

statements electronically to their customers. Moreover, it would codify the Commission's prior interpretation that permitted, and provided guidance on, electronic distribution of Account Statements.⁶³

As proposed, before a CPO could electronically distribute Account Statements to a participant, new paragraph (b)(2) of Rule 4.22 would require the CPO to obtain a signed consent from the participant acknowledging that the CPO had disclosed the following information to it: the participant's right to receive Account Statements in paper form or electronically; the electronic medium or source through which the CPO will distribute the Account Statements; the duration of the period during which the consent to receive Account Statements electronically will be effective; any charges for electronic distribution; and the participant's right to revoke consent to electronic distribution at any time. For a participant that is not an "institutional customer,"⁶⁴ the CPO would be required to obtain the participant's signed consent acknowledging the disclosures, prior to the transmission of any Account Statement by means of electronic media. Institutional customers would not need to provide written consent. New paragraph (h)(4) of Rule 4.22 would establish the signature requirements for an Account Statement distributed electronically, by providing that "for each pool for which the CPO distributes an Account Statement by means of electronic media, the CPO must make and keep * * * a manually signed copy" of the oath or affirmation required under Rule 4.22(h).⁶⁵

The Commission understands that there may be special concerns surrounding the electronic distribution of Annual Reports that are required to be certified by an independent public accountant and, in particular, surrounding the attachment of the certification itself that the public accountant provides with the report.⁶⁶ Accordingly, the Commission is not now proposing any criteria pursuant to which a CPO may distribute the Annual Report electronically but, instead, the

Commission is seeking comment on what those criteria should be.

4. Providing Facsimile Signatures on Account Statements and Annual Reports

In the preamble of the **Federal Register** release announcing the adoption of the oath or affirmation requirement of Rule 4.22(h), the Commission explained that "a facsimile signature would be appropriate," provided the CPO maintains the Account Statement or Annual Report containing the manual signature from which the facsimile signature was made, and that an Annual Report that is filed with the Commission contains the manual signature.⁶⁷ The Commission is proposing to codify this explanation in new paragraph (h)(4)(i) of Rule 4.22. Inasmuch as the Commission recently has delegated to NFA the review of, among other documents, pool Annual Reports,⁶⁸ this provision would refer to the Annual Report that the CPO files with a registered futures association.

5. Conforming Signature Requirements

Certain Part 4 rules, including several of the rules being proposed in this **Federal Register** release, provide that the various documents required thereunder must be signed by CPOs and CTAs. In particular, Rules 4.7(d), 4.12(b), 4.13(b), and 4.22(h) provide that the documents required thereunder must be signed by a CPO or CTA as follows: if it is a sole proprietorship, by the sole proprietor; if a partnership, by a general partner; and if a corporation, by the chief executive officer or chief financial officer.

Upon review of this list of permitted signatories, the Commission believes that it may be unnecessarily restrictive in that it leaves no room for other organizational structures under which CPOs and CTAs operate—e.g., limited liability companies. Accordingly, the Commission is proposing to amend Rules 4.7(d), 4.12(b) and 4.13(b) to provide that the documents required thereunder "must be signed by a duly authorized representative" of the CPO or CTA. This would be consistent with existing signature requirements under Rules 4.5 and 4.14.⁶⁹ And, as the Commission stated in connection with the adoption of Rule 4.5, a "duly authorized representative" is "a representative who has been authorized to bind the person on whose behalf [a

document is produced] to the information and the representations contained in [the document]."⁷⁰ However, because the document required under Rule 4.22(h) pertains to the accuracy and completeness of certain financial reports (i.e., commodity pool Account Statements and Annual Reports), the Commission specifically is proposing that this oath or affirmation be signed "by a representative duly authorized to bind the pool operator."

IV. Temporary No-Action Relief

By this **Federal Register** release, the Commission is, with certain modifications and clarifications made in response to comments on both the Prior Rule 4.5 Proposal and the ANPR, confirming the temporary no-action relief it issued in the Prior Rule 4.5 Proposal and the ANPR.⁷¹ Specifically, in addition to providing temporary no-action relief where the pool a CPO operates engages in a limited amount of commodity interest trading, the Commission is clarifying that: at any time, either the limited trading or notional test must be met; compliance with the criterion of a test is determined at the time the most recent position is established; the notional test criterion applies on an aggregate net basis; and the calculation of "notional value" includes the number of futures and options contracts and any multiplier specified in those contracts.

A. Temporary No-Action Relief for Rule 4.5 Eligible Persons

The Commission will not commence any enforcement action against an eligible person for failure to register as a CPO in accordance with Section 4m(1) of the Act, where the eligible person operates a qualifying entity such that at any time, with respect to non-hedge positions in commodity futures or commodity option contracts, either of the following tests is met:

- (i) The aggregate initial margin and premiums required to establish such positions, determined at the time the most recent position was established, does not exceed five percent of the liquidation value of the qualifying entity's portfolio, after taking into account unrealized profits and unrealized losses on any such contracts it has entered into; *Provided*, That in the case of an option that is in-the-money at the time of purchase, the in-the-money amount as defined in Rule 190.01(x) may be excluded in computing such five percent; or
- (ii) The aggregate net notional value of such positions, determined at the time the

⁶³ See 62 FR 39104, 39110–39111 (July 22, 1997).

⁶⁴ Rule 1.3(g) defines "institutional customer" to have the same meaning as "eligible contract participant" as defined in Section 1a(12) of the Act.

⁶⁵ See 61 FR 42146, 42158 n.91 (Aug. 14, 1996), after which the Commission has patterned this proposal.

⁶⁶ Rule 4.7(b)(3) permits a CPO who has claimed relief under the rule to distribute an Annual Report that is not certified, but that nonetheless must be presented and computed in accordance with generally accepted accounting principles consistently applied.

⁶⁷ See 46 FR 26004, 26011 (May 8, 1981).

⁶⁸ See 67 FR 77470 (Dec. 18, 2002).

⁶⁹ See also, 67 FR 38869 (June 6, 2002), wherein the Commission adopted a similar signatory provision in connection with amendments to its registration rules to facilitate on-line registration.

⁷⁰ 50 FR 15868, 15874.

⁷¹ See 67 FR 65743, 65745 and 67 FR 68785, 68788–89, respectively, and the examples provided therein.