

Rules 4.24(v) and 4.33(n) were designed to assure that core disclosures required under Commission and other rules and statutes are given due prominence and that focus upon these matters is not displaced by the often voluminous material gratuitously included in the Disclosure Document.

The comments received by the Commission indicated significant confusion regarding the meaning and operation of proposed Rules 4.24(v) and 4.33(n). Commenters asserted that it was unclear where various types of voluntary information would be required (or permitted) to be placed. They noted the potential for scattering of related items in different portions of a Disclosure Document, when clarity would be fostered by placing non-required information adjacent to the required information to which it relates. Also, commenters claimed that, in essence, by designating information as "voluntary," registrants would be declaring that such information was not material or important, when in fact such information may be necessary to explain or clarify required disclosures. Commenters also noted that it is often difficult to determine what information is mandated by law or regulation and what is merely advisable to include.

The Commission has adopted Rules 4.24(v) and 4.33(n) (renumbered as 4.34(n)) with the following modifications. The word "voluntary" has been replaced in the rule heading with "supplemental," and the rules as adopted distinguish among supplemental performance disclosures (which must be placed after the last required performance disclosure), supplemental information with respect to required non-performance disclosures (which may be placed after or within the text of the corresponding required disclosures), and supplemental information which relates neither to the performance nor the non-performance disclosures required by Commission rules, federal or state laws and regulations, self-regulatory agency regulations or laws of non-United States jurisdictions (which must be placed after the last required disclosure).

As proposed, Rules 4.24(v) and 4.33(n) referred to disclosures required, *inter alia*, by federal or state securities laws or regulations. The modifier "securities" has been deleted from the final rules to take account of the potential applicability of other bodies of law. Further, as adopted, the required disclosures from which supplemental information is distinguished by Rules 4.24(v) and 4.34(n) include information required by applicable laws of a non-United States jurisdiction. Rules 4.24(v)

and 4.34(n) as adopted, treat supplemental performance and non-performance information differently due to the extensive specific requirements of Commission rules with respect to performance data and the high susceptibility of performance data to use in a misleading manner. Thus, the entire required performance presentation must precede any supplemental performance data.<sup>183</sup> However, required volatility disclosure, for example, supplemental disclosure to indicate high monthly volatility for a CTA whose performance is otherwise required to be provided only on an annual basis, is expressly permitted to be included with the related performance disclosure. Supplemental non-performance information that relates to a disclosure required by Commission rules may be included in the text of or immediately following the related required disclosure, provided that the required disclosure is not thereby obscured or made less prominent. Other supplemental information must follow the last required disclosure, except that proprietary, hypothetical, extracted, pro forma (except as previously discussed)<sup>184</sup> or simulated trading results, because of their inherent lack of reliability and high potential to mislead, must be placed at the end of the Disclosure Document following all other information.<sup>185</sup>

## VII. Other Changes

### A. Deletion of Negative Disclosures

The Commission proposed to eliminate certain statements which the former rules had required registrants to include if there was no affirmative response to a particular disclosure requirement (e.g., a statement that no material actions had been brought against the CPO in the preceding five years). Although many commenters generally approved of the Commission's efforts to eliminate excessive and burdensome required statements, none of the comments received specifically addressed these proposed changes.

As adopted, the revised disclosure rules thus no longer require CPOs or CTAs to make the following types of statements, as applicable: That there are

no actual or potential conflicts of interest regarding any aspect of the pool or trading program on the part of certain persons;<sup>186</sup> that certain persons do not own any beneficial interest in the pool;<sup>187</sup> that there is no minimum or maximum amount of contributions or maximum amount of time pool funds will be held prior to trading;<sup>188</sup> that there are no restrictions on transfer or redemptions of participations;<sup>189</sup> that no material actions have been brought within the past five years against certain persons;<sup>190</sup> and that certain persons will not trade for their own accounts.<sup>191</sup> There remain requirements for affirmative, positive related disclosures on these subjects, as applicable.

### B. Use, Amendment and Filing of Disclosure Documents: Rules 4.26 for CPOs and 4.36 for CTAs

As proposed, Rules 4.26 and 4.35, which govern the use, amendment and filing of Disclosure Documents, would have retained, substantially unchanged, the requirements of the former rules, with one exception.<sup>192</sup> The Commission proposed to extend the length of time that a Disclosure Document could have been used following the date thereof from six to nine months. As the Commission noted in the Proposing Release, this would conform the updating requirements of pool Disclosure Documents to those of section 10(a)(3) of the Securities Act for public securities offerings.<sup>193</sup> Thus,

<sup>186</sup> See former Rules 4.21(a)(3)(iii) and 4.31(a)(5)(iii).

<sup>187</sup> See former Rule 4.21(a)(6)(ii).

<sup>188</sup> See former Rules 4.21(a)(8)(i)(B), 4.21(a)(8)(ii)(B) and 4.21(a)(8)(iii)(B).

<sup>189</sup> See former Rule 4.21(a)(10)(ii)(C)(2).

<sup>190</sup> See former Rules 4.21(a)(13)(ii) and 4.31(a)(7)(ii).

<sup>191</sup> See former Rules 4.21(a)(15)(iii) and 4.31(a)(6)(iii).

<sup>192</sup> Proposed Rule 4.26 would have combined the requirements of former Rules 4.21 (b), (e), (f) and (g), which, respectively, required correction of material inaccuracies or omissions in a Disclosure Document, specified how current the performance and non-performance information must be and how long a Disclosure Document could be used, required attachment of the current Account Statement and Annual Report, and specified the filing requirements for CPO Disclosure Documents. Proposed Rule 4.35 would have combined the requirements of former Rules 4.31 (b), (e) and (f), which, respectively, required correction of material inaccuracies or omissions in a Disclosure Document, specified how current the performance and non-performance information must be and how long a Disclosure Document could be used, and specified the filing requirements for CTA Disclosure Documents.

<sup>193</sup> 59 FR 25351, 25367. Section 10(a)(3) of the Securities Act (15 U.S.C. 77j(a)(3)) requires that when a securities prospectus is used more than nine months after the effective date of the registration statement, information contained therein may not be as of a date more than sixteen

<sup>183</sup> The Commission does not consider footnotes and explanatory text, if any, directly related to a required performance presentation to be supplemental performance disclosures and thus they should be included with the required performance.

<sup>184</sup> See discussion in Section V.C.3., *supra*, concerning required pro forma adjustments.

<sup>185</sup> See Rules 4.25(a)(8) for CPOs and 4.35(a)(7) for CTAs. The Commission is not specifying the order of presentation as among proprietary, hypothetical, extracted, pro forma or simulated trading results.