June 17, 2022

Mr. Keaghan Ames  
GMAC Designated Federal Officer and  
Counselor & Senior Policy Advisor to Commissioner Caroline D. Pham

Ms. Natasha Coates  
Senior Counsel to Commissioner Kristin N. Johnson

U.S. Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street NW  
Washington, DC 20581

Copy: Professor Gina-Gail S. Fletcher, Professor of Law, Duke Law School; Professor Colleen Honigsberg, Associate Professor of Law at Stanford Law School; Mr. Andrew Park, Senior Policy Analyst – Hedge Funds and Private Equity, Americans for Financial Reform; Ms. Susan Launi, Global Head of Regulatory Affairs, Policies and Procedures, Fitch Ratings; Mr. Nick Miller, Managing Director, Global Regulatory Affairs, Moody’s Corporation; and Mr. Thomas Torgerson, Co-Head of Sovereign Ratings, Sovereign Ratings Group, DBRS Morningstar

Via Electronic Mail

Re: Global Markets Advisory Committee and Market Risk Advisory Committee

Dear Mr. Ames and Ms. Coates,

My name is Bill Harrington. I am senior fellow at the non-profit research and action entity Croatan Institute.

About - Croatan Institute
I work to boost the sustainability of the world financial system with the dual aims of rationalizing economic decision-making and avoiding bailouts. I focus on governance decisions in the financial sector that establish the capitalization and regulation of complex finance, particularly derivative contracts and structured finance products.

Bill Harrington - Croatan Institute
Injecting Accountability into the U.S. and Global Financial Systems - Croatan Institute

Self-Nomination to the Global Markets Advisory Committee and to the Market Risk Advisory Committee
Collectively, this letter and the 16 other documents that the delivering email attached comprise my self-nomination to the Global Markets Advisory Committee and my self-nomination to the Market Risk Advisory Committee.

Topics for the Global Markets Advisory Committee and for the Market Risk Advisory Committee
Collectively, this letter and the 16 other documents that the delivering email attached detail the four topics that the Global Markets Advisory Committee should explore and that the Market Risk Advisory Committee should explore. The four topics pertain directly to: robustness of the U.S. and global financial systems; exposure of the systems to climate events and transition; harmonization of the respective rules, regulations, and policy of the Commission and the U.S. Securities and Exchange Commission; and extent to which the Commission should defer to international regulation in the name of “comity.”

1) The non-margined and non-cleared swap contract with a flip clause, walk-away, or other variable subordination provision: Harm to the public interest, to economic efficiency, competition, and capital formation in the debt and derivative sectors, and to financial stability


— Benefits to the public interest, benefits to economic efficiency, competition, and capital formation in the debt and derivative sectors, and benefits to financial stability that my respective petitions for the CFTC and the SEC to ban the contract will, if enacted, deliver

— Twenty-year-and-counting governance failure of the CFTC to independently analyze or develop information on the contract. Instead, the CFTC has relied entirely on information and analysis that I have provided. See “CFTC Response to WJH FOIA Request Re Flip-Clause Rule-Making” attached to the delivering email

— Contract prevalence in the U.S. pre-2008 financial crisis
— Contract as root cause of the 2008 financial crisis in the U.S.
— Contract as root cause of 2008 financial crisis in Greece and other EU countries
— Harm to the public interest, to economic efficiency, competition, and capital formation in the debt and derivative sectors, and to financial stability that contract provider wreaks via its governance failure in booking self-referencing exposure to itself = 100% value of each contract that is an asset
— Accurate capital treatment by contract provider = 100% value of each contract that is an asset
— Intentionally deficient accounting, capitalization, credit, and regulatory treatments of the contract that ignore the zero-sum, self-referencing exposure of a contract provider to itself and the associated exposure to loss of 100% of value of each contract that is an asset
— Intentionally inaccurate and inflated credit ratings of contract provider that intentionally mask the provider’s zero-sum, self-referencing credit exposure to itself = 100% value of each contract that is an asset
— Intentionally and deficiently inaccurate accounting, capitalization, credit, and regulatory treatments of an asset-backed security (ABS), securitization, structured note, or other structured debt that mask the exposure from, and governance failure of, an issuer being party to a contract
— Intentionally inaccurate, circular, and inflated credit ratings of an ABS, securitization, structured note, or other structured debt that mask the exposure from, and governance failure of, an issuer being party to a contract
— Intentionally inaccurate, circular, and inflated credit ratings of the contract itself
— Benefits to the public interest, to economic efficiency, competition, and capital formation in the debt and derivative sectors, and to financial stability from U.S. swap margin rules that obligate a provider of a new contract to ensure daily, two-way exchange of full variation margin, and that also constrain eligible collateral
— Benefits to the public interest, to economic efficiency, competition, and capital formation in the debt and derivative sectors, and to financial stability from U.S. swap margin rules having prevented a contract provider and end user from entering a new contract since 2017
— Harm to the public interest, to economic efficiency, competition, and capital formation in the debt and derivative sectors, and to financial stability from sector lobbying to rescind the U.S. swap margin rules and allow a contract provider and end user to enter a new contract
— Governance failure and harm to the public interest, to economic efficiency, competition, and capital formation in the debt and derivative sectors, and to financial stability from issuers of U.S. collateralized loan obligations (CLOs) placing flip clauses in priorities of payment without providing capital and operational capacities for the two-way exchange of full variation margin ever, let alone daily
— Deficiency of swap margin rules in Canada, the EU, the U.K., Australia, and other non-U.S. domiciles that, via large loopholes, allow most contract providers to exchange **ZERO** margin against the contract, and that also allow inappropriate eligible collateral such as structured debt where an issuer is a contract end-user
— Harm to the public interest, to economic efficiency, competition, and capital formation in the debt and derivative sectors, and to financial stability from CFTC comparability determinations for non-U.S. domiciles that, via large loopholes, enable a contract provider to exchange **ZERO** margin against the contract, and that also allow inappropriate eligible collateral such as structured debt where an issuer is a contract end-user

2) **Credit Rating Inflation: Harm to the public interest, to economic efficiency, competition, and capital formation in the debt and derivative sectors, and to financial stability**
— Rampant and pervasive in all U.S. sectors and all G-20 sectors
— Deficient credit rating methodologies that enable committees to ignore credit exposures, including student-loan ABS (SLABS) and other ABS methodologies, CLO methodologies, methodologies for parties to derivative contracts, the contracts themselves, and derivative contract marketplaces such as exchanges, methodologies for credit exposures to ESG in all sectors globally, and public sector methodologies, including for municipalities and for sovereigns
— Inflated credit ratings for SLABS and other ABS, for CLOs, for parties to derivative contracts, the contracts themselves, and derivative contract marketplaces such as exchanges, for issuers with ESG credit exposures in all sectors globally, and for public entities, including municipalities and sovereigns
— Intentionally circular, self-referencing credit ratings. As example, EU sovereign credit ratings are an input into the credit ratings of EU ABS, which in turn must have a minimum credit rating to qualify for European Central Bank lending programs, the success of which in turn is an input into the credit ratings of EU sovereigns.
— Harm to the public interest, to economic efficiency, competition, and capital formation in the debt and derivative sectors, and to financial stability from the poor governance and **violation of Dodd-Frank 939A** by the CFTC and other U.S. financial regulators that reference credit ratings. As example, the CFTC references credit ratings in rationales for comparability determinations that “permit substituted compliance with non-U.S. regulatory regimes as compared to certain swaps provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Commission’s regulations.”

■ **“CFTC Comparability Determination for the EU: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants”**
“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].”

— Page 4840

— Harm to the public interest, to economic efficiency, competition, and capital formation in the debt and derivative sectors, and to financial stability from the poor governance by the CFTC in harmonizing rules, regulations, and policies with those of the SEC considering the latter’s failed governance in enabling credit rating companies to inflate credit ratings in all sectors

- Joint-Letter-EC-Call-for-Evidence-ESG-and-Credit-Ratings.pdf (croataninstitute.org)

“Propelled by the IOSCO blueprint, CRAs [credit rating companies] intentionally inflate the credit ratings of constituent entities to minimize their financing costs and to boost CRA franchises and earnings. As a result, economic efficiency can suffer. Credit rating inflation directly distorts the prices of rated debt such as bonds and loans and indirectly distorts prices of equities and non-rated debt to favour CRA clients and misallocate investment away from projects of maximum utility, such as ones that boost sustainability. Credit rating inflation also disproves CRA claims that ESG credit rating methodologies specify rigorous assessment of credit exposures to ESG factors.”

— Pages 7-8.

3) Poor information on financial sector exposure to climate events and transition: Harm to the public interest, to economic efficiency, competition, and capital formation in the debt and derivative sectors, and to financial stability

— Credit ratings of debt, of derivative contracts, of derivative counterparties, and of derivative marketplaces such as exchanges intentionally omit credit exposures to climate events, credit exposures to climate transition, and credit exposures to other ESG factors.

“WJH Comments to SEC Re: Public Input Welcomed in Climate Change Disclosures”

— I can speak from 10-years of personal experience as a senior vice president at Moody’s Investors Service. Moody’s did not evaluate credit exposures to climate events, did not evaluate credit exposures to climate transition, and did not evaluate credit exposures to other ESG factors in assigning credit ratings to debt, to derivative contracts, to derivative counterparties, and to derivative marketplaces such as exchanges during the period 1999 to 2010.
— Credit rating companies, parents, and affiliates regularly lie to the public and lie to financial regulators in asserting that credit rating companies, to paraphrase, “have always incorporated ESG factors into credit ratings where relevant.” See the virtually identical, fantastical representations that DBRS I Morningstar, Moody’s, and Fitch Ratings made last week in response to the European Commission’s “Targeted Consultation on the Functioning of the ESG Ratings Market in the EU and on the Consideration of ESG Factors in Credit Ratings that the delivering email attaches. ratings”. The delivering email attached each of the three submissions.

■ Morningstar I DBRS

“Credit rating agencies have always considered ESG factors, including climate-related risks, when issuing a credit rating, provided that these risks were identifiable, relevant, and material for the credit risk profile of the relevant rated entity.”

■ Moody’s Corporation, June 6, 2022

“At Moody’s, we have always taken account of ESG considerations in our credit ratings, where materially relevant to credit.”

■ Fitch Ratings, June 8, 2022

“Fitch Ratings has always incorporated ESG factors into credit ratings where they are relevant.”

4) Role and Impact of CFTC Advisory Committees: How best to support the public interest, strengthen economic efficiency, competition, and capital formation in the U.S. debt and derivative sectors, and boost financial stability

— Intent of each committee member must be to help the CFTC serve the American people to the maximum possible extent by boosting the stability of the U.S. financial system to the maximum extent possible

— Committees must be comprised of a diversity of well-informed people with diverse views on derivative contracts, derivative counterparties, derivative marketplaces such as exchanges, and regulations of the foregoing

— Committees must be comprised of people free of all conflict-of-interest whose sole interest is to help the U.S. economy operate as efficiently as possible and to promote the stability of the U.S. financial system to the maximum extent possible

— Committees must be comprised of people with track records of producing and publicly disseminating impeccable, best-practice work on derivative contracts, derivative counterparties, derivative marketplaces such as exchanges, and regulations of the foregoing

— Committees must learn from mistakes such as the intentional and systemically damaging mistakes that the CFTC Climate Related Market Risk Subcommittee made in its work and report
Managing Climate Risk in the U.S. Financial System (cftc.gov)
“In recent years, credit rating agencies have started to consider climate-related risks in their ratings. For example, one rating agency cited environmental, social, and governance (ESG) risks as material credit considerations in a third of the more than 7,600 private sector rating actions published in 2019 (Mutua, 2020). Progress has been notable in the incorporation of physical climate risk variables into sovereign and municipal bond ratings, as well as into ratings of some corporate debt.”
— Page 46.

William-J.-Harrington-Croatan-Institute-Comments-on-Climate-Change-Disclosures.pdf (croataninstitute.org)

“Mainstream ESG Coalitions Endorse SEC Endorsement of NRSRO ESG Non-Analysis
Large coalitions such as the CFTC Climate Related Market Risk Subcommittee and Ceres promote the straw horse of NRSRO ‘disclosure’ rather than redress the ESG ‘content’ void. The disclosure straw horse helps the SEC help NRSROs perpetuate their ESG ruse.”
— Page 11.

“The CFTC Climate Subcommittee failed its own self-governance by justifying unwarranted praise for NRSRO ESG efforts with brazen dissembling [emphasis added]. To wit, the CFTC report buried the underlying source (an NRSRO ESG report), overstated the report’s conclusions, lumped together the comparatively modest observations of ‘climate-related risks’ and the vast majority of other ‘ESG risks,’ and conflated ‘sovereign and municipal bond ratings’ with ‘private sector rating actions.’
— Page 13.

“The CFTC Climate Subcommittee Knew Its NRSRO Recommendation Was a Dead-End
Member Martina L. Cheung’s credentials — S&P Global Market Intelligence President; prior S&P Global Ratings Managing Director — meant any NRSRO recommendation must be a dead-end.”
— Page 14.

Sincerely yours,

Bill Harrington

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