

## Final Response Letter--CFTC FOIA Request No. 21-00039-FOIA

**From:** noreply@cftc.gov <noreply@cftc.gov>

**To:** [REDACTED]

**Cc:** [REDACTED]

**Sent:** Tuesday, January 5, 2021, 03:07:54 PM EST

**Subject:** Final Response Letter--CFTC FOIA Request No. 21-00039-FOIA

RE: 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."

Dear Mr. Harrington:

Attached please find correspondence from the U.S. Commodity Futures Trading Commission ("CFTC") regarding your Freedom of Information Act ("FOIA") request, dated December 17, 2020, for the information described above.

Please contact the CFTC FOIA Compliance Staff if you have any questions concerning your request at 202-418-6236 or [foiasubmissions@cftc.gov](mailto:foiasubmissions@cftc.gov). Please refer to the control number (21-00039-FOIA) that has been assigned when making your inquiry.

Sincerely,

Catherine Brescia

FOIA Paralegal



## U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre  
1155 21<sup>st</sup> Street, NW, Washington, DC 20581  
[www.cftc.gov](http://www.cftc.gov)

FOIA Office

January 5, 2021

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

RE: 21-00039-FOIA

Dear Mr. Harrington:

This is in response to your request dated December 17, 2020, under the Freedom of Information Act 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.”].

In accordance with the FOIA and agency policy, we have searched our records, as of December 17, 2020, the date we received your request in our FOIA office.

We have located 6 pages of responsive records. I am granting partial access to, and am attaching copies of, the accessible records. Some information falls within the exemptions to the FOIA's disclosure requirements, as explained below.

Some responsive records contain staff analyses, opinions, and recommendations. Those portions are deliberative and pre-decisional and are an integral part of the agency's decision making process. They are exempt from the FOIA's disclosure requirements by FOIA Exemption 5. 5 U.S.C. § 552(b)(5); see *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

Some records contain personal information, which is exempt from release under FOIA Exemption 6 because individuals' right to privacy outweighs the general public's interest in seeing personal identifying information. 5 U.S.C. § 552(b)(6); see also *The Lakin Law Firm v. FTC*, 352 F.3d 1122 (7th Cir. 2003).

If you have any questions about the way we handled your request, or about our FOIA regulations or procedures, please contact me at 202-418-5912, or Jonathan Van Doren, our FOIA Public Liaison, at 202-418-5505.

Additionally, you may 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, email at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with this response to your request, you may appeal by writing to Freedom of Information Act Appeal, Office of the General Counsel, Commodity Futures Trading Commission, Three Lafayette Centre, 8<sup>th</sup> Floor, 1155 21<sup>st</sup> Street, N.W., Washington, D.C. 20581, within 90 days of the date of this letter. Please enclose a copy of your original request and a copy of this response.

Sincerely,



Rosemary Bajorek  
Attorney-Advisor

[RR 1?]

From: Beale, Joshua  
TO: Marlinez, Rafael  
Subject: Bill Harrington  
Date: Thursday, 16, 2020 10:01:48 AM

Hey can you call me today,

(b)(5)

(b)(5)

Thanks,

Josh B.

(b)(6)

[N.B. WJH January 6, 2021.]

1. "RR 1?" denotes first of six pages of "responsive records."

See "We have located 6 pages of responsive records. I am granting partial access to, and am attaching copies of, the accessible records. Some information falls within the exemptions to the FOIA's disclosure requirements, as explained below."

Letter to William J. Harrington Re 21-00039-FOIA from Attorney Advisor Rosemary Bajorek and dated January 5, 2021.

2. "Date: July 16, 2020" precedes Voting Draft of July 22, 2020 and therefore is "deliberative and pre-decisional" and "exempt from the FOIA's disclosure requirements."

3. However, "Subject: Bill Harrington" and NOT "Subject: Flip Clause"

4. Redacted images = "(b)(5)" and "(b)(6)". In what document? Final Rule?]

**[RR 2?]**

From: Martinez. Rafael  
To: Beale. Joshua; Smith. Thomas J.  
Subject: RE: [EXTERNAL] Commission Treatment of the Flip Clause in  
Capital Rules: "Arbitrary / Capricious / An Abuse of Discretion"  
Date: Thursday, July 23, 2020 1:39:09 PM  
Attachments: imaae001.nna  
irnage002.png  
imaae003.ona  
imaaeC104.Dna  
imaQe005.ona  
irnaqe00i.png  
image008.png  
image009.png  
image010.png  
image011.png

**[N.B. WJH January 7, 2021.]**

- 1. "RR 2?" denotes second of six pages of "responsive records."**
- 2. Conversion into Word split original RR 2 into two pages. Second follows below.**
- 3. Three emails (one above and two below) almost immediately follows mine.**
- 4. 11 blocked images (above) plus a twelfth (below) that cites "(b)(5)"**
- 5. Can't find "(b)(5)" in Voting Draft of rule**

**[RR 2 Continued?]**

(b)(5)

From: Beale, Joshua

sent: Thursday, July 23, 2020 11:45 AM

To: Martinez, Ralael; Smith, Thomas J.

Subject: FW: [EXTERNAL] Commission Treatment 01 [he Flip Clause in Capital Rules: "Arbitrary / Capricious / An Abuse of Discretion"]

From: Bailey, Margo

Sent: Thursday, July 23, 2020, 11:37 AM

To: Beale, Joshua

Subject: FW: [EXTERNAL] Commission Treatment of [he Flip Clause in Capital Rules: "Arbitrary / Capricious / An Abuse of Discretion"]

**[N.B. WJH January 7, 2021.  
Continuation of "RR 2."]**

[RR 3?]

Margo Bailey  
Special Counsel  
Office of Commissioner Brian Quintenz  
Commodity Futures Trading Commission

From: Bill [REDACTED]  
Harrington [REDACTED] 13, 2020 11:17 AM  
Sent: Thursday, July 23, 2020 11:17 AM

To: OIGEmail; Quintenz, Brian; Behnam, Rostin; Stump, Dawn; Berkovitz, Dan; Lewis, Alicia L. , Remmler, Erik F; Kirkpatrick, Chris; Jesse I Eisinger; Jesse 2 Eisinger; Jesse I Eisinger; [REDACTED]  
John C. Coffee; [REDACTED]; Lawrence Lessig; Professor Lawrence Lessig  
Cc: [REDACTED]; Pizzola, Chelsea; Thornton, Charlie; Grimm, Daniel; Webb, Kevin S;  
Bailey, Margo; Gardy, Laura; Dunfee, John; Mastrogiacomo, Elizabeth; Arbit, Terry; [REDACTED]

Subject: [EXTERNAL] Commission Treatment of the Flip Clause in Capital Rules: "Arbitrary / Capricious / An Abuse of Discretion"

*"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 [emphasis added throughout]."***

—Voting Draft: Capital Requirements for Swap Dealers and Swap Participants, page 50.

Dear Secretary Kirkpatrick,

The Commission rationale for not imposing 100% capital charge on an uncleared swap with a flip clause is arbitrary. The flip clause subjects a swap dealer to its own credit risk, in addition to the credit risk of a structured debt counterparty. In fact, the rating of structured debt depends on the flip clause imposing a loss on the swap dealer. No other "bespoke" component of any swap contract that the Commission regulates subjects a swap dealer to its own credit risk. "Existing Commission and SEC standardized market risk charges" entirely ignore the self-referencing credit risk that a swap dealer assumes in booking a swap with a flip clause.

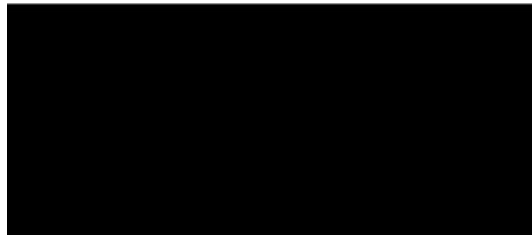
*The Commission rationale for not imposing 100% capital charge on an uncleared swap*

[RR 4?]

*with a flip clause is capricious.* The "Commission's long experience" with swap contracts with a flip clause does not even cover the 2008 crisis when the contracts started and fueled the financial crisis. In fact, the Commission did not begin evaluating swap contracts with a flip clause until a former Moody's legal colleague and I challenged the Commission to do so in 2015. Only a capital charge of 100% can address the market risk of a swap asset that loses 100% of its value on the day that a swap dealer enters bankruptcy or is declared insolvent.

External Meetings: Conference Call with Mr. William Harrington and Mr. Rick Michalek |CFTC

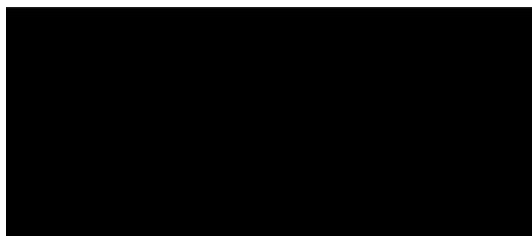
<https://www.cftc.gov/node/157371>



External Meetings: Conference  
Call with Mr. William Harrington  
and Mr. R...

*The Commission rationale for not imposing a 100% capital charge on an uncleared swap with a flip clause is an abuse of discretion.* I have provided the Commission with a wealth of information on the correct method to capitalize a flip clause swap contract. I imposed the method on swap dealers such as Merrill Lynch Derivative Products, Nomura Derivative Products, and Lehman Brothers Financial Products from 2000 to 2010. The Commission belief that its "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. . ." is as unfounded as President Trump's core belief that the coronavirus will "just disappear." Trump says coronavirus crisis will probably 'get worse before it gets better'

<https://www.nbcnews.com/politics/donald-trump/trump-says-coronavirus-crisis-will-probably-get-worse-it-gets-n1234544>



Trump says coronavirus crisis will probably 'get worse before it gets better'



[RR 5?]

The Commission must provide a more convincing rationale when, as I fully expect, the Commission postpones or denies my Section 13.1 petition to ban the flip clause. At the very least, the Commission might be inventive and devise a new rationale out of whole cloth, i.e. a new rationale that is arbitrary, capricious, and an abuse of discretion. Calling out the same ole', same ole' Commission lies is getting old.

The Country cannot expect the Commission to do anything but undermine the financial system. However, I can help the Country understand the full extent to which the financial sector has co-opted the Commission by flushing out Commission rationales that are arbitrary, capricious, and an abuse of discretion.

Finally, I suggest to the US journalist Jesse Eisinger, whom this email copies, that the Commission would farm an excellent case study "THE CHICKEN ██████████ CLUB \2.0."

Bill Harrington, Harrington Independent Flip Clause Assessments

On Friday, June PG, 2020, 12:39:42PM EDT, Kirkpatrick, Chris <ckirkpatrick@cftc.gov> wrote:

Dear Mr. Harrington,

Please find attached the formal acknowledgment of the S 1 3.1 petition referenced in the subject line. No further submission, or other action on your part, is required to perfect the filing of this petition.



Sincerely,

**Christopher Kirkpatrick**  
Secretary of the Commission  
Executive Secretariat Branch / Office of the  
Executive Director  
Commodity Futures Trading Commission  
████████████████████

[RR 6?]

From: Bill [REDACTED]  
Harrington . 2020 1:54 PM  
Sent: Friday, June 26, 2020 1  
To: OIGEmail; Kirkpatrick, Chris; Quintenz, Brian; Behnam, Rostin; Stump, Dawn; Berkovitz, Dan; Lewis, Alicia L.; Remmler, Erik F  
Cc: [REDACTED]; Pizzola, Chelsea; Thornton, Charlie; Grimm, Daniel; Webb, Kevin S; Bailey, Margo; Gardy, Laura; Dunfee, John; dbusca@cftc.gov; Mastrogiacomo, Elizabeth; Arbit, Terry; [REDACTED]  
Subject: [EXTERNAL] Request that the Secretariat Acknowledge Receipt of the S 13.1 Petition by William J. Harrington, dated May 26, 2020, for the Issuance of a Rule that Prohibits a Swap Dealer, Major Swap Participant, or Other Regulated Entity from Predicating...

Dear All,

The attachment contains my letter addressed to the Secretarial regarding the title-line request.

The pertinent cases al the US Court of Appeals lor the Second Circuit Case is No. 18-1079-bk (Lehman Brothers Special Financing, Inc vs Branch Banking and Trust Company, et al.

Bill Harrington

Harrington Independent Flip Clause Assessments