

incorporates by reference NFA's instructions for calculating the "break-even" point. The portion of NFA's Submission concerning hypothetical trading results<sup>18</sup> was modified by NFA in response to Commission and public comments and remains under consideration.<sup>19</sup> Rule 4.41, revised as discussed herein, permits persons to follow either the Commission or rules adopted by NFA.

NFA's Submission included proposed rules with respect to past performance presentations, which were considered by the Commission in preparing the recommendations set forth in the Proposing Release. As noted in the Proposing Release, the portion of NFA's Submission addressing the use of "nominal" or "notionally funded" accounts was remitted to the NFA for further explanation and documentation. The Commission is not addressing the issue of "nominal" or "notional" account size in this release.

#### C. April 25, 1995 Roundtable Discussion

On April 25, 1995, the Commission convened a roundtable discussion led by Chairman Mary L. Schapiro, entitled "Rethinking Past Performance Disclosure," to elicit input from industry, academic, end-user, regulatory and other sources with respect to public policy issues relevant to past performance disclosure, as well as technical and pragmatic aspects of past performance presentations. A number of the speakers expressed the view that past performance data alone are not directly predictive of future trading results but that past performance data provide information that is important in evaluating a contemplated pool offering or trading program. For example, patterns of volatility and other trading patterns in various market conditions may be evident.

Participants also noted the tendency for past performance data to have a potent persuasive effect, which some viewed as significantly exceeding the usefulness of such information as a basis for an investment decision. Speakers discussed the effect of such factors as the volume of performance data and the format in which performance information is provided, the utility of monthly as opposed to annual rates of return, and the extent to

which meaningful benchmarks or standards are available to measure performance.<sup>20</sup>

#### D. Review of Public Comments

The Commission received thirty comment letters in response to the Proposing Release: three from persons registered as CTAs; five from persons registered as both a CPO and a CTA; two from persons registered as both a CTA and an introducing broker ("IB"); two from persons registered as futures commission merchants ("FCMs"); two from self-regulatory organizations; two from a futures industry trade organization; two from certified public accountants; nine from law firms; two from bar associations; and one from an academician.

The commenters strongly supported the rulemaking in general. Many commenters, however, advocated changes in various aspects of the proposed rules. The Commission has carefully considered the comments received and, based upon its review of the comments and its own reconsideration of the proposed amendments, has determined to adopt the revisions contained in the Proposing Release, with certain modifications, as discussed below. Comments received on the proposed amendments are discussed below in the context of the particular provisions to which they relate.

The Commission believes that the revised rules, as adopted, not only respond to the concerns of the commenters but, also, meet the regulatory objectives of this rulemaking. Notwithstanding the adoption of the rule amendments discussed herein, the Commission intends that the staff will continue to respond to requests for relief from the Part 4 rules on a case-by-case basis consistent with the objectives and principles of this rulemaking. The Commission also is exploring possible mechanisms for addressing additional CPO and CTA disclosure issues with the benefit of industry and other external input, including input from other federal and state regulators, on an ongoing basis.

#### II. Transitional Provisions

The revisions being announced today will become effective thirty days from the date hereof, but Disclosure Documents may be prepared, filed and used in accordance with the revised rules prior to the effective date. To facilitate the transition to compliance with the revised rules adopted herein, the Commission has determined that,

for a period of six months after the effective date, it will not take enforcement action against any person solely on the basis of such person's use of a Disclosure Document prepared pursuant to the former rules rather than the revised rules. For pools that are continuously offered, amendment of the Disclosure Document is not required solely due to the rule revisions announced herein, and operators of such pools may make conforming changes as part of their next regular update.

Persons to whom the Division previously has granted exemptive or no-action relief permitting them to prepare Disclosure Documents in accordance with certain provisions of the proposed rules set forth in the Proposing Release are reminded that such relief is superseded by the revisions adopted herein, and any Disclosure Document used by any such person subsequent to the effective date of these revisions must comply with the revised rules.

#### III. Summary of Rule Changes

The following summary is intended to provide interested persons with information concerning significant changes to the Commission's disclosure framework and the manner in which those changes vary, if at all, from the Commission's proposals. These and all other changes to part 4 and other Commission rules are discussed below in the section-by-section analysis. For purposes of this release, the rules as in effect prior to the amendments discussed herein are referred to as the "former" rules.

##### A. Definitions<sup>21</sup>

Many of the proposed amendments set forth in the Proposing Release introduced new concepts into the rules. As a consequence, the Proposing Release contained several new definitions designed to modernize the rules in light of marketplace developments and to aid in implementation of the revised rules. Several of these new definitions have been adopted with modifications: "multi-advisor pool" (Rule 4.10(d)(2)); "principal-protected pool," which was proposed as a "limited risk pool" (Rule 4.10(d)(3)); "trading manager" (Rule 4.10(h)); "major commodity trading advisor" (Rule 4.10(i)); "major investee pool" (Rule 4.10(d)(5)); "trading principal" (Rule 4.10(e)(2)); and "break-even point" (Rule 4.10(j)). Two of the proposed definitions have been

even" analysis is a computation of the trading profit that a pool must realize in the first year of an investor's participation for the investor to recoup his or her initial investment.

<sup>18</sup> Proposed NFA Compliance Rule 2-29(c).

<sup>19</sup> Separately, the Commission contemplates further review of the subject of hypothetical performance presentations to assure adequate safeguards against the misuse of such disclosure.

<sup>20</sup> A summary of the roundtable discussion is on file with the Commission's Office of the Secretariat.

<sup>21</sup> The section-by-section analysis of revised and new definitions is set forth in Section IV below.