip clause in the priorities of payments?

42. Does any NRSRO credit rating company, including your own, have the standing to assess the ***governance*** of any other entity?

43. Does the prevalence of the flip-clause-swap-contract outside of the US undermine or strengthen the respective economies and financial systems? Does the absence of flip-

[56] See footnote 26 to this letter.

[57] NRSRO credit rating companies use the term "four-corners" to represent that credit ratings of a given CLO, particularly a new credit rating, addresses all actions that an issuer *may take* per the governing documents as opposed to only those actions that the issuer *has taken* at time of committee vote.

clause-swap-contracts in US structured debt (the prevalence of flip clauses without flip-clause-swap-contracts in US CLOs notwithstanding) strengthen or undermine the US economy and financial system?

44. Do you train and test analysts of financial institutions that provide flip-clause-swap contracts to end-users on the self-referencing credit risk that an institution incurs under each flip-clause-swap-contract? **If "yes,"** do you use Lehman Brothers as an example of how an institution can lose 100% of a swap asset after it has entered bankruptcy? **Also, if "yes,"** do you use BSFP as an example of the losses that a parent company takes when forced to divest flip-clause-swap-contracts that are assets at fire-sale prices?

45. Should the Federal Reserve System comply with Dodd-Frank 939A and remove all references to the credit ratings of your company and other NRSROs from all recovery programs?[58] Is the Fed's use of your credit ratings self-referencing and circular, given that, in turn, your company uses Fed policy as a rating input? How do you evaluate the impact of capital rules of the CFTC, the SEC, and any other financial regulators that do not obligate a swap dealer to hold much more capital against a flip-clause-swap-contract viz-a-viz an otherwise similar swap contract with no flip clause?[59] Are such capital rules a credit negative for the respective domiciles?

Respectfully,

/s/William J. Harrington

Harrington Independent Flip Clause Assessments
Senior Fellow, Croatan Institute
Wikirating.org Experts Board — Structured Finance Topics

CC: Mr. Rostin Benham, Commissioner, U.S. Commodity Futures Trading Commission

Mr. Dan Berkovitz, Commissioner, U.S. Commodity Futures Trading Commission

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[58] Pimbley, Joe and Bill Harrington, "Federal Reserve Trashes Dodd-Frank Restrictions on Credit Ratings," *Croatan View*, May 20, 2020. (Available at: http://www.croataninstitute.org/latest/news/federal-reserve-trashes-dodd-frank-restrictions-on-credit-ratings.)

[59] U.S. Commodity Futures Trading Commission, "Capital Requirements of Swap Dealers and Major Swap Participants," 85 FR 57462, September 15, 2020, page 57475. "The Commission believes at this time that this approach, in conjunction with other charges discussed herein, appropriately accounts for the wide variety of possible uncleared swap transactions that FCMs, FCM-SDs, and covered SDs may engage in, ***including bespoke swap transactions involving flip clauses or other unique features*** [emphasis added]."
(Available at: https://www.federalregister.gov/documents/2020/09/15/2020-16492/capital-requirements-of-swap-dealers-and-major-swap-participants#page-57475.)

Ms. Dawn Stump, Commissioner, U.S. Commodity Futures Trading Commission

Ms. Allison Herren Lee, Commissioner, United States Securities and Exchange Commission

Mr. Abe Putney, US Securities and Exchange Commission

Mr. David Teicher, Office of Credit Ratings, US Securities and Exchange Commission

Mr. Rick Michalek, RJM Consulting

Mr. Swami Venkataraman, Moody's Investor Service

Mr. James Leaton, Moody's Investors Service

Mr. Gus Harris, Moody's Analytics

Mr. Jason Silverstein, Securities Industry and Financial Markets Association

Mr. Mark Adelson, *Journal of Structured Finance*

Mr. Norbert Gaillard, NG Consulting

Mr. Marc Joffe, Reason Foundation

Mr. Gene Phillips, PF2 Securities

Dr. Joe Pimbley, *Journal of Derivatives*

Ms. Ann Rutledge, Credit Spectrum Corp

Mr. Alberto Thomas, Fideres Partners, LLP

Ms. Mayra Rodriguez Valladares, MRV Associates

Mr. Andy Green, American Progress

Mr. Jerome Jérôme Tagger, Preventable Surprises

Mr. Hamish Stewart

Professor John C. Coffey, Jr., Columbia Law School

Professor Greg Feldberg, Yale School of Management

Professor Itay Goldstein, Wharton School, University of Pennsylvania

Professor Robert J. Jackson, NYU School of Law

Professor Elisabeth Kempf, University of Chicago Booth School of Business

Professor Larry Lessig, Harvard Law School

Professor Frank Partnoy, Berkeley Law

Professor Katharina Pistor, Columbia Law School

Professor Jessica Roth, Cardozo Law

Professor Francesco Sangiorgi, Frankfurt School of Finance and Management

Professor Chester Spatt, Carnegie Mellon University

Professor Nancy E. Wallace, Berkeley Haas

Professor Dean Leistikow, Gabelli School of Business, Fordham University

Professor Steve Coll, Columbia Journalism School

International Consortium of Investigative Journalists

Professor John L. Jackson, Jr., Annenberg School for Communications, University of Pennsylvania

Professor Joe Mathewson, Medill School of Journalism, Northwestern

Mr. Cezary Podkul, Hong Kong University

Professor Stephen D. Solomon, Arthur L. Carter Journalism Institute, NYU

Mr. Said Perwaiz Kadiri, *CreditFlux*

Mr. Jesse Eisinger, ProPublica

United State Attorney for the District of New Jersey,
United States Attorney's Office for the District of New Jersey,
970 Broad Street, 7th Floor Newark, NJ 07102

Director, Consumer Protection Branch, U.S. Department of Justice
450 5th Street NW Washington, DC 20530

Mr. Kyle Plotkin, Chief of Staff for US Senator Joshua D. Hawley

Ms. Amy Winkelman, Moody's Investors Service

Ms. Sharon Nelles, Sullivan & Cromwell

Ms. Letitia James, Attorney General, State of New York State Office of the Attorney General Re: "Moody's Investors Service / Reference Number: 20-055709 / Matter Identification Number: 1-208010483"

Mr. Gregory Turner, Assistant Deputy of Enforcement New Jersey, Office of the Attorney General, Re: "Moody's File Number: 10133000.OCP"

Appendix A — CFTC Acknowledgement of WJH 13.1 Proposal for Rule to Bar an Entity from Agreeing to a Flip Clause or Walk-Away

U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5100 Facsimile: (202) 418-5521
www.cftc.gov

Office of the Secretariat

June 26, 2020

William J. Harrington

51 5th Avenue, Apartment 16A

New York, NY 10003

Re: Petition for a Rule that Bars an Entity from Agreeing to a Flip Clause or Walk-Away

Dear Mr. Harrington:

This acknowledges receipt by the Commodity Futures Trading Commission ("CFTC" or "Commission"), on May 26, 2020, of the petition you submitted pursuant to Commission Rule 13.1 (17 CFR 13.1). The petition seeks a rulemaking by the Commission to prohibit a swap dealer, major swap participant, or other regulated entity from predicating a swap obligation on a flip clause, walk-away, or variable subordination.

As provided in Rule 13.1, this petition will be referred to the Commission for such action as the Commission may deem appropriate. This office will notify you of any action taken by the Commission on the petition.

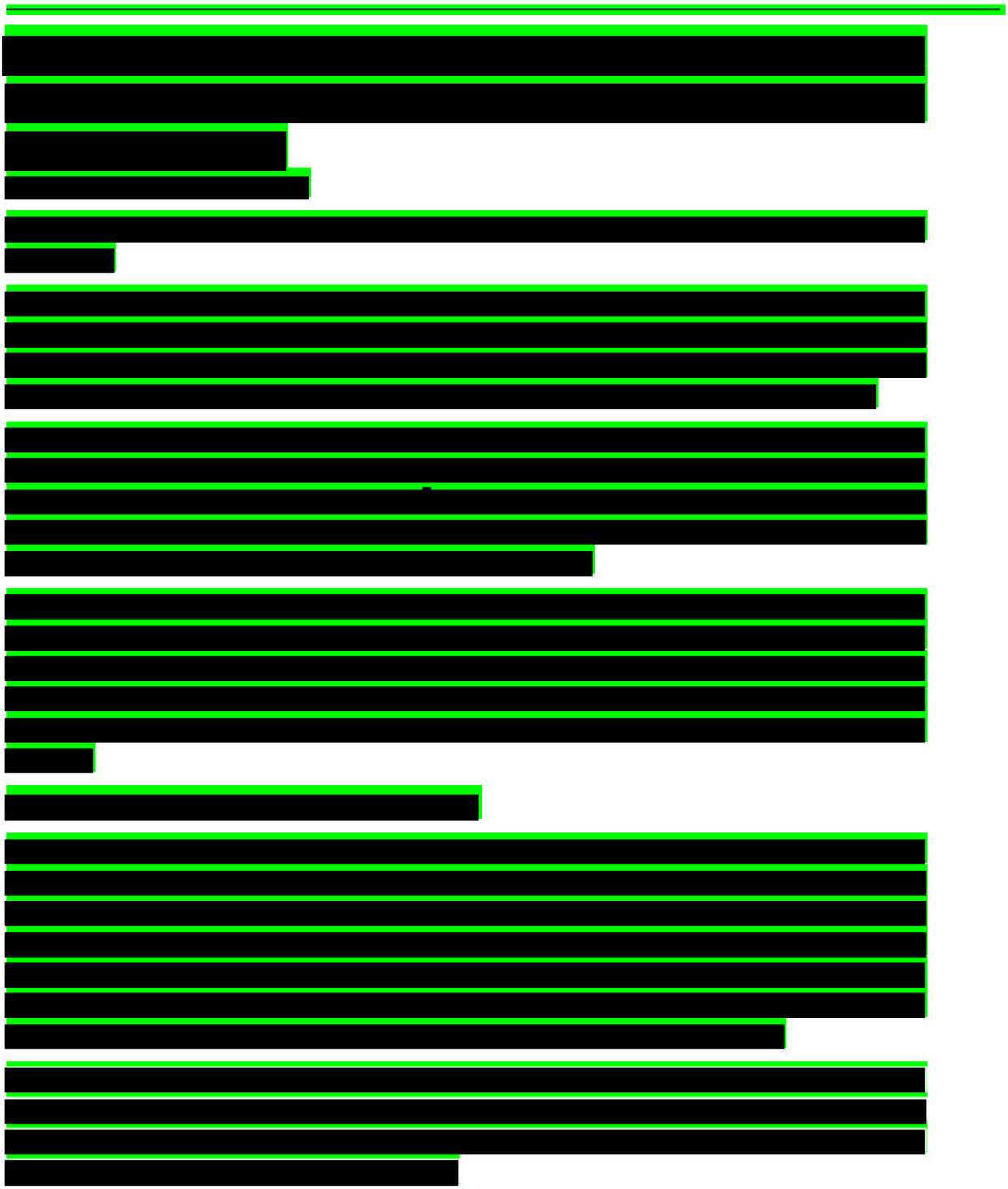
Sincerely,

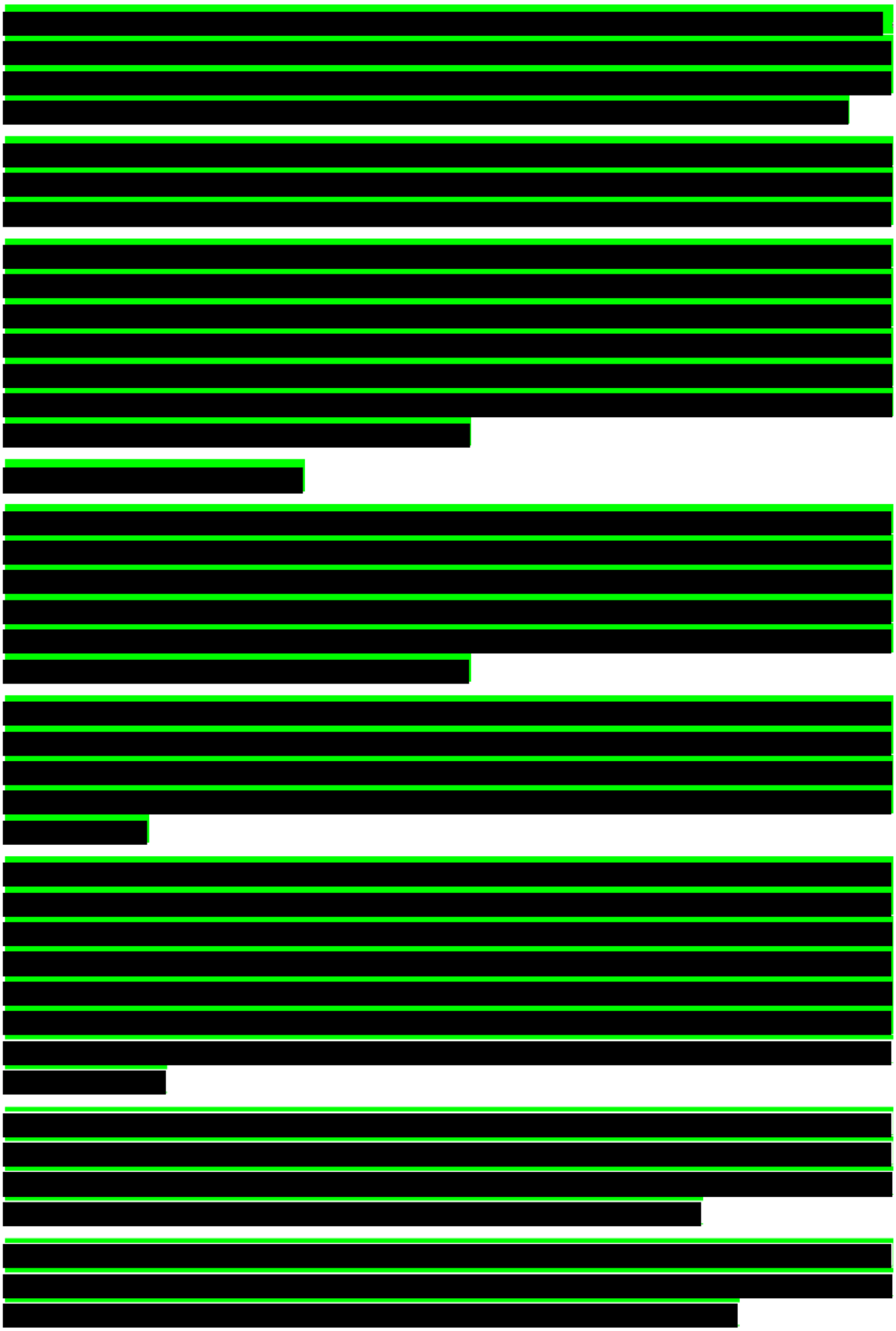
Christopher J. Kirkpatrick

Secretary of the Commission

Appendix B — 2016 *Debtwire ABS* Article on US Swap Margin Rules

Formerly publicly available from 2016-to-2019 on *Debtwire* public site at: http://www.debtwire.com/info/2015/11/04/analysis-us-marginrule-swaps-obliges-securitization-issuers-overhaul-structures-add-resources-rethink-capitalstructures/.





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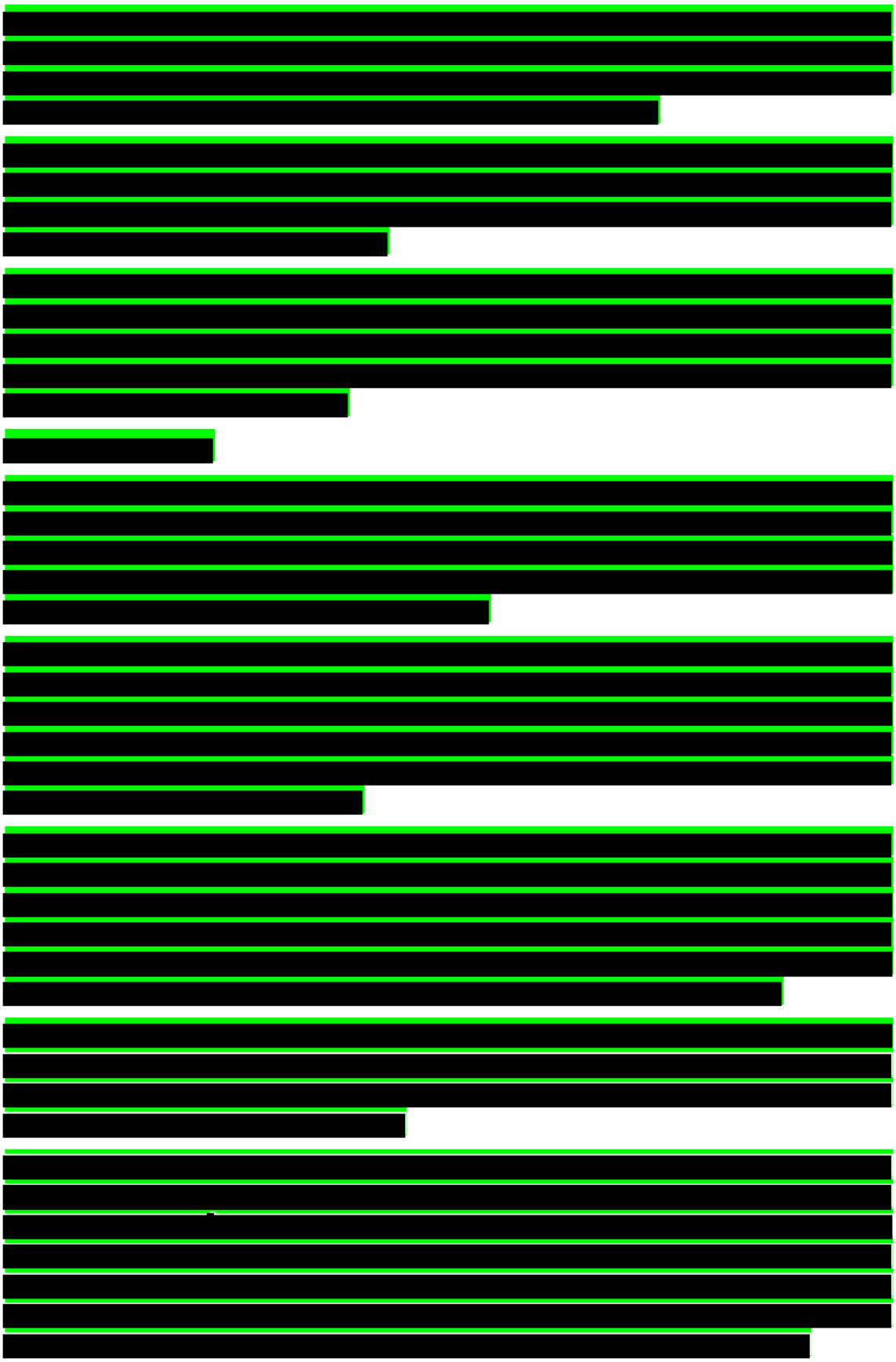


[redacted]

Appendix C – Estimates of Flip-Clause-Swap-Contracts in Deals for which Bill Harrington and Rick Michalek Were Voting Committee Members During Their Respective Tenures at Moody's Investors Service

Final Tally: 1200 Flip-Clause-Swap-Contracts that Structured Finance Entities Entered into Between June 1999 and July 2010.

Mr. Harrington and Mr. Michalek have significant first-hand experience in reviewing flip-clause-swap-contracts and in assessing both the separate, but singularly out-sized credit exposures that the contract imposes on each party, as well as the legal exposures that both parties share.

During his Moody's tenure from June 1999 to July 2010, Mr. Harrington was the lead credit analyst for at least 65 structured finance entities that collectively entered into an estimated 460 flip-clause-swap-contracts. Of the 65 structured finance entities, 60 were structured debt issuers that were end-users of the flip clause-swap-contract. The remaining five entities were derivative products companies (DPCs), four of which provided flip-clause-swap contracts and a fifth that withdrew a proposal to do so based on Mr. Harrington's evaluation. One of the four DPCs that provided flip-clause-swap-contracts — Bear Stearns Financial Products — was a major provider of flip-clause-swap-contracts to the pre-crisis RMBS sector. Mr. Harrington was also lead credit analyst for seven other DPCs and five credit default product companies that did not provide flip-clause-swap-contracts.

During his Moody's tenure from June 1999 to December 20007, Mr. Michalek was the legal analyst for at least 150 structured finance entities that entered into an estimated 140 flip-clause-swap-contracts.

For a subset of the above deals, Mr. Harrington was lead quantitative analyst and Mr. Michalek was lead legal analyst. Each such deal is counted only once, i.e., is not double counted, in the above tallies.

During the overlap of Mr. Harrington and Mr. Michalek's tenures from June 1999 to December 2007, lead analysts in Moody's Derivative Groups also voted to assign ratings in committees for deals in which a third colleague was lead analyst. An estimate of the ratio of committee participations as lead analyst viz-a-viz non-lead voting member = one-to-three. Using this ratio, Mr. Harrington was a voting committee member for an additional 180 deals with a flip-clause-swap-contract and Mr. Michalek was a voting committee member for an additional 420 deals with a flip-clause-swap-contract.

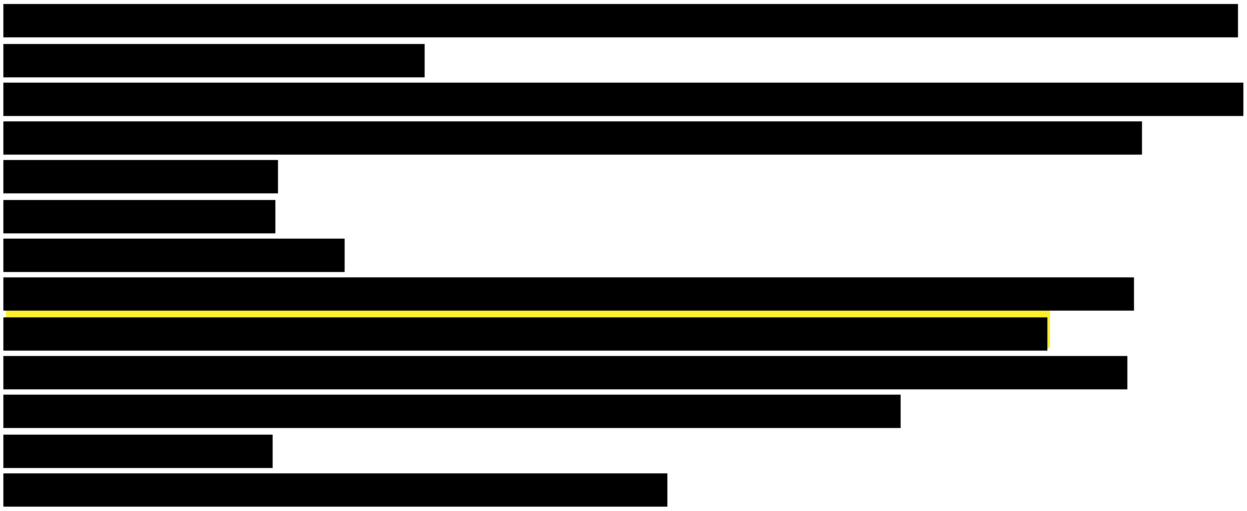
APPENDIX D WJH Transcript of Sidley Austin / LSTA Webinar: "End of the (Loan Regulatory) World as We Know It?" of May 9, 2018

N.B. Yellow-Shaded Text is Especially Noteworthy

(Available at: https://sidley.rev.vbrick.com/#/videos/9bb231c9-cc80-48bb-b13d-8d9505e51050)

[redacted]

[redacted]



[redacted]

[redacted]

[redacted]

[redacted]

APPENDIX E—Letter from State of New York Office of the Attorney General to William J. Harrington Re: Moody's Investors Service / Reference Number: 20-055709 / Matter Identification Number: 1-208010483 / December 16, 2020

State of New York
Office of the Attorney General

Letitia James
Attorney General

Division of Economic Justice
Investor Protection Bureau

November 16, 2020

William J. Harrington
51 Fifth Avenue, #16A
New York, NY 10003

Re: Moody's Investors Service
Reference Number: 20-055709
Matter Identification Number: 1-208010483

Dear William J. Harrington:

Thank you for writing to the New York State Office of the Attorney General regarding the above-referenced matter. We appreciate your alerting us to the situation you describe. Submissions like yours help our Office identify patterns of fraud in the securities industry that may warrant investigation.

While the staff of the Investor Protection Bureau reviews every submission we receive, the Bureau does not act on every submission, and, as our investigations are confidential, we are unable to provide details regarding ongoing investigations (including whether a particular investigation has been opened).

Further, the Investor Protection Bureau does not investigate or litigate cases on behalf of individual investors, and the Bureau's staff members are not private attorneys for individuals who may wish to

pursue personal claims. Therefore, if you believe you may have been harmed, you should consult with a private attorney regarding any civil remedies that may be available to you.

If you do not have an attorney and would like a referral, you may call your city or county bar association. Additional information and resources are also available at https://ag.ny.gov/investor-protection/legal-referral-services-and-clinics and https://ag.ny.gov/investor-protection/faqs. Please note that the passage of time may bar any claims that you might have. It is therefore important for you to act promptly if you wish to pursue a private claim.

If your complaint involves misconduct by a registered broker or dealer, you may be able to file a claim with one or more self-regulatory organizations that govern the securities markets. The appropriate forum for your complaint will depend upon the account agreements you signed and the exchange on which the securities you invested in are traded. A review of your contract or account agreement should reveal which forum, if any, has been specified to resolve disputes pertaining to your account. You may wish to directly contact the forum that has been specified to request information about how to pursue a claim.

If your broker or dealer is a member of the Financial Industry Regulatory Authority ("FINRA"), your customer agreement will likely contain a mandatory arbitration clause. You also have the right to independently request arbitration with a FINRA member. You can find information about filing a claim with FINRA at: http://www.finra.org/ArbitrationAndMediation/. You may also reach FINRA by telephone at: (240) 386-4357.
If your complaint involves commodities, such disputes typically are arbitrated before the National Futures Association ("NFA"). You can find information about filing a claim with NFA at: http://www.nfa.futures.org/NFA-arbitration-mediation/index.HTML. You may also reach NFA by telephone at: (800) 621-3570.
Thank you again for reaching out to the New York State Office of the Attorney General Sincerely,

The Investor Protection Bureau

28 Liberty Street-15th Floor, New York, NY 10005 | Phone (212) 416-8222 | http://www.ag.ny.gov

APPENDIX F—Letter from New Jersey Office of the Attorney General to William J. Harrington Re: Moody's File Number: 10133000.OCP / November 9, 2020

New Jersey Office of the Attorney General

PHILIP D. MURPHY *Governor* | SHEILA Y. OLIVER *Lt. Governor* | GURBIR S. GREWAL *Attorney General*

Division of Consumer Affairs
Consumer Service Center – Complaint Review Unit
124 Halsey Street, 3rd Floor, Newark, NJ 07102

PAUL R. RODRIG
Acting Direct

Mailing Addr
P.O. Box 450
Newark, NJ 07
(973) 504-620

November 9, 2020

William Harrington
51 5th Avenue, Apartment 16A
New York NY 10003

Re: Moody's
File Number: 10133000.OCP

Dear William Harrington:

Thank you for writing to the New Jersey Division of Consumer Affairs - Office of Consumer Protection and bringing this matter to our attention. Hearing from the public helps the Division in its efforts to protect the health, safety and economic well-being of the public as consumers in the marketplace and to identify the best use of our investigative resources.

The Division has reviewed the materials you submitted to determine how we can best assist you with this matter. After a careful review of the matter, we have concluded that you may benefit from a referral to the following agency which may be better able to assist you:

Office of the Attorney General of New York
Dept. of Law - The Capitol 2nd Floor
Albany, NY 12224
800-771-7755

We have taken the liberty of forwarding your materials to that agency for action and future inquiries should be directed to that agency.

Once again thank you for contacting the New Jersey Division of Consumer Affairs. If you have any questions please contact our Consumer Service Center at (973) 504-6200.

Sincerely,

Gregory Turner

Assistant Deputy of Enforcement

Consumer Service Center

GT/td

Appendix G – CFTC Acknowledgement of 21-00039-FOIA (December 18, 2020) Filed by William J. Harrington (December 17, 2020)

Please provide all information pertaining to “swap transactions involving flip clauses" that the Commission either used or uses in establishing that it “believes” that the “standardized market risk capital charges” in Commodity Futures Trading Commission “Capital Requirements of Swap Dealers and Major Swap Participants” (September 15, 2020) 85 FR 57465 are “effective and appropriately calibrated”. “The standardized market risk capital charges being adopted are generally based on existing Commission and SEC standardized market risk charges for positions in foreign currencies, commodities, U.S. treasuries, equities and other instruments, which, in the Commission’s long experience, have generally proven to be effective and appropriately calibrated to address potential market risk in the positions. The Commission believes at this time that this approach, in conjunction with other charges discussed herein, appropriately accounts for the wide variety of possible uncleared swap transactions that FCMs, FCM-SDs, and covered SDs may engage in, including bespoke swap transactions involving flip clauses or other unique features."

U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre

1155 21st Street, NW, Washington, DC 20581

www.cftc.gov

FOIA Office

December 18, 2020

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

RE: 21-00039-FOIA

Dear Mr. Harrington

This letter is to acknowledge receipt of your Freedom of Information Act ("FOIA") request dated December 17, 2020, and received by the FOIA Office in the Commodity Futures Trading Commission ("Commission") on December 17, 2020, seeking access to: [All information pertaining to "swap transactions involving flip clauses" that the Commission either used or uses in establishing that it "believes" that the "standardized market risk capital charges" in Commodity Futures Trading Commission "Capital Requirements of Swap Dealers and Major Swap Participants" (September 15, 2020) 85 FR 57465 are "effective and appropriately calibrated". "The standardized market risk capital charges being adopted are generally based on existing Commission and SEC standardized market risk charges for positions in foreign currencies, commodities, U.S. treasuries, equities and other instruments, which, in the Commission's long experience, have generally proven to be effective and appropriately calibrated to address potential market risk in the positions. The Commission believes at this time that this approach, in conjunction with other charges discussed herein, appropriately accounts for the wide variety of possible uncleared swap transactions that FCMs, FCM-SDs, and covered SDs may engage in, including bespoke swap transactions involving flip clauses or other unique features."

This letter is to inform you that we will be unable to respond to your request within the statutory 20-business day deadline as codified in 5 U.S.C. § 552(a)(6)(A)(i).

The FOIA, as amended in 2002, allows for an extension of the 20-day deadline if one of three types of "unusual circumstances" exist. *See* 5 U.S.C. § 552(a)(6)(B)(i)-(iii). Your request falls under one or more of these three circumstances:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; and/or

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

Because of these unusual circumstances, we need to extend the time limit to respond to your request by ten additional working days as provided by the statute, and may extend the time limit beyond the ten additional days in certain circumstances. For your information, we use multiple tracks to process requests, but within those tracks we work in an agile manner, and the time needed to complete our work on your request will necessarily depend on a variety of factors, including the complexity of our records search, the volume and complexity of any material located, and the order of receipt of your request. At this time we have assigned your request to the complex track. In an effort to speed up our process, you may wish to narrow the scope of your request to limit the number of potentially responsive records so that it can be placed in a different processing track. You can also agree to an alternative time frame for processing, should records be located; or you may wish to await the completion of our records search to discuss either of these options. You may also contact the Office of Government Information Services ("OGIS") at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows:

Office of Government Information Services,

National Archives and Records Administration, Room 2510

8601 Adelphi Road

College Park, Maryland 20740-6001

Telephone: 202-741-5770
Toll Free: 1-877-684-6448
Facsimile: 202-741-5769

Email: ogis@nara.gov

Please note that pursuant to the Commission regulations, processing fees may be charged even if no records are ultimately furnished to you, and the Commission will begin charging interest on unpaid bills starting on the 31st day following the day on which the bill was sent. If you have

requested a fee waiver and/or expedited processing of your request, we will provide a response once a determination has been made.

I regret the necessity of this delay, but I assure you that your request will be processed as soon as possible. If you have any questions or wish to discuss reformulation or an alternative time frame for the processing of your request, you may contact me at 202-418-6273 or Jonathan Van Doren, our FOIA Public Liaison, at 202-418-5505. Please refer to the control number (2100039-FOIA) that has been assigned when making your inquiry.

Sincerely,

Emily F. Blitzer

FOIA Paralegal Specialist

FOIA Request Form

UNITED STATES
COMMODITY FUTURES TRADING COMMISSION

This is an automatically generated response.
You will receive a separate acknowledgement letter from the CFTC FOIA Office when they receive and begin processing your request.

SUBMISSION INFORMATION

Confirmation Number 2012-1709-1331-01	**Submission Received** 12/17/2020 9:13:31 AM ET

REQUESTOR CONTACT INFORMATION

First Name William		**Last Name** Harrington
Firm Name		
Address 1 51 5th Avenue		
Address 2 Apartment 16A		
City New York		**State** New York
Province/Region/Territory	**Zip/Postal** 10003	**Country** United States
Email wjharrington@yahoo.com		
Daytime Phone Number +1 917-680-1465		**Fax Number**

DESCRIPTION OF REQUESTED FOIA INFORMATION

CERTIFICATION

☑ **I agree to the collection, processing, use, and disclosure of my personal information as stated in the Privacy Policy for www.cftc.gov.**

Please specify the information you are requesting. Be specific and include the time period covered by your request if possible.

Please provide all information pertaining to “swap transactions involving flip clauses" that the Commission either used or uses in establishing that it “believes” that the “standardized market risk capital charges” in Commodity Futures Trading Commission “Capital Requirements of Swap Dealers and Major Swap Participants” (September 15, 2020) 85 FR 57465 are “effective and appropriately calibrated”. “The standardized market risk capital charges being adopted are generally based on existing Commission and SEC standardized market risk charges for positions in foreign currencies, commodities, U.S. treasuries, equities and other instruments, which, in the Commission’s long experience, have generally proven to be effective and appropriately calibrated to address potential market risk in the positions. The Commission believes at this time that this approach, in conjunction with other charges discussed herein, appropriately accounts for the wide variety of possible uncleared swap transactions that FCMs, FCM-SDs, and covered SDs may engage in, including bespoke swap transactions involving flip clauses or other unique features."

PROCESSING FEES

Please specify the maximum fee you are willing to pay.

$1,000.00