

F. Effect of Final Rulemaking

1. Effect on Prior Claimants

The amendments to Rules 4.5, 4.13 and 4.14 that the Commission is publishing today do not require a person who previously has claimed relief under Rule 4.5 or the Temporary No-Action Relief⁵³ to re-file its claim in order to maintain that relief or to trade in accordance with amended Rule 4.5, 4.13 or 4.14. Moreover, where the person continues to comply with the commodity interest trading limitations applicable to that previously claimed relief, it does not need to take any other action to take advantage of the exemptions being made available by these amendments.⁵⁴ The person nonetheless remains subject to all other applicable requirements of Rule 4.5, 4.13 or 4.14, as the case may be, to all other applicable provisions of the Act and the Commission's rules thereunder, and to any and all obligations under any other applicable Federal and State statutory and regulatory authorities that may result from its activities under these exemptions.

2. Effect of Withdrawal From CPO Registration on Rule 4.22(c) Annual Report Requirement

A CPO who has withdrawn from registration in order to claim the Temporary No-Action Relief or who withdraws from registration in order to claim relief under Rule 4.13(a)(3) or (a)(4) adopted today nonetheless remains subject to the Annual Report requirement of Rule 4.22(c), as has been the case with CPOs who have withdrawn from registration for any other reason. This is because the Commission believes that when a CPO leaves direct CFTC oversight, the CPO's pool participants should get all of the information they are entitled to up to that time. The Commission nonetheless is aware that in past cases its staff has worked with withdrawing CPOs in appropriate cases to provide these persons with flexibility in complying with Rule 4.22(c). By this **Federal Register** release, the Commission instructs its staff to continue this practice.

G. Continued Availability of No-Action Relief From Commission Staff

The Commission is aware that, notwithstanding the rules it is adopting

today, there may be persons that do not meet the criteria of Rule 4.5 for eligible persons, section 4m(3) of the Act or Rule 4.13 for CPOs, or section 4m(1) of the Act or Rule 4.14 for CTAs but, that, nonetheless, under their particular facts or circumstances, merit relief. The Commission also is aware that, in the past, its staff has provided no-action relief from the criteria of Rule 4.5 and from the registration requirement of section 4m(1) of the Act on a case-by-case basis. Consistent with that practice, the Commission directs its staff to continue to issue such relief in appropriate cases.⁵⁵

III. Past Performance Presentation Issues

On March 13, 2003, the Commission published in the **Federal Register**⁵⁶ proposed rule amendments regarding the computation and presentation of rate of return information and other disclosures concerning past performance of accounts over which a CTA has had trading authority (Performance Proposal). In the Performance Proposal, the Commission also sought comment on whether a core principle should replace detailed performance requirements. The Commission has adopted a core principle approach regarding presentation of partially funded accounts,⁵⁷ but noted in the release adopting the core principle that proposed changes relating to certain performance issues with application beyond the partially funded account situation would be addressed separately.⁵⁸ These issues include: (1) Disclosure of the range of rates of return for closed accounts, or other measures of variability in returns experienced by clients for the offered trading program; (2) computation of program draw-down information on a composite basis; and (3) methods to account for the effect of intramonth additions and withdrawals in the computation of rate of return.

A. Range of Rates of Return for Closed Accounts

The Commission proposed to revise Rule 4.35(a)(1)(viii) to require that the performance capsule for the offered program include, in addition to the number of accounts closed with profits

and the number closed with losses, the range of rates of return for the accounts closed with net lifetime profits and accounts closed with net lifetime losses, during the five-year period for which past performance must be disclosed.⁵⁹ The Commission based this proposal on its belief that such disclosure would provide important summary information on the variation in returns experienced by individual clients and would be useful to prospective clients considering participation in the CTA's program. Several commenters on the Performance Proposal expressed the belief that this disclosure would not provide useful information to prospective clients, with one commenter noting that the requirement would increase the burden on CTAs without any corresponding benefit.

After consideration of these comments, the Commission has determined that the objective of the proposed change—to enhance the information available to prospective clients about the experience of the CTA's prior clients—continues to be an important goal of the past performance reporting required under Commission rules. However, the Commission believes that it is appropriate to permit flexibility in the manner in which CTAs meet this objective. Accordingly, the Commission is amending Rule 4.35(a)(1)(viii) to require that the performance capsule include a measure of the variability of returns experienced by clients in the offered trading program who both opened and closed their accounts during the period for which performance is required to be disclosed, for accounts closed with positive net lifetime rates of return and for those closed with negative net lifetime rates of return. The Commission notes that this requirement may be satisfied by disclosing the ranges of returns for accounts closed with positive net lifetime rates of return and those closed with negative net lifetime rates of return, as the Commission proposed, or by another method, such as standard deviation, that meets the objective.

The Commission indicated in the Performance Proposal that both the numbers of accounts closed with positive versus negative rates of return, as well as the measure of variability of returns for accounts in each category, must be disclosed only for those accounts that both opened and closed within the required five-year and year-to-date time period. One commenter noted that this change from the prior rule, which required information on all accounts that closed during the required

⁵³ See 68 FR 12622, 12630–32.

⁵⁴ Thus, for example, a person who has claimed relief under Rule 4.5 or the Temporary No-Action Relief who continues to comply with the prior limits is not subject to the revised disclosure requirement of Rule 4.5(c)(2)(i) or Rule 4.13(a)(5), as the case may be.

⁵⁵ For example, under appropriate circumstances, it may be permissible for a person who seeks to claim an exemption from CPO registration under Rule 4.13(a)(3) to include contracts such as swaps when calculating the "aggregate net notional value" criterion of the rule.

⁵⁶ 68 FR 12001. The Performance Proposal and comments received may be accessed through http://www.cftc.gov/foia/comment03/foi03-004_1.htm.

⁵⁷ 68 FR 42964 (July 21, 2003).

⁵⁸ *Id.* at 42966.

⁵⁹ See Rule 4.35(a)(5).