

amendments would have been subject to the proviso that “any material distributed in advance of the delivery of the Disclosure Document is consistent with *or amended by* the information contained in the Disclosure Document and with the obligations of the [CPO or CTA] under the Act, the Commission’s regulations issued thereunder, and the laws of any other applicable federal or state authority.” (Emphasis added.)

One of the commenters on these proposed rule amendments objected to this proviso, claiming that the phrase “or amended by” could be read to mean that information does not have to be consistent with the Disclosure Document at the time the information is distributed, as long as it is corrected when the Disclosure Document is delivered. To avoid any such misunderstanding, Rules 4.21(a) and 4.31(a) as adopted now further provide that:

In the event such previously distributed information is amended by the Disclosure Document in any material respect, the prospective participant must be in receipt of the Disclosure Document at least 48 hours prior to its (subscription or advisory agreement, as the case may be) being accepted.

Another commenter on these proposed rule amendments asked for clarification on the permissibility of distributing performance materials in advance of delivery of a Disclosure Document. In response, the Commission states that performance information may be distributed in advance of the Disclosure Document, provided it is presented in the format specified by the CFTC.⁴⁶

In connection with adopting these amendments to Rules 4.21 and 4.31, the Commission has reviewed its July 1997 interpretation regarding electronic delivery of CPO and CTA Disclosure Documents (the “1997 Interpretation”)⁴⁷ for the purpose of

considering whether it should revise certain aspects of that interpretation, such as the requirement that visitors to a CPO or CTA Web site must view a summary risk disclosure statement before they may access performance information. The Commission notes that the 1997 Interpretation was premised on the now obsolete requirement in Rules 4.21 and 4.31 that a Disclosure Document respectively be delivered on or before the date that a CPO solicited, accepted or received funds or other property from a prospective pool participant, or a CTA solicited or entered into an advisory agreement with a prospective client. Accordingly, the provisions of amended Rules 4.21 and 4.31 supercede the 1997 Interpretation.

2. New Rule 4.22(i): Distributing Account Statements and Annual Reports Electronically

The Commission is amending Rule 4.22 by adding a new paragraph (i) to the rule to establish that, as proposed, a CPO may distribute periodic Account Statements to pool participants by electronic means, and, in response to favorable comments, a CPO may so distribute Annual Reports.⁴⁸ Also in response to comments, for greater flexibility the rule as adopted does not specify each and every step a CPO must take to furnish financial information to pool participants. What the rule does require is that prior to transmission of any Account Statement or Annual Report to a pool participant by means of electronic media, a CPO must disclose to the participant that it intends to distribute these documents electronically, absent objection from the participant, which objection, if any, the participant must make no later than 10 business days following its receipt of the disclosure.⁴⁹

E. Amendments to Rules 4.5, 4.7, 4.12, 4.13, 4.14 and 4.22: Conforming Signature Requirements

The Commission proposed to amend certain of the part 4 rules that list the CPO and CTA signatories who may sign various required documents.⁵⁰ As the Commission explained:

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. * * * 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.⁵¹

The Commission received two comments on these proposed rule amendments. The first comment recommended that the same standard be applied to each situation where documents are required to be executed. The Commission agrees with this comment, and, accordingly, is adopting as the suggested “universal standard” the requirement that part 4 documents be manually executed by “a representative duly authorized to bind” an eligible person, CPO or CTA. Specifically, this requirement is now found in Rules 4.5(f)(2), 4.7(d)(1)(vii), 4.12(b)(3)(vi), 4.13(b)(1)(iii), 4.14(a)(8)(iii)(A)(3) and 4.22(h)(3).

The second comment recommended that the list of permitted signatories be expanded, such that the applicable rules would specifically provide that “any listed principal” is a permitted signatory. The Commission does not agree with this comment, because not all principals of a CPO or a CTA may in fact be duly authorized to bind the CPO or CTA.⁵²

⁵¹ *Id.*

⁵² Rule 4.10(e)(1) provides that for the purposes of part 4, the term “principal” has the same meaning as the term “principal” under Rule 3.1(a).

Rule 3.1(a) generally defines the term “principal” of an entity to include, among others, the following: executive officers; persons in charge of a function subject to Commission regulation; persons who have the power to exercise a controlling influence over the entity’s activities that are subject to Commission regulation; ten percent or greater shareholders; and persons who have contributed ten percent or more of the capital.

⁴⁶ See, e.g., Rules 4.25 and 4.35, which establish performance disclosure formats for CPOs and CTAs, respectively; Rule 4.41, which concerns advertising by CPOs, CTAs and their principals; and 46 FR 26004, 26012 (May 8, 1981), wherein the Commission provided guidance on the advertising of past performance results. See also, Rule 156 under the ‘33 Act, 17 CFR 230.156 (2003), which sets forth what the SEC would consider “materially misleading” in the context of investment company sales literature.

⁴⁷ See, “Interpretation Regarding Use of Electronic Media by Commodity Pool Operators and Commodity Trading Advisors for Delivery of Disclosure Documents and Other Materials,” 62 FR 39104 (July 22, 1997). In that interpretation, the Commission made provision for delivery of required Disclosure Documents in the context of, for example, CPO and CTA Internet Web sites by requiring that a summary risk disclosure be given along with a hyperlink or other comparable ready access to the full Disclosure Document, *in lieu of*

requiring that the CPO or CTA make a Web site viewer scroll through the entire Disclosure Document before viewing any material that might constitute a solicitation by the CPO or CTA.

⁴⁸ See 68 FR 12622, 12629–30.

⁴⁹ In light of this action, the Commission may review the procedures in Rule 1.33 and 1.46 it previously adopted for electronic transmission of certain information by FCMs to their customers, with a view towards conforming them to new Rule 4.22(i).

⁵⁰ 68 FR 12622, 12630.