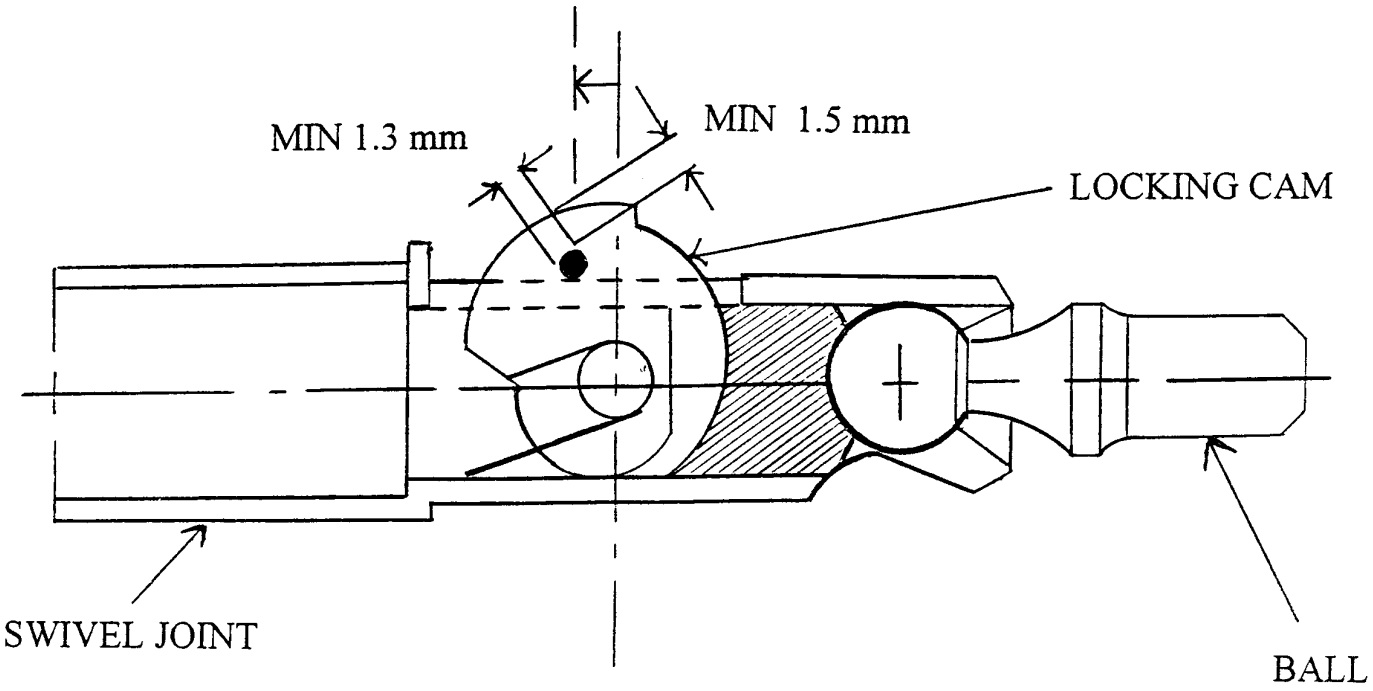

FIGURE 2

BILLING CODE 4910–13–C

(B) When the ball is seated correctly, the hole is located aft of the centerline of the cam pivot point. (See the dashed line in Figure 2 of this AD).

(C) The type of aviation locking device used is at the discretion of the certificated mechanic based on the installation accessibility of the locking devices and fittings.

Note 4: The applicable aircraft manufacturer has identified suitable locking devices based on the aircraft's specific type design features. The operator may contact the U.S. aircraft company representative or manufacturer for any technical information related to this matter.

Note 5: It is recommended, but not required by this AD, that the owner/operator inspect these connectors per L'Hotellier's ''Instructions for the Maintenance L'Hotellier Ball and Swivel Joints.'' This technical data may be obtained from your U.S. sailplane dealer or from: L'Hotellier S.A., 93 Avenue Charles De Gaulle, 92270 Bois Colombes, France.

(b) Fabricate and install a placard (using 1/8 inch letters) in the glider or sailplane, within the pilot's clear view, with the following words:

''All L'Hotellier control system connectors must be secured with safety wire, pins, or safety sleeves, as applicable, prior to operation.''

(c) Fabricating and installing the placard as required by paragraph (b) of this AD may be performed by the owner/operator holding at least a private pilot certificate as authorized by section 43.7 of the Federal Aviation Regulations (14 CFR 43.7), and must be entered into the sailplane's or glider's records showing compliance with this AD in accordance with section 43.9 of the Federal Aviation Regulations.

(d) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(e) An alternative method of compliance or adjustment of the compliance time that provides an equivalent level of safety may be approved by the Manager, Small Airplane Directorate, Aircraft Certification Service, FAA, 1201 Walnut, suite 900, Kansas City, Missouri 64106. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Small Airplane Directorate. Alternative methods of compliance approved in accordance with AD 97–08–06 are considered approved as alternative methods of compliance for this AD.

Note 6: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Small Airplane Directorate.

(f) Copies of this AD may be inspected at the FAA, Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri.

(g) This amendment (39–10080) becomes effective on August 1, 1997.

Issued in Kansas City, Missouri, on July 9, 1997.

John R. Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–18497 Filed 7–21–97; 8:45 am]

BILLING CODE 4910–13–U

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4

Interpretation Regarding Use of Electronic Media by Commodity Pool Operators and Commodity Trading Advisors for Delivery of Disclosure Documents and Other Materials

AGENCY: Commodity Futures Trading Commission.

ACTION: Final Interpretation; Final Rules.

SUMMARY: The Commodity Futures Trading Commission (the ''Commission'' or ''CFTC'') is modifying in part the interpretation set forth in its August 14, 1996 release (61 FR 42146) to clarify the Commission's views concerning electronic delivery of required Disclosure Documents and other materials by commodity pool operators (''CPOs'') and commodity trading advisors (''CTAs''). The Commission also is adopting technical amendments to its rules governing the form of documents distributed by CPOs and CTAs and the requirement that a CPO or CTA obtain a signed acknowledgment when a Disclosure Document is delivered. The rule amendments were proposed in the Commission's August 27, 1996 release (61 FR 44009) and are intended to facilitate the use of electronic media by CPOs and CTAs.

EFFECTIVE DATE: August 21, 1997.

FOR FURTHER INFORMATION CONTACT: Susan C. Ervin, Deputy Director/Chief Counsel, or Christopher W. Cummings, Special Counsel, Division of Trading and Markets, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581. Telephone Number: (202) 418–5450. Facsimile Number: (202) 418–5536. Electronic Mail: tm@cftc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On August 8, 1996, the Commission issued a proposed interpretation regarding the use of electronic media [1] by commodity pool operators (''CPOs''), commodity trading advisors (''CTAs'') and their associated persons (''Initial Release''). The Initial Release provided guidance to CPOs and CTAs concerning the application of the Commodity Exchange Act (''CEA'') and the Commission's regulations thereunder to activities involving electronic media. The original effective date of the Initial Release, which was published in the **Federal Register** on August 14, 1996, was October 15, 1996, with a sixty day period for the submission of public comments. On October 15, 1996, the Commission postponed the effective date for sixty days and extended the comment period on the Initial Release for thirty days to provide additional time for the public to submit comments. On December 11, 1996, the Commission indefinitely postponed the effective date of the Initial Release to enable a full review and consideration of the comments received and issues presented.[2]

On August 19, 1996, the Commission proposed a series of technical changes to Part 4 of its rules (the ''Proposed Rules'') to clarify application of paper-based formatting, filing and acknowledgment requirements in light of the interpretations set forth in the Initial Release. The Proposed Rules were published for public comment in the **Federal Register** on August 27, 1996.[3] The Commission did not receive any comments specifically addressed to the Proposed Rules. However, because the proposed changes to Rules 4.1, 4.21 and 4.31 codified portions of the Initial Release, the Commission is considering the comments received in response to the Initial Release as applicable also to those proposed rule amendments.

The Initial Release discussed the application of the existing statutory and regulatory regime to the use of electronic media, including in Section II a discussion of the registration implications of using electronic media and in Section III specific guidance for the use of electronic media for delivery of Disclosure Documents. In Section IV the Commission announced an optional, six month pilot program for the electronic filing of Disclosure Documents (the ''Pilot Program'').

Based upon its review of the comments received and its experience with the Pilot Program, on April 9, 1997, the Commission determined to convert the electronic filing program to a permanent, voluntary filing program.[4] On April 9, 1997, the Commission adopted the proposed changes to Rules 4.2(a), 4.26(d) and 4.36(d) substantially as proposed to implement the electronic filing program.[5] This Release addresses the issues relating to the electronic delivery of Disclosure Documents and other documents by CPOs and CTAs discussed in Section III of the Initial Release. This Release does not affect the status of Section II of the Initial Release, which principally addressed registration issues, the effectiveness of which was indefinitely postponed by the Commission's **Federal Register** release of December 16, 1996.[6]

The Commission received comment letters from seventy-seven sources: twenty-six from persons registered as CTAs, nineteen from CPOs/CTAs, two from CTAs/introducing brokers (''IBs''), one from a CTA/futures commission merchant, one from a CTA/CPO/IB, one from a contract market, one from a futures industry trade association, one from a self-regulatory organization, one from a public interest legal center, one from a publishers' trade association and the remainder from various unregistered persons or entities. The comments received expressed broad support for the Commission's initiative to provide guidance regarding the use of electronic media but raised issues concerning a number of specific applications of the requirements for delivery of Disclosure Documents.[7] Based upon the Commission's consideration of the comments received and its own reconsideration of the Initial Release, the Commission has determined to modify the interpretation as discussed below. The Commission also has determined to adopt the remaining technical amendments to Part 4 in substantially the form in which they were proposed.

As the Commission stated in the Initial Release, ''electronic media can provide an effective alternative to traditional paper-based media.'' [8] Thus, as a general proposition, the Commission supports consistency in the application of regulatory requirements to electronic and non-electronic media to ensure that information is conveyed in a manner that achieves the relevant regulatory objectives, regardless of the medium selected. The following guidance is designed to aid in the application of the rules to delivery of Disclosure Documents and other documents by means of electronic media in a manner that achieves the same objectives as delivery of hardcopy documents.

II. Delivery of Disclosure Documents to Prospective Investors—Compliance With Rules 4.21(a) and 4.31(a)

Commission rules require that CPOs and CTAs deliver a Disclosure Document at or prior to the time of solicitation of customers. Commission Rule 4.21(a) provides that ''no CPO

[1] The term ''electronic media'' refers to such media as audiotapes, videotapes, facsimiles, CD–ROM, electronic mail, bulletin boards, Internet World Wide Web sites and computer networks (*e.g.*, local area networks and commercial on-line services) used to provide documents and information required by or otherwise affected by the Commodity Exchange Act and the regulations promulgated thereunder.

[2] The pilot program for electronic filing of Disclosure Documents announced in the Initial Release was implemented October 15, 1996 and was not affected by postponement of the Initial Release's effective date.

[3] 61 FR 44009 (August 27, 1996).

[4] 62 FR 18265 (April 15, 1997).

[5] 62 FR 18265 (April 15, 1997). Rule 4.2(a) was changed to provide for electronic filing at an e-mail address to be designated by the Commission. Rules 4.26(d) and 4.36(d) were changed to provide that, when a Disclosure Document is filed electronically, only one copy need be submitted.

[6] 61 FR 65940 (December 16, 1996).

[7] Because final action on Section II of the Initial Release is not being taken at this time, the Commission is not addressing in this release the comments received concerning registration-related issues.

[8] 61 FR at 42150.

* * * may, directly or indirectly, solicit, accept or receive funds, securities or other property from a prospective pool participant in a pool that it operates or that it intends to operate unless, on or before the date it engages in that activity, the CPO delivers or causes to be delivered to the prospective participant a Disclosure Document for the pool * * *.''[9] Similarly, Rule 4.31(a) provides that ''no CTA * * * may solicit a prospective client, or enter into an agreement with a prospective client to direct the client's commodity interest account or to guide the client's commodity interest trading by means of a systematic program that recommends specific transactions, unless the commodity trading advisor, at or before the time it engages in the solicitation or enters into the agreement (whichever is earlier), delivers or causes to be delivered to the prospective client a Disclosure Document for the trading program * * *.''[10]

The Initial Release provided guidance to CPOs and CTAs concerning the use of electronic media to comply with the requirements of Part 4 of the Commission's regulations for the delivery of Disclosure Documents by CPOs and CTAs and distribution of monthly or quarterly statements and annual reports by CPOs. The requirement to deliver Disclosure Documents to prospective customers is an essential component of the Commission's regulatory regime for CPOs and CTAs. The Commission reaffirms the view expressed in the Initial Release that ''the requirements that CTAs and CPOs deliver Disclosure Documents to prospective clients and pool participants, respectively, may be satisfied by the use of electronic media, provided appropriate measures are taken to assure that the purposes of the delivery requirements are achieved.''[11] In the Initial Release, the Commission identified criteria to guide CPOs and CTAs in making use of electronic media to effect delivery of Disclosure Documents and other required communications in a manner that assures that the purposes of the delivery requirements are achieved. The Commission invited comment concerning the criteria highlighted in the Initial Release and any additional criteria that commenters believed to be relevant. The Commission has reviewed the Initial Release in light of the comments received and has determined to make several modifications of the guidance provided, as discussed more fully below.

Consent. In the past, compliance with Part 4 of the Commission's rules has required delivery of Disclosure Documents in paper form. While the Commission supports the use of electronic media as an alternative medium for delivery of Disclosure Documents, it recognizes that some persons may prefer to receive disclosure in paper form. Paper disclosures generally have a greater degree of permanence and portability than electronic disclosures and in some contexts may be easier to review, *e.g.*, if one wishes to review several pages ''side by side.'' Accordingly, CPOs and CTAs may use electronic delivery in lieu of delivery of a hardcopy Disclosure Document only where the intended recipient has provided informed consent to receipt of the document by means of electronic delivery.

In the Initial Release, the Commission set forth six generic factors that must be disclosed by a CPO or CTA to obtain informed consent to delivery of required documents electronically: (1) the regulatory requirement to deliver the relevant document, such as a Disclosure Document, to prospective commodity pool participants or managed account customers, as applicable; (2) the right to elect to receive such document in hardcopy form or by means of electronic delivery; (3) the specific media and method by which electronic delivery will be made;[12] (4) the potential costs associated with receiving or accessing electronically delivered documents; (5) the types of documents that will be delivered through electronic media, if documents in addition to the Disclosure Document are to be delivered electronically; and (6) the prospective customer's right to revoke his consent to receive documents by electronic means at any time.

Two commenters, the National Futures Association (''NFA'') and the Managed Futures Association (''MFA''), contended that the Commission's procedures for obtaining informed consent were complicated and required unnecessary information. For example, NFA questioned whether in an electronic environment a CPO should be required to obtain informed consent concerning delivery of pool account statements at the time of initial solicitation. NFA was also concerned as to how registrants could provide estimates concerning the cost of receiving electronic disclosures when such costs are likely to vary substantially from user to user. Similarly, MFA's comment letter asked that the Commission clarify what is required for obtaining informed consent and contended that the requirement of informed consent could amount to a ''penalty'' for using electronic media. MFA urged that both informed consent and acknowledgment of delivery be required only at the point of sale, rather than at initial solicitation.

The Commission does not believe that obtaining informed consent need require complex or burdensome procedures and is providing further clarification to address concerns expressed by various commenters. With respect to NFA's concern that a CPO might be required to obtain informed consent concerning delivery of other required pool reports such as pool account statements at the time of initial solicitation, the Commission notes that the Initial Release was only intended to set forth the consent criteria that would apply to *all* potentially required communications without addressing when each relevant consent need be obtained. It did not require that such consents be obtained at the time of initial solicitation, except consent to delivery of the Disclosure Document electronically, since such delivery is required to occur at or prior to solicitation.[13] With respect to explaining the potential costs of electronic delivery, the Commission did not intend that CPOs or CTAs provide the actual amount of attendant costs other than costs added by the deliverer for the electronic delivery of required documents. This means that if charges specific to access and receipt of the Disclosure Document, in addition to basic Internet or electronic media access fees, will be incurred, CPOs and CTAs must so specify. Consequently, for materials posted on the World Wide Web and accessible without charge, as is the case with materials presented on the vast majority of Internet sites, there would be no duty to disclose potential costs. In many, if not most, cases the consent requirements should be satisfiable with a single sentence identifying the document to be delivered electronically, the prospective customer's right to receive a hardcopy, and the prospective customer's right to

[9] 17 CFR 4.21(a). CPOs and CTAs are reminded of their obligations, regardless of the medium used, to disclose all material information to existing or prospective clients (*see* Rules 4.24(w) and 4.34(o)) and not to mislead (*see* Sections 4b and 4*o* of the Act, 7 U.S.C. 6b and 6*o*).

[10] 17 CFR 4.31(a).

[11] 61 FR at 42158.

[12] This information should include, for example, identification of software (other than that which the customer/user is using to view the disclosures given to obtain informed consent) needed to download the Disclosure Document and, as appropriate, an indication that download times may be lengthy.

[13] See discussion below as to how such delivery (*i.e.*, presubscription delivery) may be accomplished in an electronic environment.

revoke consent to electronic delivery. As discussed more fully below, the disclosures requisite to obtaining informed consent may be included in the disclosure statement presented in lieu of the full Disclosure Document at the beginning of the solicitation material to permit access to a CPO or CTA Internet site.

Delivery. Commission Rules 4.21(a) and 4.31(a) require that, at or before the time at which a CPO or CTA solicits a prospective pool participant or client, respectively, he must deliver the applicable Disclosure Document. In the Initial Release, the Commission construed the requirements of Rules 4.21(a) and 4.31(a) (which, by reference to Rules 4.24 and 4.34, impose both specific presentation and order of disclosure requirements) in the context of electronic media to require that the full Disclosure Document be delivered electronically to a prospective investor prior to providing access to any solicitation materials concerning the offered pool or managed account services other than *de minimis* introductory material. In order not to constrain unduly the ability to provide a menu of available information, the Commission indicated that a general description of the contents of a website, through presentation of an outline or table of contents for the website in which the Disclosure Document is listed as the first item, would satisfy Rules 4.21(a) and 4.31(a) provided that the prospective pool participant or client would be unable to review other sections of the site before accessing and scrolling through the Disclosure Document and affirming that he or she had received it.

This ''click and scroll'' requirement addressed both the Commission's concern that prospective investors actually have the Disclosure Document brought to their attention with a comparable degree of directness and immediacy as would normally be attained by postal mail or personal delivery, and the ''order'' of disclosure requirements of Commission rules. Postal mail or personal delivery assures actual notice to the recipient of receipt of a document as well as actual receipt of the document. By contrast, electronic media have the capability of making vast inventories of documents passively available through indices or hyperlinks, which provide a computer connection to documents often too numerous for any viewer to access or, in many cases, even to identify as being of particular relevance to that viewer. Consequently, announcing the availability of a document by means of electronic media may have far less significance to, and impact upon, a prospective customer than actual delivery of a hardcopy Disclosure Document. Thus, in the Initial Release, the Commission endeavored to give guidance designed to balance the regulatory interest in the prospective pool participant's or managed account customer's actually having notice and immediate receipt of the Disclosure Document with the CPO's and CTA's interest in the efficiencies obtainable through the use of electronic media.

However, a number of commenters argued that application of the delivery requirement in the manner suggested in the Initial Release was unduly burdensome. They objected to the requirement that investors access and scroll to the end of a Disclosure Document prior to receiving promotional material on the ground that hardcopy documents, while provided before other material, may not be read completely. These commenters believed that such a requirement might discourage persons from obtaining information concerning managed futures on the Internet. Although the ''click and scroll'' procedure permits a viewer to scroll through a document in a matter of seconds, some commenters viewed the requirement that the viewer scroll through the Disclosure Document as excessive and analogous to ''requir[ing] registrants to ensure that prospective customers review each page of the hardcopy document before proceeding with a solicitation.'' [14] NFA's comment letter proposed that, in lieu of requiring that viewers actually proceed through the full text of the Disclosure Document before receiving any additional solicitation material, CPOs and CTAs instead provide a concise risk disclosure statement, which viewers would be required to scroll through, together with immediate electronic (or hardcopy) access to the full electronic (or hardcopy) Disclosure Document. NFA's comment letter also proposed that the Disclosure Document be deemed to have been delivered if: (1) the Disclosure Document is prominently available and in close proximity to the solicitation information requiring delivery of a Disclosure Document; (2) the Disclosure Document and all supplements are made accessible electronically for the time period for which the Disclosure Document is effective; and (3) the Disclosure Document is available upon request in paper form or able to be downloaded by the recipient.[15] Further, some commenters contended that the Commission's interpretation of delivery differed from that of the Securities and Exchange Commission (''SEC''), which permits the use of hyperlinks to effectuate delivery in certain circumstances.[16]

Based upon further consideration of the issues and the comments received, the Commission believes that the delivery requirements of Rules 4.21 and 4.31 may be satisfied in the context of electronic media by methods that do not require the prospective customer to scroll through the *entire* Disclosure Document prior to receiving other solicitation material, provided that the requirements on prominence of presentation and comparable availability discussed herein are followed. One such method acceptable to the Commission would be providing a simple, concise statement highlighting the nature of the risks relevant to the pool or managed account program being offered and directing the viewer to the Disclosure Document for a fuller explanation of the nature of the proposed investment and its attendant risks and costs. The same explanatory statement could be used to satisfy the requirement to obtain the informed consent of prospective customers who elect to receive the Disclosure Document electronically rather than through delivery of a hardcopy document. This risk disclosure statement would be filed with the Commission together with the registrant's Disclosure Document. In this scenario, the prospective investor is using electronic media to consent to electronic receipt of the Disclosure Document and is also receiving on that medium a summary risk statement highlighting the availability of the Disclosure Document and a hyperlink or other similarly immediate connection to the Disclosure Document. In this context, the CPO or CTA has delivered the relevant Disclosure Document at the

[14] NFA comment letter at 2.

[15] NFA also referenced the interpretations of the SEC concerning electronic delivery of required disclosures. NFA's tripartite test is consistent with that of the SEC.

[16] For example, the SEC stated that during the ''post-effective'' period of a public securities offering, a company could place its sales literature on the World Wide Web provided that the sales literature contains a hyperlink to the Company's final prospectus where an individual may click on a box marked ''final prospectus'' and almost instantly the final prospectus appears on the individual's computer screen. The SEC noted that ''[s]ales literature, whether in paper or electronic form, is required to be preceded or accompanied by a final prospectus. The hyperlink function enables the final prospectus to be viewed directly as if it were packaged in the same envelope as the sales literature. Therefore, the final prospectus would be considered to have accompanied the sales literature.'' 60FR 53458, 53463 (October 13, 1995).

time of or prior to solicitation of the prospective customer.[17]

For purposes of providing this concise risk disclosure and highlighting the contents and availability of the Disclosure Document, the Commission believes that the ''risk disclosure statement'' set forth in Rules 4.24 and 4.34 and required to be presented at the beginning of the Disclosure Document for commodity pools and commodity trading advisors, respectively, may provide a useful template, with minor adjustments. A sample ''short form'' risk disclosure statement for a commodity pool might read as follows:

YOU SHOULD CAREFULLY CONSIDER WHETHER YOUR FINANCIAL CONDITION PERMITS YOU TO PARTICIPATE IN A COMMODITY POOL. IN SO DOING, YOU SHOULD BE AWARE THAT FUTURES AND OPTION TRADING CAN QUICKLY LEAD TO LARGE LOSSES AS WELL AS GAINS. SUCH TRADING LOSSES CAN SHARPLY REDUCE THE NET ASSET VALUE OF THE POOL AND CONSEQUENTLY THE VALUE OF YOUR INTEREST IN THE POOL. IN ADDITION, RESTRICTIONS ON REDEMPTIONS MAY AFFECT YOUR ABILITY TO WITHDRAW YOUR PARTICIPATION IN THE POOL.

FURTHER, COMMODITY POOLS MAY BE SUBJECT TO SUBSTANTIAL CHARGES FOR MANAGEMENT AND ADVISORY AND BROKERAGE FEES. IT MAY BE NECESSARY FOR THOSE POOLS THAT ARE SUBJECT TO THESE CHARGES TO MAKE SUBSTANTIAL TRADING PROFITS TO AVOID DEPLETION OR EXHAUSTION OF THEIR ASSETS. THE DISCLOSURE DOCUMENT CONTAINS A COMPLETE DESCRIPTION OF THE PRINCIPAL RISK FACTORS, EACH EXPENSE TO BE CHARGED THIS POOL AND A STATEMENT OF THE AMOUNT, AS A PERCENTAGE RETURN AND DOLLAR AMOUNT, NECESSARY TO BREAK EVEN, THAT IS, TO RECOVER THE AMOUNT OF YOUR INITIAL INVESTMENT.[18]

THE REGULATIONS OF THE COMMODITY FUTURES TRADING COMMISSION (''CFTC'') REQUIRE THAT PROSPECTIVE INVESTORS RECEIVE A DISCLOSURE DOCUMENT WHEN THEY ARE SOLICITED TO INVEST FUNDS IN A COMMODITY POOL AND THAT CERTAIN RISK FACTORS BE HIGHLIGHTED. THIS DOCUMENT IS READILY ACCESSIBLE AT THIS SITE. THIS BRIEF STATEMENT CANNOT DISCLOSE ALL OF THE RISKS AND OTHER FACTORS NECESSARY TO EVALUATE YOUR PARTICIPATION IN THIS COMMODITY POOL. THEREFORE, YOU SHOULD PROCEED DIRECTLY TO THE DISCLOSURE DOCUMENT AND STUDY IT CAREFULLY TO DETERMINE WHETHER SUCH TRADING IS APPROPRIATE FOR YOU IN LIGHT OF YOUR FINANCIAL CONDITION. YOU ARE ENCOURAGED TO ACCESS THE DISCLOSURE DOCUMENT BY CLICKING BELOW. YOU WILL NOT INCUR ANY ADDITIONAL CHARGES BY ACCESSING THE DISCLOSURE DOCUMENT. YOU MAY ALSO REQUEST DELIVERY OF A HARDCOPY OF THE DISCLOSURE DOCUMENT, WHICH ALSO WILL BE PROVIDED TO YOU AT NO COST. THE CFTC HAS NOT PASSED UPON THE MERITS OF PARTICIPATING IN THIS POOL NOR ON THE ADEQUACY OR ACCURACY OF THE DISCLOSURE DOCUMENT.

PLEASE ACKNOWLEDGE YOUR UNDERSTANDING OF THIS IMPORTANT STATEMENT.

Similarly, a CTA's ''short form'' risk disclosure statement might read as follows:

THE RISK OF LOSS IN TRADING COMMODITIES CAN BE SUBSTANTIAL. YOU SHOULD THEREFORE CAREFULLY CONSIDER WHETHER SUCH TRADING IS SUITABLE FOR YOU IN LIGHT OF YOUR FINANCIAL CONDITION.

THE HIGH DEGREE OF LEVERAGE THAT IS OFTEN OBTAINABLE IN COMMODITY TRADING CAN WORK AGAINST YOU AS WELL AS FOR YOU. THE USE OF LEVERAGE CAN LEAD TO LARGE LOSSES AS WELL AS GAINS.

IN SOME CASES, MANAGED COMMODITY ACCOUNTS ARE SUBJECT TO SUBSTANTIAL CHARGES FOR MANAGEMENT AND ADVISORY FEES. IT MAY BE NECESSARY FOR THOSE ACCOUNTS THAT ARE SUBJECT TO THESE CHARGES TO MAKE SUBSTANTIAL TRADING PROFITS TO AVOID DEPLETION OR EXHAUSTION OF THEIR ASSETS. THE DISCLOSURE DOCUMENT CONTAINS A COMPLETE DESCRIPTION OF THE PRINCIPAL RISK FACTORS AND EACH FEE TO BE CHARGED TO YOUR ACCOUNT BY THE COMMODITY TRADING ADVISOR (''CTA'').

THE REGULATIONS OF THE COMMODITY FUTURES TRADING COMMISSION (''CFTC'') REQUIRE THAT PROSPECTIVE CLIENTS OF A CTA RECEIVE A DISCLOSURE DOCUMENT WHEN THEY ARE SOLICITED TO ENTER INTO AN AGREEMENT WHEREBY THE CTA WILL DIRECT OR GUIDE THE CLIENT'S COMMODITY INTEREST TRADING AND THAT CERTAIN RISK FACTORS BE HIGHLIGHTED. THIS DOCUMENT IS READILY ACCESSIBLE AT THIS SITE. THIS BRIEF STATEMENT CANNOT DISCLOSE ALL OF THE RISKS AND OTHER SIGNIFICANT ASPECTS OF THE COMMODITY MARKETS. THEREFORE, YOU SHOULD PROCEED DIRECTLY TO THE DISCLOSURE DOCUMENT AND STUDY IT CAREFULLY TO DETERMINE WHETHER SUCH TRADING IS APPROPRIATE FOR YOU IN LIGHT OF YOUR FINANCIAL CONDITION. YOU ARE ENCOURAGED TO ACCESS THE DISCLOSURE DOCUMENT BY CLICKING BELOW. YOU WILL NOT INCUR ANY ADDITIONAL CHARGES BY ACCESSING THE DISCLOSURE DOCUMENT. YOU MAY ALSO REQUEST DELIVERY OF A HARD COPY OF THE DISCLOSURE DOCUMENT, WHICH ALSO WILL BE PROVIDED TO YOU AT NO COST. THE CFTC HAS NOT PASSED UPON THE MERITS OF PARTICIPATING IN THIS TRADING PROGRAM NOR ON THE ADEQUACY OR ACCURACY OF THE DISCLOSURE DOCUMENT.

OTHER DISCLOSURE STATEMENTS ARE REQUIRED TO BE PROVIDED YOU BEFORE A COMMODITY ACCOUNT MAY BE OPENED FOR YOU.

PLEASE ACKNOWLEDGE YOUR UNDERSTANDING OF THIS IMPORTANT STATEMENT.

At a minimum, such a risk disclosure statement should state: (1) that the risk of loss in trading futures contracts or commodity options can be substantial; (2) that Commission rules require delivery at or prior to the time of solicitation of a Disclosure Document, which explains, among other things, the principal risk factors and costs of the proposed participation in the commodity pool or managed account program including the potential impact of fees and expenses, the ''break even'' point in dollars and the percentage return necessary to recover one's initial investment, and restrictions on redeeming or withdrawing one's initial investment; (3) that a hardcopy Disclosure Document may be obtained from the CPO or CTA at no cost at any time;[19] and (4) that the Commission has not passed upon the merits of participating in a particular investment or on the adequacy or accuracy of the Disclosure Document. At the end of the risk disclosure statement, the prospective investor would be required to acknowledge that he or she understands the statement. CPOs and CTAs may tailor the risk disclosure statement to the particular facts of their situation.[20]

This summary risk disclosure statement should be accompanied by the Disclosure Document, made accessible by means of a hyperlink or similarly immediate connection and presented in a form that is readily accessible to the recipient. In stating that the Disclosure Document be

[17] However, if a prospective investor were solicited other than by electronic media, providing a summary risk disclosure statement and notice of the electronic availability of a Disclosure Document would not constitute delivery of the Disclosure Document at the time of or prior to solicitation.

[18] Ideally, individual disclosure documents provided electronically would include electronic tables of contents, providing hyperlinks (or comparable features) to highlight and facilitate access to the principal risk factors, costs, and break-even amounts, matters which are required to be highlighted in hardcopy disclosure. In any event, a table of contents is required by Rules 4.24(c) and 4.34(c) to be included in all Disclosure Documents.

[19] Inclusion of an indication of the time required to download the Disclosure Document may assist the prospective client in determining whether to request a paper copy and is therefore strongly encouraged by the Commission.

[20] After experience with this arrangement, the Commission may develop more explicit rules, as determined to be necessary.

''readily accessible,'' the Commission requires that the Disclosure Document be accessible on a comparable basis to other promotional material on the CPO's or CTA's website. Thus, to the extent that a Disclosure Document is in a form that requires use of a specially designated viewer or software, the other promotional material should require use of such viewer or software. This requirement is necessary to prevent the situation where a user may access promotional materials, such as performance data or a narrative description of the trading methodology, but is unable to access the Disclosure Document.[21] Use of a concise risk disclosure statement which highlights the immediate availability of the Disclosure Document and electronic hyperlinking or other similarly accessible arrangement that requires no greater facility or steps than access to other materials on the site should balance the need for electronic delivery of Disclosure Documents to be no more cumbersome than hardcopy delivery with the need for a customer to be properly informed of the relevant costs and risks of the proposed investment. Prospective pool participants or advisory clients would be required to access only the abbreviated risk disclosure statement and not to ''click and scroll'' through the entire Disclosure Document. Permitting delivery of the Disclosure Document in the manner discussed above also promotes consistency with the approach of other financial regulators such as the SEC.[22] Specific examples illustrating how CPOs and CTAs may use electronic media to deliver Disclosure Documents are provided in Section V.

Delivery of a risk disclosure statement in the form provided above or with minor adjustments should satisfy the requirements for informed consent with respect to delivery of a Disclosure Document. Where the sample risk disclosure statement provided does not address all required disclosures, such as where the Disclosure Document is delivered in a different manner from the risk disclosure statement, *e.g.*, where a Disclosure Document will be delivered by means of electronic mail, or where accessing the electronic Disclosure Document entails additional costs, CPOs or CTAs should modify the risk disclosure statement to address these additional factors. In every case, the Disclosure Document should be as accessible as promotional material.

Format. Commission rules include a number of format requirements which are designed to assure that certain information is accorded special prominence or emphasis in the Disclosure Document. These requirements create an order of presentation under which certain basic information must be placed at the beginning of the document, information of lesser relevance is presented after matters of greater importance, and voluntarily presented information follows required disclosures. The prescribed order also facilitates comparison of documents by maintaining the same sequence of topics across documents of different registrants. In the Initial Release and the Proposed Rules, the Commission recognized that a Disclosure Document could be presented in electronic form in place of paper form, provided that documents electronically delivered comply with the formatting standards specified in Commission rules. Specifically, the Commission noted that, where Commission rules specify the prominence, location, or other attributes of the information required to be delivered, an electronic version of such information must present the information in the same order and must reflect (if not replicate) the differences in emphasis and prominence that would exist in a hardcopy document.

The Commission received only one comment addressed to format issues.[23] The commenter noted that certain electronic document formats do not have standard ''pages'' and thus may not present legends, disclaimers and notes in the same manner as documents in hardcopy form. To address this disparity, the commenter proposed that the Commission require the use of certain technologies that make the appearance of electronic documents nearly identical to their paper versions, such as the currently popular Adobe Acrobat. The Commission recognizes that electronic and paper versions of the same document may differ in some respects as to format, but as noted above, does not intend to limit the technologies that CPOs or CTAs may use to deliver their Disclosure Documents as long as such documents present information in the same format and order as specified in Commission rules, and reflect ''the differences in emphasis and prominence that would exist in the paper document.'' [24] The Initial Release suggested methods by which the electronic versions of documents might present information for which special presentation requirements exist. For example, the Commission noted that where text is required to be presented in boldface type, an electronic presentation might achieve the same objective by changing the color or shading of the text or the background in a manner that causes that portion of the text to be emphasized.

Receipt of Acknowledgments by Electronic Media—Compliance with Rules 4.21(b) and 4.31(b). Commission Rule 4.21(b) provides that a ''commodity pool operator may not accept or receive funds, securities or other property from a prospective pool participant unless the pool operator first receives from the prospective pool participant an acknowledgment signed and dated by the prospective participant stating that the prospective participant received a Disclosure Document for the pool.'' [25] Similarly, Commission Rule 4.31(b) provides that a ''commodity trading advisor may not enter into an agreement with a prospective client to direct the client's commodity interest account or to guide the client's commodity interest trading unless the trading advisor first receives from the prospective client an acknowledgment signed and dated by the prospective client stating that the client received a Disclosure Document for the trading program pursuant to which the trading advisor will direct his account or will guide his trading.'' [26] This acknowledgment of delivery is required of a subscribing participant as opposed to one who is merely solicited, a distinction preserved in the electronic context. A signed and dated acknowledgment certifies that the

[21] The SEC has reflected similar concerns. For example, in example (38), the SEC stated, ''A server available through the Internet contains a fund's prospectus and application form in separate files. Users can download or print the application form without first accessing, downloading or printing the prospectus; the form includes a statement that by signing the form, the investor certifies that he or she has received the prospectus. Logistically, it is significantly more burdensome to access the prospectus than the application form (*e.g.*, the investor needs to download special software before accessing the prospectus). The statement in the form about receipt of the prospectus would not by itself constitute electronic delivery of the prospectus, and the application form is not evidence of delivery of the prospectus, given the need to download special software before the prospectus can be viewed.'' 60 FR 53458, 53465 (October 13, 1995).

[22] *See* footnote 16 *supra.*

[23] That commenter also asked whether an electronic Disclosure Document must be contained as a single file or may be several files linked together. This comment appears to address language in proposed Rule 4.1, which equated readily communicated information with material in a ''single file.'' 61 FR at 44012. This commenter favored linking several files together so that the Disclosure Document may be downloaded in portions, each of which could be downloaded more rapidly than the entire document. This comment and the Commission's modifications to proposed Rule 4.1 are discussed below in Section VI.

[24] 61 FR at 42161.

[25] 17 CFR 4.21(b).

[26] 17 CFR 4.31(b).

prospective investor has received the Disclosure Document, and the acknowledgment is one of the records that CPOs and CTAs are required to maintain under Part 4.

In the Initial Release, the Commission stated that it ''supports the use of electronic media to obtain customer acknowledgments but believes that measures must be taken to assure an adequate level of verification of the authenticity of such acknowledgments.'' [27] Similarly, in the Rule Proposal, the Commission stated that ''adequate evidence of receipt of a Disclosure Document may be obtained in ways other than a manually signed paper receipt.'' [28] In the Initial Release, the Commission stated that use of personal identification numbers (''PINs'') to verify the identity of a recipient represented a non-exclusive method of obtaining electronic acknowledgments of receipt of a Disclosure Document, and the Commission invited comment concerning the validity of electronic acknowledgments. The Commission noted that PINs serve two important objectives: (1) they enable the CPO or CTA, to the extent practicable, to verify the identity of the person sending the electronic communication; and (2) they help to protect innocent persons from false claims that they have sent a particular electronic communication.[29] Failure to include a valid PIN assigned to the intended party would render invalid any message purportedly sent by that person. The Commission has approved the use of PINs in lieu of manual signatures in other contexts, *e.g.*, by FCMs filing financial reports with self-regulatory organizations. Consequently, in the Initial Release, the Commission confirmed that the use of PINs ''would provide an acceptable method of obtaining acknowledgments of receipt of Disclosure Documents.'' [30] Further, the Commission noted that under Rules 4.21(b) and 4.31(b), CPOs and CTAs bear the burden of obtaining a valid acknowledgment of receipt of Disclosure Documents and are thus responsible for establishing procedures adequate to establish the authenticity of electronic acknowledgments. The Commission originally stated that if a CPO or CTA plans to accept electronic acknowledgments, it is responsible for establishing a system for issuing individualized PINs, but requested comment concerning alternative methods of authentication. In a subsequent release, the Commission stated that the methodology specified was not intended to be exclusive, provided that the CPO or CTA could satisfy the relevant criteria for verifiability.[31]

A number of commenters, including the NFA, MFA and the Chicago Mercantile Exchange, objected to the requirement of use of a PIN to verify the authenticity of electronic acknowledgments. These commenters expressed concern that the Commission's discussion of a PIN system mandated the use of that technology and prevented use of any other means of verification. The MFA, for example, contended that existing regulations do not require that a registrant verify the authenticity of a customer's signature and recommended that, in light of multiple technologies and procedures which may satisfy the regulatory requirements, the Commission ''require that a registrant develop procedures to ensure a means of identifying uniquely the recipient from whom an acknowledgment is required,'' without mandating a particular procedure. Although NFA objected to a requirement of authentication, it agreed that the rules currently require ''receipt of an executed acknowledgment which uniquely identifies an individual and purports to be his signature.''

The Commission believes that it is reasonable to require that electronic acknowledgments incorporate use of a PIN or other comparably efficacious form of verifying the identity of the recipient. The Commission recognizes, however, that different levels of verification control may be required depending upon the sensitivity of the signature obtained (*e.g.*, chief financial officers currently are permitted to sign electronically by PIN) and believes that greater flexibility may be appropriate where a signature merely evidences receipt of a document rather than validation of its contents. Further, the Commission does not wish to freeze its approaches to new technologies. The Commission therefore agrees that the acknowledgment requirement may be satisfied by any electronic methodology that uniquely identifies a specified person who has confirmed receipt of a document. As use of electronic media raises particular concerns of unique identification and attribution, a verification requirement of this nature is necessary and prudent.[32] Moreover, verification procedures should benefit CPOs and CTAs insofar as they may reduce the risk of customer complaints of failure to provide required disclosures. Thus, to the extent that methods other than PINs for verifying the identity of a person are available and provide a comparable level of identification of the recipient, the Commission does not intend PIN systems to be the exclusive method of obtaining electronic acknowledgments of receipt.

In the Initial Release, the Commission requested comment concerning alternatives to the use of PINs to verify receipt of electronically delivered documents. The commenters alluded to a number of alternatives, including electronic gating, security coded electronic mail, digital and electronic signatures, cryptography, public key-private key configurations and certificates of identity. However, the commenters' discussion of these alternatives did not provide information sufficient to assess the efficacy of these methods. Accordingly, the Commission has determined to continue to treat acknowledgment by PIN as adequate but also to set out a performance standard for the use of alternative mechanisms for receipt of electronic acknowledgments.

The performance standard requires use of a unique identifier to confirm the identity of the person sending the electronic acknowledgment to convey the acknowledgment in order to protect persons from claims that they have received a particular electronic communication when in fact they have not. Hard copy or electronic evidence of each use of such a system must be retained in order that the Commission and other authorities can verify that the acknowledgment was in fact given.[33] Registrants who develop alternative systems that meet this performance criterion are permitted, but not required, to submit such systems to the Commission's Division of Trading and Markets for review.

III. Use of Electronic Media To Deliver Documents Other Than Disclosure Documents

A. Account Statements for Pools

In the Initial Release, the Commission also provided guidance concerning the delivery of documents other than Disclosure Documents (specifically, monthly and quarterly account statements required to be delivered to pool participants by Rule 4.22, and modifications of Disclosure

[27] 61 FR at 42160.

[28] 61 FR at 44011.

[29] 61 FR at 42161.

[30] *Id.*

[31] 61 FR at 44011.

[32] Indeed, many parties on the Internet presently use PIN systems to verify the identity of an individual.

[33] See Section IV, *infra*, concerning electronic recordkeeping.

Documents).[34] As discussed in the Initial Release, CPOs may deliver electronically monthly and quarterly account statements required by Rule 4.22 provided that the CPO obtains the pool participant's informed consent. The procedures outlined for obtaining informed consent discussed above provide a single mechanism for establishing informed consent to delivery of Disclosure Documents as well as other required documents. A CPO seeking informed consent to deliver monthly or quarterly account statements would disclose: (1) that the CPO is required to deliver the monthly or quarterly account statement; (2) the right of the pool participant to elect to receive such statement in hardcopy form or by means of electronic delivery; (3) the specific media and method by which electronic delivery will be made; (4) the potential costs associated with receiving or accessing the electronic account statement; and (5) the prospective customer's right to revoke his consent to electronic delivery of account statements at any time.

The Commission received no comments with respect to electronic delivery of monthly or quarterly account statements other than NFA's comment, discussed above, concerning whether a CPO is required to obtain informed consent to deliver pool account statements at the time it obtains informed consent to deliver a Disclosure Document. As noted above, CPOs may obtain informed consent concerning pool account statements at any time, either in conjunction with informed consent to deliver a Disclosure Document or separately, as long as the informed consent is obtained prior to electronic delivery of the document in question.

B. Modifications

Commission Rules 4.26 and 4.36 require that Disclosure Documents be used for no longer than nine months and contain performance information that is current as of a date not more than three months prior to the date of the Disclosure Document. Rules 4.26 and 4.36 also require that, in the event that a CPO or CTA knows or should know that a Disclosure Document is materially inaccurate or incomplete, the registrant must correct the defect and distribute the correction to, in the case of a CPO, all existing pool participants and previously solicited pool participants prior to accepting or receiving funds from such prospective participants and, in the case of a CTA, all existing clients in the trading program and each previously solicited client for the trading program prior to entering into an agreement to manage such prospective client's account. The Initial Release made clear that CPOs and CTAs may use electronic media to comply with the amendment requirements of Rules 4.26 and 4.36 provided that the intended recipient has consented to electronic delivery of such information. Due to the relatively lower costs of electronic publishing, a CPO or CTA may wish to update its electronically presented Disclosure Documents more frequently than it would a hardcopy version of such document distributed in the customary manner. As stated in the Initial Release, however, the electronic version of a Disclosure Document must be at least as current as any paper-based version.[35]

In the Initial Release, the Commission stated that CPOs and CTAs relying upon electronic delivery of a Disclosure Document must continue to provide access to the Disclosure Document for a period of nine months to allow repeated access to the Disclosure Document used at the time of solicitation. The requirement that Disclosure Documents be maintained at a CPO's or CTA's website for a period of nine months was designed to coincide with the maximum effective period of a Disclosure Document. However, NFA commented that the Commission's proposal would require CPOs and CTAs to maintain multiple versions of their Disclosure Documents on their websites and that this would have the potential to confuse prospective investors. The Commission agrees with this comment and, to avoid the potential confusion described by NFA, adopts NFA's recommendation that CPOs and CTAs be required to maintain only the most current version of their Disclosure Documents on their websites.[36] The informed consent required for electronic delivery of a Disclosure Document provides that a CPO or CTA furnish a hardcopy Disclosure Document to a prospective investor at any time. Consequently, individuals who may have visited a website earlier and who wish to receive a prior version of a Disclosure Document may contact the CPO or CTA, who must provide the previous version of the Disclosure Document, either in hardcopy (or electronic form if the individual consents).

C. Term Sheets

Rule 4.21(a) provides that a CPO soliciting a prospective pool participant who is an accredited investor, as defined in 17 CFR 230.501(a), may provide the prospective participant with a notice of intended offering and statement of the terms of the intended offering, *i.e.*, a ''term sheet,'' prior to delivery of a Disclosure Document. This is an exception to the general prohibition against solicitation of prospective pool participants unless a Disclosure Document has been given previously or is given contemporaneously. In the Initial Release, the Commission stated that a CPO may not satisfy the requirements of Rule 4.21(a) by electronically posting a ''term sheet'' because ''[i]n posting a term sheet on a public electronic forum, a CPO is soliciting all persons who are able to access such term sheet, many of whom may not be 'accredited investors.' Consequently, unless a CPO restricts access to its term sheet to 'accredited investors' only, a CPO must also provide a copy of its Disclosure Document in accordance with the criteria set forth herein in order to comply with the requirements of Rule 4.21(a).'' [37] In its comment letter, MFA agreed that, ''where the registrant is able to restrict access to the term sheet when it is distributed electronically in the same manner as he restricts access to paper-based versions of the term sheet, he should be permitted to use term sheets distributed electronically.'' Thus, term sheets may be used electronically in accordance with Rule 4.21(a) provided that access to such term sheets is restricted to persons who the CPO reasonably believes to be accredited investors.[38] For example, a CPO might present on its website a series of questions to determine whether an individual is an accredited investor and restrict access to its term sheet to those persons who, based upon the responses to such questions, it reasonably believes are accredited investors. Similarly, if a CPO requires the use of a password to

[34] In the Initial Release, the Commission invited comment from CPOs, accounting professionals, and other interested persons concerning the advisability of amending Rule 1.16 to allow for certification of Annual Reports by independent public accountants by means of electronic media. The Commission received no comments on this issue.

[35] Ideally, the paper version would explain that more frequent updates could be obtained electronically.

[36] Additionally, this prevents any potential confusion that could result in prospective investors being solicited through use of an out-of-date Disclosure Document. *See* Rules 4.26(a)(2) and 4.36(b). Rules 4.24(d)(4) and 4.34(d)(2) state that a Disclosure Document must contain the date on which the CPO or CTA first intends to use the document, and Rules 4.26(a)(1) and 4.36(a)(1) require that all information must be current as of that date (although performance information may be current as of a date up to three months prior thereto).

[37] 61 FR at 42159 n.92.

[38] *See also* IPONET, 1996 SEC No-Act. LEXIS 642 (July 26, 1996).

access its term sheet and restricts such passwords to persons it reasonably believes to be accredited investors based upon information available to it, such CPO also would be in compliance with Rule 4.21.[39]

D. Review of Websites

The Commission also received a comment that NFA should offer to review the content of websites much in the way as it reviews promotional materials. Pursuant to NFA Compliance Rule 2–29 and the related Interpretive Notice dated May 1, 1989,[40] as a service to its members, NFA will review promotional material prior to its first use.[41] To the extent that CPOs and CTAs favor a voluntary prior review process for electronic media, they may propose this to NFA directly.

IV. Maintenance of Records

A substantial number of the comments received in response to the Initial Release concerned the application of the Commission's recordkeeping requirements in the context of electronic media. Rule 4.23, with respect to CPOs, and Rule 4.33, with respect to CTAs, specify books and records that must be maintained by CPOs and CTAs in accordance with Rule 1.31. These records include the acknowledgments required by Rules 4.21(b) and 4.31(b), as well as the original or a copy of each report, letter, circular, memorandum, publication, writing, advertisement or other literature or advice distributed by CPOs and CTAs. Rule 1.31, requires among other things, that records be retained for a period of five years and be readily accessible during the first two years of the five-year period. Rule 1.31(b) provides that copies may be retained on microfilm, microfiche, or optical disk but must be maintained in accordance with the standards set forth in Rule 1.31(c) and (d).[42]

To facilitate CPOs' and CTAs' use of electronic media when possible and to avoid imposing duplicative or inconsistent requirements on registrants who may also be registered with the SEC, the Commission hereby permits a CPO or CTA, whether or not registered with the SEC, to use guidelines set forth by the SEC in its recent rulemaking in connection with recordkeeping requirements for broker-dealers.[43] Accordingly, a CPO or CTA may maintain required records pursuant to Commission Rule 1.31 or as allowed by SEC regulations.[44] For that purpose, in the case of CPOs and CTAs, the designated examining authority would be considered to be the NFA.

Concerning the storage and maintenance of records of electronic communications, the Commission understands that it may be difficult or impossible as a technical matter to store certain data in exactly the format in which it is transmitted to customers. However, the CPO or CTA must be able to store and maintain required records in order that, upon request of any representative of the Commission or the United States Department of Justice, the CPO or CTA can reproduce the recorded materials in substantially the same form[45] and containing the same information as was transmitted to customers.

V. Illustrative Examples

(1) *Disclosure Document Must be Readily Accessible and Delivery of Risk Disclosure Statement May be Sufficient to Obtain Informed Consent.* ABC is a registered CTA who operates a site on the World Wide Web. The first page of ABC's website sets forth the risk disclosure statement followed by ''yes'' or ''no'' lines which can be clicked upon for viewers to confirm that they have read the statement and wish to continue or do not wish to continue. After ''clicking'' to continue, the user is hyperlinked to a document containing recent performance data as well as a prominent hyperlink to the Disclosure Document. Access to the Disclosure Document is comparably accessible as was access to the page displaying the performance data. In this case, ABC has complied with the requirements of Rule 4.31(a).

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[39] In the Initial Release, the Commission noted that the SEC has taken the position that placing offering materials on the Internet would not be consistent with the prohibition against general solicitation or advertising in Rule 502(c) of Regulation D unless the prospective accredited investor purchasers who are permitted to access the offering materials have been otherwise located without a general solicitation. 60 FR at 53463–64. For example, the SEC has approved the use of a password protected page of a website that is accessible only to persons previously identified as qualified accredited investors as not involving any form of ''general solicitation'' or ''general advertising'' within the meaning of Rule 502(c) of Regulation D provided that the process whereby accredited investors are identified is generic in nature and does not reference any specific transactions. *See* IPONET, supra note 38.

[40] National Futures Association Manual, Vol. 3, No. 2, (Jan. 1, 1997) at ¶ 9009.

[41] Registrants have the options to file promotional material unless otherwise required to do so by rule or directive.

[42] Rule 1.31(d) states, among other things, that all records preserved on optical media pursuant to Rule 1.31(b) must be preserved on non-rewritable, write once read many (''WORM'') media. In addition, the technology must have write-verify capabilities that continuously and automatically verify the quality and accuracy of the information stored and automically correct quality and accuracy defects. Rule 1.31(d)(1) states that an optical storage system must: (i) use removable disks; (ii) serialize the disks; (iii) time-date all files of information placed on the disks, reflecting the computer run time of the file of information and using a permanent and non-erasable time-date; and (iv) write files in ASCII or EBCDIC format. As the Commission has noted, the ASCII and EBCDIC formats ''generally do not allow storage of paper records or electronic images, such as webpages, since such records or images are normally not written in ASCII or EBCDIC format. Therefore, these records would be required to be retained in hard[]copy form.'' 61 FR at 42162.

[43] SEC Release No. 34–38245, 62 FR 6469 (February 12, 1997). The SEC amended its Rule 17a–4(f) to provide for the production or reproduction of records by means of electronic storage media, with the limited exception of those records required for penny stocks. Rather than specify particular electronic storage media, the SEC provided that the particular medium chosen must meet certain criteria:

(A) Preserve the records exclusively in a non-rewrit[]able, non-erasable format;

(B) Verify automatically the quality and accuracy of the storage media recording process;

(C) Serialize the original and, if applicable, duplicate units of storage media, and time-date for the required period of retention the information placed on such electronic storage media; and

(D) Have the capacity to readily download indexes and records preserved on the electronic storage media to any medium acceptable under [Rule 17a–4(f)] as required by the [SEC] or the [SROs] or which the member, broker, or dealer is a member.

17 CFR § 240.17a–4(f)(ii) (1997). If a broker-dealer chooses to use electronic storage media, it must notify its designated examining authority prior to using such media and, if the broker-dealer uses media other than optical disk technology or CD-ROM, it must provide notice of at least 90 days. The SEC also set forth, among other things, the following requirements: maintenance of duplicates of records, which can be stored on any medium satisfying the above criteria; organizing and indexing of both original and duplicate records; an audit system that can record both the entry and modification of records; a third-party download provider, whose name is provided to the SRO and who agrees to promptly furnish to the SEC and SRO(s) information necessary to access and download records; and, where a broker-dealer uses an outside service bureau to preserve records, an escrow agent who keeps a current copy of the information necessary to access and download records.

[44] A substantial number of Commission registrants are also registered with the SEC. As of March 31, 1997, 113 of 236 futures commission merchants (''FCM'') were registered with the SEC as broker-dealers. Therefore, the Commission has attempted, where possible, to coordinate its regulatory efforts with SEC requirements. For instance, Rule 1.10(h) permits an FCM to file reports concerning its financial condition by submitting a copy of its Financial and Operational Combined Uniform Single report filed with the SEC in lieu of the Commission's Form 1–FR–FCM, and Rules 1.14 and 1.15, the Commission's risk assessment rules, attempt to avoid duplication of similar SEC rules with regard to recordkeeping and reporting.

In the Commission's recent advisory (62 Fed. Reg. 31507 (June 10, 1997) permitting FCMs to deliver confirmations, purchase and sale statements and monthly statements electronically, it also stated that they may comply with recordkeeping requirements by following either Commission Rule 1.31 or the SEC's guidance as set forth in Release No. 34–38245.

[45] For example, registrant logos may be deleted.

(2) *Disclosure Document Must be Comparably Accessible as Other Promotional Material.* ABC is a registered CTA who operates a site on the World Wide Web. The first page of ABC's website sets forth the risk disclosure statement with a section for individuals to indicate by clicking on the appropriate statement that they have read the statement and wish to continue. After ''clicking'' to continue, the user is hyperlinked to a document containing recent performance data as well as a prominent hyperlink to the Disclosure Document. For some users, clicking on the Disclosure Document hyperlink brings up instructions and hyperlinks concerning how to download the required software viewer to access the Disclosure Document. By contrast, accessing the performance data on the website does not require the use of the same viewer. In this case, ABC has not complied with Rule 4.21(a). The Disclosure Document is not as accessible as promotional material. Although some users may have the viewer already installed on their web browser, others may not. Requiring users to use specialized software to view the Disclosure Document but not the promotional material does not satisfy the requirement that the Disclosure Document be comparably accessible as the promotional material. The Disclosure Document must be as readily accessible as performance data and other promotional material.

(3) *Informed Consent Necessary to Deliver Monthly Account Statements at World Wide Web Site.* XYZ is a registered CPO who operates a site on the World Wide Web. XYZ plans to offer its pool participants the choice of receiving monthly account statements by electronic media or by postal mail. In a letter to pool participants, XYZ informs its investors that it plans to post its monthly account statements on its World Wide Web site and that persons who wish to receive monthly account statements electronically may elect to do so. In its letter, XYZ explains that the monthly account statements will be hyperlinked to its website. The letter also explains that pool participants electing to receive disclosures solely by electronic media may revoke their election at any time and request that any monthly account statement be sent to them in hardcopy. At the bottom of the letter is a form for pool participants to complete and mail or fax back to XYZ indicating that they consent to delivery of monthly account statements by electronic media. Pool participants who do not complete the form will continue to receive monthly account statements in hardcopy. XYZ has complied with the requirements for informed consent to deliver monthly account statements.

(4) *Informed Consent Necessary to Deliver Monthly Account Statements Through Electronic Mail.* RST is a registered CPO who operates a site on the World Wide Web. RST's website complies with all Commission requirements with respect to delivery of a concise risk disclosure statement and Disclosure Document. In order to provide RST's pool participants with access to monthly account statements faster and at less expense, RST has decided to use electronic mail to deliver monthly account statements to those pool participants interested in receiving such statements in this manner. On its website is a section devoted to providing information on how pool participants may receive monthly account statements by electronic mail. In addition to requesting the pool participant's electronic mail address, the section explains: (1) that RST is required to deliver monthly account statements; (2) the pool participant's right to elect to receive such statements either in hardcopy or electronic form; (3) that electronic account statements will be delivered as a part of an electronic mail message; (4) that there is no charge for electronic delivery of account statements; and (5) that pool participants' election to receive monthly account statements by electronic mail may be revoked at any time and that RST would then resume delivery of hardcopy statements. At the conclusion of these disclosures is an electronic form for pool participants to complete if they are interested in receiving monthly account statements in this manner. RST has complied with the requirement to obtain informed consent to delivery monthly account statements.

(5) *Modifications to Disclosure Document.* ABC is a registered CTA who operates a site on the World Wide Web. ABC posts its Disclosure Document on its website in a manner consistent with the requirements for obtaining informed consent. Because of the additional flexibility that electronic media provide, ABC updates the performance data on a monthly basis. For example, by the 5th day of every month, ABC's Disclosure Document performance data is current as of the month that just expired. ABC is not required to keep prior months' Disclosure Documents on its website even though prospective managed account customers may have viewed them without obtaining a copy. If a prospective client wishes to see a Disclosure Document as of a date several months ago, ABC must furnish that Disclosure Document to the prospective client, either in hardcopy or by electronic media if the prospective client consents. Based upon the modifications made in this Release, CTAs (or CPOs) are no longer required to maintain each Disclosure Document posted on the website for a period of nine months.

VI. Final Rules

Rule 4.1—Requirements as to form. Commission Rule 4.1(a) sets forth the form requirements for documents distributed pursuant to Part 4 and requires generally that documents be clear and legible, paginated and fastened in secure manner and that information required to be ''prominently'' disclosed must be in capital letters and in boldface type. Rule 4.1, which was adopted by the Commission in 1981, was designed to address hardcopy documents. The proposed amendments to Rule 4.1 issued by the Commission on August 19, 1996, were designed to reflect the reality that many documents today are presented in electronic media. Proposed Rule 4.1 was designed to make clear that documents may be distributed by electronic media. To this end, proposed Rule 4.1(c)(1) would have required that for documents distributed through an electronic medium, ''all required information must be presented in a format readily communicated to the recipient'' and that for this purpose ''information is readily communicated to the recipient if it is accessible as a single file by means of commonly available hardware and software, and if the electronically delivered document is organized in substantially the same manner as would be required for a paper document with respect to the order of presentation and the relative prominence of information.'' [46] Proposed Rule 4.1(c)(2) also would have applied to electronic media the requirement of existing Rule 4.1(b) that information required to be ''prominently'' disclosed be displayed in capital letters and boldface type by requiring that such information be presented in a manner that is reasonably calculated to draw it to the recipient's attention. Proposed Rule 4.1(c)(3) would have required that a complete paper version of a document be provided to a recipient upon request. Finally,

[46] Additionally, the Commission stated in the preamble to the August 27, 1996 **Federal Register** release that ''[e]lectronically delivered information is readily communicated for purposes of Part 4 if it is accessible in a single 'package' or by a single data retrieval process, without the need to download and assemble multiple files, and preferably without the need to use special 'viewer' software.'' 61 FR at 44010.

proposed Rule 4.1(d) required that if any graphic, image or audio material that is included with or that accompanies the Disclosure Document delivered to a recipient cannot be filed with the Commission in the form in which delivered to the recipient, the CPO or CTA must provide a fair and accurate narrative description, tabular representation or transcript of the omitted material in the version filed with the Commission.

The only comment received concerning these proposed amendments to Rule 4.1 was from a CTA who noted that requiring the use of a single file containing the Disclosure Document was unnecessarily restrictive and may not be advantageous since CTAs could link several sections of the Disclosure Document to a table of contents and thus accelerate the download time as compared to the time required for a single file. The Commission agrees that Rule 4.1(c)(1) need not specify whether a document is contained in a single or multiple files. Although the Commission believes that delivery procedures typically will result in delivery of the Disclosure Document in a single file, the Commission does not believe that it is necessary to specify such procedures by rule nor does the Commission wish to restrict the flexibility of CPOs or CTAs to devise alternative methods of delivery so long as such delivery ''readily communicates'' the information to the required recipient.[47]

As adopted, Rule 4.1(c)(2) clarifies that, where use of capital letters and bold-face type is required by Commission rules, this type of presentation would also be required in the context of electronic presentations. However, where the use of capital letters and bold-face type would not in the context of electronic media achieve the purpose of highlighting and emphasizing specified information, another method reasonably calculated to draw attention to the specified information should be used. Rule 4.1(c)(3), as adopted, clarifies that the paper version that must be made available to recipients of electronically-transmitted documents upon request must comply with applicable paper-based Part 4 rules. Based upon the Commission's further consideration of proposed Rule 4.1, section (d) is being adopted as proposed.

Rules 4.21 and 4.31—Required delivery of pool Disclosure Document and Required delivery of Disclosure Document to prospective clients. Rules 4.21(b) and 4.31(b) establish the requirement that CPOs and CTAs obtain a signed and dated acknowledgment of receipt of the Disclosure Document before accepting any funds from a prospective pool participant or client. As proposed, Rules 4.21(b) and 4.31(b) would have been modified to permit CPOs and CTAs to obtain acknowledgments electronically in a form approved by the Commission. Proposed Rules 4.21 and 4.31 provided that, ''[w]here a Disclosure Document is delivered to a prospective pool participant by electronic means, in lieu of a manually signed and dated acknowledgment the pool operator may establish receipt by electronic means approved by the Commission.'' The proposed rules also would have required that the CPO and CTA retain the acknowledgment in accordance with Rules 4.23 and 4.33, respectively, either in hardcopy or in another form approved by the Commission.

The Commission did not receive any comments addressing the proposed amendments to Rules 4.23 and 4.33. While the Commission did receive comments concerning the requirements for and use of electronic acknowledgments, these comments were addressed in section II, supra, and Rules 4.21(b) and 4.31(b) have been modified in conformity with the analysis set forth above. Specifically, final Rules 4.21(b) and 4.31(b) have been modified to permit alternative methods of electronic verification so long as the performance criteria enunciated in section II are satisfied. As discussed above, use of a PIN or other unique identifier to confirm the identity of the person acknowledging receipt provides an acceptable method of obtaining electronic acknowledgments of receipt. This modification responds to the concerns of commenters that PINs might be considered the exclusive means of complying with Rules 4.21(b) and 4.31(b) with respect to electronic media. As discussed above, to facilitate use of electronic media, CPOs and CTAs may maintain required records either pursuant to Commission Rule 1.31 or as permitted by SEC regulations.

VII. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601–611 (1994), requires that agencies, in proposing rules, consider the impact of those rules on small businesses. The rule amendments discussed herein would affect registered CPOs and CTAs. The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its rules on such entities in accordance with the RFA.[48] The Commission previously determined that registered CPOs are not small entities for the purpose of the RFA.[49] With respect to CTAs, the Commission has stated that it would evaluate within the context of a particular rule proposal whether all or some affected CTAs would be considered to be small entities and, if so, the economic impact on them of any rule.[50]

The amendments adopted herein do not impose any new burdens upon CPOs or CTAs. Rather, these amendments facilitate the use of electronic media to meet existing requirements, and they clarify the application of existing regulations to the use of such media. Consequently, the Commission believes that the adoption of these rule amendments will in many cases reduce the burden of compliance by CPOs and CTAs. Moreover, CPOs and CTAs are free to continue using paper documents.

In certifying pursuant to section 3(a) of the of the RFA that the proposed revisions would not have a significant economic impact on a substantial number of small entities, the Commission invited comments from any CPOs and CTAs who believed that the proposed revisions, if adopted, would have a significant impact on their activities. No such comments were received on the revisions adopted herein.

Accordingly, pursuant to Rule 3(a) of the RFA, the Chairperson, on behalf of the Commission, certifies that the action taken herein will not have a significant impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995, Pub. L. 104–13 (May 13, 1995), imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the Paperwork Reduction Act. While this rule has no burden, the group of rules (3038–0005) of which this is a part has the following burden:

Average Burden Hours per Response: 124.75.

Number of Respondents: 4,654.

Frequency of Response: On occasion.

[47] Of course, where multiple files must be downloaded by the recipient in order to view the entire Disclosure Document, the CPO or CTA must make this fact clear.

[48] 47 FR 18618–21 (April 30, 1982).

[49] 47 FR 18619–20.

[50] 47 FR 18618, 18620.

Copies of the OMB approved information collection package associated with this rule may be obtained from: Desk Officer, CFTC, Office of Management and Budget, Room 10202, NEOB Washington DC 20503, (202) 395–7340.

List of Subjects in 17 CFR Part 4

Advertising, Commodity futures, Consumer protection, Reporting and recordkeeping requirements.

In consideration of the foregoing, and pursuant to the authority contained in the Commodity Exchange Act, and in particular sections 2(a)(1), 4b, 4c, 4*l*, 4m, 4n, 4*o*, and 8a, 7 U.S.C. 2, 6b, 6c, 6*l*, 6m, 6n, 6*o*, and 12a, the Commission amends chapter I of title 17 of the Code of Federal Regulations as follows:

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

Subpart A—General Provisions, Definitions and Exemptions

1. The authority citation for part 4 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 4, 6b, 6c, 6*l*, 6m, 6n, 6*o*, 12a and 23.

2. Section 4.1 is amended by adding paragraphs (c) and (d) to read as follows:

§ 4.1 Requirements as to form.

(a) * * *

(b) * * *

(c) Where a document is distributed through an electronic medium:

(1) The requirements of paragraphs (a) of this section shall mean that required information must be presented in a format that is readily communicated to the recipient. For purposes of this paragraph (c), information is readily communicated to the recipient if it is accessible to the ordinary user by means of commonly available hardware and software and if the electronically delivered document is organized in substantially the same manner as would be required for a paper document with respect to the order of presentation and the relative prominence of information. Where a table of contents is required, the electronic document must either include page numbers in the text or employ a substantially equivalent cross-reference or indexing method or tool;

(2) The requirements of paragraph (b) of this section shall mean that such information must be presented in capital letters and boldface type or, as warranted in the context, another manner reasonably calculated to draw the recipient's attention to the information and accord it greater prominence than the surrounding text; and

(3) A complete paper version of the document that complies with the applicable provisions of this part 4 must be provided to the recipient upon request.

(d) If graphic, image or audio material is included in a document delivered to a prospective or existing client or pool participant, and such material cannot be reproduced in an electronic filing, a fair and accurate narrative description, tabular representation or transcript of the omitted material must be included in the filed version of the document. Inclusion of such material in a Disclosure Document shall be subject to the requirements of § 4.24(v) in the case of pool Disclosure Documents, and § 4.34(n) in the case of commodity trading advisor Disclosure Documents.

3. Section 4.21 paragraph (b) is to be revised to read as follows:

Subpart B—Commodity Pool Operators

§ 4.21 Required delivery of pool Disclosure Document.

(a) * * *

(b) The commodity pool operator may not accept or receive funds, securities or other property from a prospective participant unless the pool operator first receives from the prospective participant an acknowledgment signed and dated by the prospective participant stating that the prospective participant received a Disclosure Document for the pool. Where a Disclosure Document is delivered to a prospective pool participant by electronic means, in lieu of a manually signed and dated acknowledgment, the pool operator may establish receipt by electronic means that use a unique identifier to confirm the identity of the recipient of such Disclosure Document, Provided, however, That the requirement of § 4.23(a)(3) to retain the acknowledgment specified in this paragraph (b) applies equally to such substitute evidence of receipt, which must be retained either in hard copy form or in another form approved by the Commission.

Subpart C—Commodity Trading Advisors

4. Section 4.31 paragraph (b) is to be revised to read as follows:

§ 4.31 Required delivery of Disclosure Document to prospective clients.

(a) * * *

(b) The commodity trading advisor may not enter into an agreement with a prospective client to direct the client's commodity interest account or to guide the client's commodity interest trading unless the trading advisor first receives from the prospective client an acknowledgment signed and dated by the prospective client stating that the client received a Disclosure Document for the trading program pursuant to which the trading advisor will direct his account or will guide his trading. Where a Disclosure Document is delivered to a prospective client by electronic means, in lieu of a manually signed and dated acknowledgment the trading advisor may establish receipt by electronic means that use a unique identifier to confirm the identity of the recipient of such Disclosure Document, Provided, however, That the requirement of § 4.33(a)(2) to retain the acknowledgment specified in this paragraph (b) applies equally to such substitute evidence of receipt, which must be retained either in hard copy form or in another form approved by the Commission.

Issued in Washington, DC on July 15, 1997, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 97–19147 Filed 7–21–97; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[TD 8725]

RIN 1545–AU64

Miscellaneous Sections Affected by the Taxpayer Bill of Rights 2 and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to joint returns, property exempt from levy, interest, penalties, offers in compromise, and the awarding of costs and certain fees. The regulations reflect changes to the law made by the Taxpayer Bill of Rights 2 and a conforming amendment made by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The regulations affect taxpayers with respect to filing of returns, interest, penalties, court costs, and payment, deposit, and collection of taxes.

DATES: These regulations are effective July 22, 1997.