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or indirectly, from the maintenance of the client's commodity interest account with a futures commission merchant or the introduction of such account through an introducing broker (such as payment for order flow or soft dollar arrangements).

(k) *Litigation.* (1) Subject to the provisions of § 4.34(k)(2), any material administrative, civil or criminal action, whether pending or concluded, within five years preceding the date of the Document, against any of the following persons; *Provided, however,* that a concluded action that resulted in an adjudication on the merits in favor of such person need not be disclosed:

(i) The commodity trading advisor and any principal thereof;

(ii) Any futures commission merchant with which the client will be required to maintain its commodity interest account; and

(iii) Any introducing broker through which the client will be required to introduce its account to the futures commission merchant.

(2) With respect to a futures commission merchant or an introducing broker, an action will be considered material if:

(i) The action would be required to be disclosed in the notes to the futures commission merchant's or introducing broker's financial statements prepared pursuant to generally accepted accounting principles;

(ii) The action was brought by the Commission; *Provided, however,* that a concluded action that did not result in civil monetary penalties exceeding \$50,000 need not be disclosed unless it involved allegations of fraud or other willful misconduct; or

(iii) The action was brought by any other federal or state regulatory agency, a non-United States regulatory agency or a self-regulatory organization and involved allegations of fraud or other willful misconduct.

(l) *Trading for own account.* If the commodity trading advisor or any principal thereof trades or intends to trade commodity interests for its own account, the trading advisor must disclose whether clients will be permitted to inspect the records of such person's trading and any written policies related to such trading.

(m) *Performance disclosures.* Past performance must be disclosed as set forth in § 4.35.

(n) *Supplemental information.* If any information, other than that required by Commission rules, the antifraud provisions of the Act, other federal or state laws and regulations, any rules of a self-regulatory agency or laws of a non-United States jurisdiction, is provided, such information:

(1) May not be misleading in content or presentation or inconsistent with the required disclosures;

(2) Is subject to the antifraud provisions of the Act and Commission rules, and to rules regarding the use of promotional material promulgated by a registered futures association pursuant to section 17(j) of the Act; and

(3) Must be placed as follows, unless otherwise specified by Commission rules:

(i) Supplemental performance information (not including proprietary trading results as defined in § 4.35(a)(7), or hypothetical, extracted, pro forma or simulated trading results) must be placed after all required performance information;

(ii) Supplemental non-performance information relating to a required disclosure may be included with the related required disclosure; and

(iii) Other supplemental information may be included after all required disclosures; *Provided, however,* That any proprietary trading results as defined in § 4.35(a)(7), and any hypothetical, extracted, pro forma or simulated trading results included in the Disclosure Document must appear as the last disclosure therein following all required and non-required disclosures.

(o) *Material information.* Nothing set forth in §§ 4.31, 4.34, 4.35 or 4.36 shall relieve a commodity trading advisor from any obligation under the Act or the regulations thereunder, including the obligation to disclose all material information to existing or prospective clients even if the information is not specifically required by such sections.

[60 FR 38189, July 25, 1995, as amended at 66 FR 53522, Oct. 23, 2001]

§ 4.35 Performance disclosures.

(a) *General principles—(1) Capsule performance information.* Unless otherwise

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specified, disclosure of the past performance of an account or trading program required under this § 4.35 must include the following information:

(i) The name of the commodity trading advisor or other person trading the account and the name of the trading program;

(ii) The date on which the commodity trading advisor or other person trading the account began trading client accounts and the date when client funds began being traded pursuant to the trading program;

(iii) The number of accounts directed by the trading advisor or other person trading the account pursuant to the trading program specified, as of the date of the Disclosure Document;

(iv)(A) The total assets under the management of the trading advisor or other person trading the account, as of the date of the Disclosure Document; and

(B) The total assets traded pursuant to the trading program specified, as of the date of the Disclosure Document;

(v) The largest monthly draw-down for the account or trading program specified during the most recent five calendar year and year-to-date expressed as a percentage of client funds and indicating the month and year of the draw-down (the capsule must include a definition of "draw-down" that is consistent with § 4.10(k));

(vi) The worst peak-to-valley draw-down for the trading program specified during the most recent five calendar year and year-to-date, expressed as a percentage of net asset value and indicating the months and year of the draw-down;

(vii) Subject to § 4.35(a)(2) for the offered trading program, the annual and year-to-date rate-of-return for the program specified for the five most recent calendar years and year-to-date, computed on a compounded monthly basis; *Provided, however,* That performance of the offered trading program must include monthly rates of return for such period; and

(viii) In the case of the offered trading program:

(A)(1) The number of accounts traded pursuant to the offered trading program that were opened and closed during the period specified in § 4.35(a)(5)

with a positive net lifetime rate of return as of the date the account was closed; and

(2) A measure of the variability of returns for accounts that were both opened and closed during the period specified in § 4.35(a)(5) and closed with positive net lifetime rates of return; and

(B)(1) The number of accounts traded pursuant to the offered trading program that were opened and closed during the period specified in § 4.35(a)(5) with negative net lifetime rates of return as of the date the account was closed; and

(2) A measure of the variability of returns for accounts that were both opened and closed during the period specified in § 4.35(a)(5) and closed with negative net lifetime rates of return.

(C) The measure of variability required by §§ 4.35(a)(1)(viii)(A)(2) and (B)(2) may be provided as a range of both positive and negative net lifetime returns, or by any other form of disclosure that meets the objective of disclosure of the variability of returns experienced by clients in the trading program whose accounts were opened and closed during the period specified in § 4.35(a)(5). The net lifetime rate of return shall be calculated as the compounded product of the monthly rates of return for each month the account is open.

(2) *Additional requirements with respect to the offered trading program.* (i) The performance of the offered trading program must be identified as such and separately presented first;

(ii) The rate of return of the offered trading program must be presented on a monthly basis for the period specified in § 4.35(a)(5), either in a numerical table or in a bar graph;

(iii) A bar graph used to present monthly rates of return for the offered trading program:

(A) Must show percentage rate of return on the vertical axis and one-month increments on the horizontal axis;

(B) Must be scaled in such a way as to clearly show month-to-month differences in rates of return; and

(C) Must separately display numerical percentage annual rates of return

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for the period covered by the bar graph; and

(iv) The commodity trading advisor must make available to prospective and existing clients upon request a table showing at least quarterly the information required to be calculated pursuant to § 4.35(a)(6).

(3) *Composite presentation.* (i) Unless such presentation would be misleading, the performance of accounts traded pursuant to the same trading program may be presented in composite form on a program-by-program basis, using the format set forth in § 4.35(a)(1).

(ii) Accounts that differ materially with respect to rates of return may not be presented in the same composite.

(iii) The commodity trading advisor must discuss all material differences among the accounts included in a composite.

(4) *Current information.* All performance information presented in the Disclosure Document must be current as of a date not more than three months preceding the date of the Document.

(5) *Time period for required performance.* All required performance information must be presented for the most recent five calendar years and year-to-date or for the life of the trading program or account, if less than five years.

(6) *Calculation of, and recordkeeping concerning, performance information.* (i) All performance information presented in a Disclosure Document, including performance information contained in any capsule and performance information not specifically required by Commission rules, must be current as of a date not more than three months preceding the date of the Document, and must be supported by the following amounts, calculated on an accrual basis of accounting in accordance with generally accepted accounting principles, as specified below or by a method otherwise approved by the Commission.

(A) The beginning net asset value for the period, which shall represent the previous period's ending net asset value;

(B) All additions, whether voluntary or involuntary, during the period;

(C) All withdrawals and redemptions, whether voluntary or involuntary, during the period;

(D) The net performance for the period, which shall represent the change in the net asset value net of additions, withdrawals, redemptions, fees and expenses;

(E) The ending net asset value for the period, which shall represent the beginning net asset value plus or minus additions, withdrawals and redemptions, and net performance; and

(F) The rate of return for the period, computed on a compounded monthly basis, which shall be calculated by dividing the net performance by the beginning net asset value.

(ii) All supporting documents necessary to substantiate the computation of such amounts must be maintained in accordance with § 1.31.

(7) *Performance of partially-funded accounts.* Notwithstanding the foregoing, a commodity trading advisor will be deemed in compliance with this § 4.35(a) concerning the performance of partially-funded accounts if the commodity trading advisor presents the performance of such accounts in a manner that is balanced and is not in violation of the antifraud provisions of the Commodity Exchange Act or the Commission's regulations thereunder.

(8) *Proprietary trading results.* (i) Proprietary trading results shall not be included in a Disclosure Document unless such performance is prominently labeled as proprietary and is set forth separately after all disclosures in accordance with § 4.34(n), together with a discussion of any differences between such performance and the performance of the offered trading program, including, but not limited to, differences in costs, leverage and trading.

(ii) For the purposes of § 4.34(n) and this § 4.35(a), proprietary trading results means the performance of any account in which fifty percent or more of the beneficial interest is owned or controlled by:

(A) The commodity trading advisor or any of its principals;

(B) An affiliate or family member of the commodity trading advisor; or

(C) Any person providing services to the account.

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(9) *Required legend.* Any past performance presentation, whether or not required by Commission rules, must be preceded with the following statement, prominently displayed:

PAST PERFORMANCE IS NOT NECESSARILY INDICATIVE OF FUTURE RESULTS.

(b) *Performance to be disclosed.* Except as provided in § 4.35(a)(7), the commodity trading advisor must disclose the actual performance of all accounts directed by the commodity trading advisor and by each of its trading principals; *Provided, however,* that if the trading advisor or its trading principals previously have not directed any accounts, the trading advisor must prominently disclose this fact with one of the following statements, as applicable:

(1) THIS TRADING ADVISOR PREVIOUSLY HAS NOT DIRECTED ANY ACCOUNTS; or

(2) NONE OF THE TRADING PRINCIPALS OF THIS TRADING ADVISOR HAS PREVIOUSLY DIRECTED ANY ACCOUNTS; or

(3) NEITHER THIS TRADING ADVISOR NOR ANY OF ITS TRADING PRINCIPALS HAVE PREVIOUSLY DIRECTED ANY ACCOUNTS.

If the commodity trading advisor is a sole proprietorship, reference to its trading principals need not be included in the prescribed statement.

[60 FR 38191, July 25, 1995, as amended at 68 FR 42967, July 21, 2003; 68 FR 47235, Aug. 8, 2003]

§ 4.36 Use, amendment and filing of Disclosure Document.

(a) Subject to paragraph (c) of this section, all information contained in the Disclosure Document must be current as of the date of the Document; *Provided, however,* that performance information must be current as of a date not more than three months preceding the date of the Document.

(b) No commodity trading advisor may use a Disclosure Document dated more than nine months prior to the date of its use.

(c)(1) If the commodity trading advisor knows or should know that the Disclosure Document is materially inaccurate or incomplete in any respect, it

must correct that defect and must distribute the correction to:

(i) All existing clients in the trading program within 21 calendar days of the date upon which the trading advisor first knows or has reason to know of the defect; and

(ii) Each previously solicited prospective client for the trading program prior to entering into an agreement to direct or to guide such prospective client's commodity interest account pursuant to the program. The trading advisor may furnish the correction by way of an amended Disclosure Document, a sticker on the Document, or other similar means.

(2) The trading advisor may not use the Disclosure Document until such correction is made.

(d)(1) The commodity trading advisor must file with the National Futures Association one copy of the Disclosure Document for trading program that it offers or that it intends to offer not less than 21 calendar days prior to the date the trading advisor first intends to deliver the Document to a prospective client in the trading program; and

(2) The commodity trading advisor must file with the National Futures Association one copy of the subsequent amendments to the Disclosure Document for each trading program that it offers or that it intends to offer within 21 calendar days of the date upon which the trading advisor first knows or has reason to know of the defect requiring the amendment.

[60 FR 38192, July 25, 1995, as amended at 62 FR 18268, Apr. 15, 1997; 65 FR 58650, Oct. 2, 2000; 67 FR 77411, Dec. 18, 2002]

Subpart D—Advertising

§ 4.40 [Reserved]

§ 4.41 Advertising by commodity pool operators, commodity trading advisors, and the principals thereof.

(a) No commodity pool operator, commodity trading advisor, or any principal thereof, may advertise in a manner which:

(1) Employs any device, scheme or artifice to defraud any participant or client or prospective participant or client; or