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August 24, 2026

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

Copy: Fitch Ratings (Fitch); Moody's Ratings (Moody's); S&P Global Ratings (S&P); Office of Credit Ratings, U.S. Securities and Exchange Commission (SEC); Supervision of Credit Rating Agencies, European Securities and Markets Authority; Credit Rating Supervision, UK Financial Conduct Authority; Deputy Governor for Financial Stability Strategy, and Bank of England

Via Electronic Mail

Re: SEC 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
SEC "File No. 4-799" ("*Policy Clarification on Credit Rating Agencies*")[2]
AND

[1] (https://www.sec.gov/rules/petitions/2022/petn4-790.pdf).
[2] (https://www.sec.gov/rules/petitions/2023/petn4-799.pdf).

U.S. Commodity Futures Trading Commission (CFTC) "§ 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
CFTC RIN 3038–AF71 and SEC File Number S7–2026–21: "Joint Request for Comment on Further Definition of 'Swap' and 'Security-Based Swap' and on Alternative Compliance"[4]
AND
Fitch "Bank Rating Criteria", 8 May 2026"[5]
AND
Fitch "Exposure Draft: Non-Bank Financial Institutions Rating Criteria", 12 June 2026[6]
AND
Moody's "Rating Methodology: Banks", 17 November 2025[7]
AND
S&P "Criteria: Financial Institutions", 13 August 2026[8]
AND
S&P "Request for Comment: Methodology For Bank Ratings Excluding Implicit Government Support", 4 March 2026 and Republished 11 May 2026"[9]

Dear All,

My name is Bill Harrington and I affiliate as Senior Fellow at Croatan Institute, a non-profit research and action institute.[10]

I am among the few worldwide who publicly and candidly evaluate needlessly complex finance, most notably credit-rated asset-backed securities (ABS), structured debt, and derivative contracts such as the swap-contract-with-flip-clause.[11]

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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.govinfo.gov/content/pkg/FR-2026-06-24/pdf/2026-12743.pdf)**.
5 **(https://www.fitchratings.com/research/banks/bank-rating-criteria-08-05-2026)**.
6 **(Exposure Draft: Non-Bank Financial Institutions Rating Criteria)**.
7 **(https://www.moodys.com/research/Rating-Methodology-Banks-Rating-Methodology--PBC_1430268)**.
8 **(https://www.spglobal.com/ratings/en/regulatory/article/-/view/type/HTML/id/3611611)**.
9 **(https://www.spglobal.com/ratings/en/regulatory/article/-/view/type/HTML/id/3559804)**.
10 **(https://croataninstitute.org/)**.
11 Harrington, Bill, "Experienced U.S. Practitioners: Step Up and Fix Your Fields!", *Croatan Institute View*, February 2026. **(https://croataninstitute.org/cro-view-bill-harrington-experienced-us-**

I work to boost the sustainability of the U.S. financial system with the dual aims of optimizing economic decision-making and preventing bailouts. Most crucially, I advocate protecting the public interest by establishing robust governance in the financial sector, particularly regarding the capitalization, regulation, and credit ratings of needlessly complex finance.[12]

Today's letter is a joint submission to the U.S. Securities Exchange Commission (SEC), to the U.S. Commodity Futures Trading Commission (CFTC), and to the three dominant NRSRO credit rating companies Fitch Ratings (Fitch), Moody's Ratings (Moody's), and S&P Global Ratings (S&P) regarding each of the nine title-line matters. Please post the entirety of today's submission on all applicable websites.

CFTC and SEC Joint Request for Comment on Further Definition of ''Swap'' and ''Security- Based Swap'' and on Alternative Compliance (CFTC-SEC Joint Request for Comment)

> **"***Title VII provides that the Commissions may adopt rules to further define terms included in Title VII, but it also limits the exemptive authority of each Commission over certain provisions related to swaps and SBS.***"**[13]
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> "*And when the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits*."[14]
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>
> *"US Congress, markets, and regulators have consigned the flip clause-swap-contract to the garbage heap of history. There, the contract rots away with aerosol sprays, trans fats, asbestos tiles, and other synthetics that poisoned users, producers, and Our Country."* [15]

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practitioners-step-up-fix-your-field/) and **(https://www.sec.gov/comments/4-790/4790-717727-2246814.pdf)**.

12 **(https://croataninstitute.org/2021/05/30/injecting-accountability-into-the-u-s-and-global-financial-systems/) and (https://croataninstitute.org/william-j-harrington/)**.

13 "CFTC-SEC Joint Request for Comment", pP37876.

14 Blumenthal, Michael R. and all, "The End of Chevron Deference: What Does It Mean, and What Comes Next?", *ABA Business Law Today*, August 16, 2024. Accessed August 20, 2026. **(https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-august/end-chevron-deference-what-does-it-mean-what-comes-next/)**.

15 Harrington, William J., "Proposed Amicus Curiae Brief to the US 2nd Circuit 'Re: Case No. 18-1079-bk (Lehman vs 250 Financial Entities Re Flip Clause Enforceability)'", 25 June 2019, p24 (PDF-p64). **(https://www.sec.gov/comments/4-799/4799-513135-1484802.pdf)**. **II** See also "Proposed Brief", p24 (PDF-p64) in Docket Entry No. 361, U.S. Court of Appeals for the 2nd Circuit, Case No.

Regarding "II. Request for Comment on Definitional Clarity", pp37875-3786
The CFTC and the SEC must both define the flip-clause-swap-contract and ban the contract!

No flip-clause-swap-contract is "*innovative*" (even if some aspects of a given contract may be considered innovative in isolation). Rather, every contract is inherently ruinous by longstanding, intentionally defective design that coalesced 30 years ago. In 2008, U.S. and European calamities demonstrated that the contract warps economic decision making, vaporizes financial systems, and shatters social compacts. Post-2008, persistent European sluggishness establishes that even when not generating full-blown crises, the contract undermines economies and social cohesion by suppressing investment and thwarting meaningful growth.[16]

To "*draw clearer regulatory lines for agency oversight*" of the flip-clause-swap-contract, the SEC and the CFTC must immediately initiate action on the first and third title-line items of today's response, namely my respective petitions for rulemakings to ban the contract. The agencies can efficiently develop an optimal rule — namely, one that incorporates useful feedback, asserts unimpeachable rationales for doing so and also for rejecting suboptimal suggestions, helps optimize economic decision making, and strengthens the financial system — by proposing and requesting public comment on a joint rule to ban the contract today.

Crucially, a joint rule to ban the flip-clause-swap-contract will withstand legal scrutiny for two reasons, one pertaining to process and a second pertaining to content. **(1)** Regarding process, the best-in-world contract assessments that I have posted on sec.gov and cftc.gov since 2011 will inform each rulemaking task — e.g., proposal, request for public comment, response assessment, and final drafting — and thereby constitute best practice under the Administrative Procedure Act (APA). **(2)** Regarding content, a contract ban will "*effectuate the will of Congress*" viz-a-viz not only the contract itself but also both NRSRO credit ratings and ABS: A contract ban is the simplest, plain-language, and *independent* interpretation of several Dodd-Frank provisions (not least, Title VII), a key post-Dodd-Frank Act, and equally compelling, a notable post-Dodd-Frank *failure to act*.[17], [18]

18-1079-bk, "MOTION, to file amicus curiae brief, on behalf of Movant William J. Harrington, FILED. Service date 07/10/2019 by US mail.[2605433] [18-1079] [Entered: 07/11/2019 09:59 AM]".

16 A practitioner may mischaracterize the flip-clause-swap-contract as innovative by highlighting a secondary feature, including but not limited to a new or novel index, security, or instrument as reference obligation.

17 Blumenthal, Michael R., and all, "The End of Chevron Deference: What Does It Mean, and What Comes Next?", *ABA Business Law Today*, August 16, 2024. Accessed August 20, 2026. **(https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-august/end-chevron-deference-what-does-it-mean-what-comes-next/)**.

18 Harrington, William J. "Proposed Amicus Curiae Brief to the US 2nd Circuit 'Re: Case No. 18-1079-bk (Lehman vs 250 Financial Entities Re Flip Clause Enforceability)'", 25 June 2019, pp24-33 (PDF-pp64-73) and pp39-43 (PDF-pp79-83). **(https://www.sec.gov/comments/4-799/4799-513135-1484802.pdf)**. **II** See also "Proposed Brief", pp24-33 (PDF-pp64-73) and pp39-43 (PDF-pp79-83) in Docket Entry No. 361, U.S. Court of Appeals for the 2nd Circuit, Case No. 18-1079-bk, "MOTION, to

Collectively and by clear intention, my respective petitions for SEC and CFTC rulemakings to ban the flip-clause-swap-contract, accompanying exhibits, and follow-on comments constitute comprehensive blueprint and impeccable, irrefutable evidence to support the SEC and CFTC in each rulemaking task. As just one example, "Flip Clause Questions to CFTC-SEC-LSTA-SFA-DBRS-Fitch-Moody's-S&P", 28 December 2020, poses 45 questions to 15 entity proponents of the flip-clause-swap-contract. Given that no entity publicly addressed a single question at the time of this writing five-plus years later, a comment request can pose many of the same questions to force proponents either to go on-the-record or to let their silence speak volumes.[19]

In sum, my petitions for SEC and CFTC rulemakings to ban the flip-clause-swap-contract and accompanying petition materials both compel the SEC and CFTC to issue a rule that bans the contract and guide the agencies every step of the way. Armed with superb insights and conclusive evidence, the SEC and CFTC can perfect technical details of contract definition and rule implementation; memorialize Irredeemably faulty contract design; document historically catastrophic contract performance with Lehman Brothers as Exhibit No. 1; demonstrate that both parties to every contract grossly under-capitalize respective exposures; further demonstrate that the same transacting parties intentionally misrepresent the gross capital insufficiencies; and ditto parties' vendors such as auditors, credit rating companies, and other information providers.

Finally, SEC and CFTC rulemakings to ban the flip-clause-swap-contract can explicitly state what Commissioners and staff have known since my first submission to sec.gov stripped them of plausible deniability in 2011.[20]

To wit, contract proponents have offered no convincing evidence either to defend the contract or to oppose a contract ban since 2011 because no convincing evidence exists, as scrutiny of public *and* internal SEC and CFTC records proves.[21]

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file amicus curiae brief, on behalf of Movant William J. Harrington, FILED. Service date 07/10/2019 by US mail.[2605433] [18-1079] [Entered: 07/11/2019 09:59 AM]".

19 Harrington, William J., "Flip Clause Questions to CFTC-SEC-LSTA-SFA-DBRS-Fitch-Moody's-S&P", December 28, 2020, in Harrington, William J., "Letter to the SEC and CFTC 'Re 14 Matters'", June 12, 2024, pp15-23. **(https://www.sec.gov/comments/4-790/4790-482151-1379834.pdf)** and analogous "*CFTC record associated with your above-referenced petition, as to which the Commission has not opened a separate comment file.*" See CFTC Secretary Chris Kirkpatrick "Email to WJH 'Re SEC File Numbers 4-790 & 4-799 // CFTC File for WJH § 13.1 Petition of May 26, 2020'", February 5, 2025, in Harrington, William J., "Letter to CFTC FOIA Compliance Office ' Re: Freedom of Information Act Request'", April 23, 2025, Appendix A, p6. **(https://www.sec.gov/comments/4-790/4790-596975-1732462.pdf)**.

20 For example, see 61 mentions of "*replacement*" and 199 of "*swap*" in Harrington, William J., "Comment on SEC Proposed Rules for Nationally Recognized Statistical Rating Organizations // 'File Number S7-18-11'", August 8, 2011. **(https://www.sec.gov/comments/s7-18-11/s71811-33.pdf)**.

21 CFTC, "Letter to William J. Harrington, 'Re 25-00220-FOIA (Response to WJH Freedom of Information Act (FOIA) Request of April 23, 2025)'", May 7, 2025. **(https://www.sec.gov/comments/4-790/4790-598795-1739004.pdf)**. **II** Also Harrington, William

Regarding "III. Request for Comment on Alternative Compliance", p37876

"'[N]o walkaway clause shall be enforceable in a qualified financial contract of a covered financial company in default.' (Dodd-Frank Act, § 210, 124 Stat. 1488.)

II

"The flip clause closely resembles a walkaway clause. Congress was crystal clear in enacting § 210(c)(6)(F) ***Walkaway Clauses Not Effective****. . . .*

"This is for good reason. The circumstance that prompts one counterparty to activate a walkaway clause — the severe credit-impairment of a financial institution — enables all counterparties with a walkaway to activate it. The 100% correlation of walkaway activation would strip an insured depository institution, financial company, or government-sponsored entity of swap assets after becoming severely credit-impaired, thereby defeating the dual purposes of receivership and conservatorship — i.e., to preserve institution assets and limit losses to US taxpayers."[22]

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*"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 swap, i.e., they will have established a track record of mutually accepting both the termination valuation and the means of monetizing it."*[23]

"The Dodd-Frank Act unequivocally directs six financial regulators to adopt capital and margin rules for swap dealers and for the SEC to do the same for security-based swap

J., "Letter to CFTC FOIA Compliance Office 'Re: Freedom of Information Act Request'", April 23, 2025. **(https://www.sec.gov/comments/4-790/4790-596975-1732462.pdf)**. **II** Also, Harrington, William J., "Submission to the SEC and CFTC Regarding Six Matters", October 4, 2022, pp33-35. **(https://www.sec.gov/comments/4-790/4790-20147063-312602.pdf**).

22 Harrington, William J. "Proposed Amicus Curiae Brief to the US 2nd Circuit 'Re: Case No. 18-1079-bk (Lehman vs 250 Financial Entities Re Flip Clause Enforceability)'", 25 June 2019, pp28-29 (PDF-pp68-69). **(https://www.sec.gov/comments/4-799/4799-513135-1484802.pdf)**. **II** See also "Proposed Brief", pp28-29 (PDF-pp68-69) in Docket Entry No. 361, U.S. Court of Appeals for the 2nd Circuit, Case No. 18-1079-bk, "MOTION, to file amicus curiae brief, on behalf of Movant William J. Harrington, FILED. Service date 07/10/2019 by US mail.[2605433] [18-1079] [Entered: 07/11/2019 09:59 AM]".

23 "Ibid.", pp34-35 (PDF-pp74-75).

dealers. Collectively, the regulators' rules must impose 'capital requirements' and 'initial and variation margin requirements on all swaps' and 'all security-based swaps that are not cleared by a registered derivatives clearing organization.' See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 731(e)(2), 124 Stat. 1704-5 and § 764 (e)(2), 124 Stat. 1786-87.

"*Note the **all** in '**all swaps**' and in '**all security-based swaps'**. Congress expressed its clear and unambiguous intent in enacting § 731 and § 764. **All** regulators would formulate rigorous margin rules that would encompass **all** swap contracts, **no exceptions!** To ensure CFTC and SEC compliance, Congress curbed the agencies' 'exemptive authority with respect to the swaps requirements of Dodd Frank.'*"[24]

"*The 115th Congress (2017-2018) intentionally preserved **all** Dodd Frank provisions that fix ABS, including those that kill the flip-clause-swap contract. In 2018, Congress enacted one bill that tweaked the Dodd-Frank Act and let a second bill, a wholesale reversal of the Dodd-Frank Act, die.*

"President Trump signed into law the Economic Growth, Regulatory Relief, and Consumer Protection Act (Pub. L. No. 115-174, S.2155) on May 24, 2018. The act primarily eases Dodd-Frank restrictions on community and regional banks.

"*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 failed bill would have eased the CFTC-Swap-Margin-Rule by exempting many swap contracts from margin posting. The bill also would have amended US Bankruptcy Law so that Chapter 11 proceedings covered large financial institutions."*[25]

Until such time as the CFTC has enacted a final rule to ban the flip-clause-swap-contract and the rule has taken full effect, the agency must continue to "*defuse the flip clause*" by preserving or even ratcheting up the CFTC swap margin rules in effect at time of this writing. In particular, the CFTC must not recharacterize or redefine "*financial end user*" or take other action that exempts a registered entity from exchanging variation margin daily and with no threshold with an end user that is an ABS, securitization, or other structured instrument issuer. To do otherwise, the CFTC would violate both plain-language statute and the express *"will of Congress"*.[26]

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[24] "Ibid.", pp24-25 (PDF-pp64-65).

[25] "Ibid.", pp42-43 (PDF-pp82-83).

[26] CFTC, "Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants", January 6, 2016. (**https://www.govinfo.gov/content/pkg/FR-2016-01-06/pdf/2015-32320.pdf**).

Likewise, until such time as the SEC has enacted a final rule to ban the flip-clause-swap-contract and the rule has taken full effect, the agency must continue to "*defuse the flip clause*" by preserving or even ratcheting up the SEC swap margin rules in effect at time of this writing. In particular, the SEC must not recharacterize or redefine "*financial end user*" or take other action that exempts a registered entity from exchanging variation margin daily and with no threshold with an end user that is an ABS, securitization, or other structured instrument issuer. To do otherwise, the SEC would violate both plain-language statute and the express *"will of Congress"*.[27]

Regarding harmonization more broadly, the CFTC and SEC must harmonize their respective regulatory treatments of the flip-clause-swap-contract with the common good of all Americans. To so harmonize, the SEC and CFTC must take up my respective petitions for rulemakings to ban the contract.

Best regards,

Bill Harrington

[27] SEC, "Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security- Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers", August 22, 2019. **(https://www.govinfo.gov/content/pkg/FR-2019-08-22/pdf/2019-13609.pdf)**.