

to maintain its commodity interest account; and

(iii) Any introducing broker through which the client will be required to introduce its account to the futures commission merchant.

(2) With respect to a futures commission merchant or an introducing broker, an action will be considered material if:

(i) The action would be required to be disclosed in the notes to the futures commission merchant's or introducing broker's financial statements prepared pursuant to generally accepted accounting principles;

(ii) The action was brought by the Commission; *Provided, however*, that a concluded action that did not result in civil monetary penalties exceeding \$50,000 need not be disclosed unless it involved allegations of fraud or other willful misconduct; or

(iii) The action was brought by any other federal or state regulatory agency, a non-United States regulatory agency or a self-regulatory organization and involved allegations of fraud or other willful misconduct.

(l) *Trading for own account.* If the commodity trading advisor or any principal thereof trades or intends to trade commodity interests for its own account, the trading advisor must disclose whether clients will be permitted to inspect the records of such person's trading and any written policies related to such trading.

(m) *Performance disclosures.* Past performance must be disclosed as set forth in § 4.35.

(n) *Supplemental information.* If any information, other than that required by Commission rules, the antifraud provisions of the Act, other federal or state laws and regulations, any rules of a self-regulatory agency or laws of a non-United States jurisdiction, is provided, such information:

(1) May not be misleading in content or presentation or inconsistent with the required disclosures;

(2) Is subject to the antifraud provisions of the Act and Commission rules, and to rules regarding the use of promotional material promulgated by a registered futures association pursuant to section 17(j) of the Act; and

(3) Must be placed as follows, unless otherwise specified by Commission rules:

(i) Supplemental performance information (not including proprietary trading results as defined in § 4.35(a)(7), or hypothetical, extracted, pro forma or simulated trading results) must be placed after all required performance information;

(ii) Supplemental non-performance information relating to a required disclosure may be included with the related required disclosure; and

(iii) Other supplemental information may be included after all required disclosures; *Provided, however*, That any proprietary trading results as defined in § 4.35(a)(7), and any hypothetical, extracted, pro forma or simulated trading results included in the Disclosure Document must appear as the last disclosure therein following all required and non-required disclosures.

(o) *Material information.* Nothing set forth in §§ 4.31, 4.34, 4.35 or § 4.36 shall relieve a commodity trading advisor from any obligation under the Act or the regulations thereunder, including the obligation to disclose all material information to existing or prospective clients even if the information is not specifically required by such sections.

§ 4.35 Performance disclosures.

(a) *General principles.*—(1) *Capsule performance information.* Unless otherwise specified, disclosure of the past performance of an account or trading program required under this § 4.35 must include the following information:

(i) The name of the commodity trading advisor or other person trading the account and the name of the trading program;

(ii) The date on which the commodity trading advisor or other person trading the account began trading client accounts and the date when client funds began being traded pursuant to the trading program;

(iii) The number of accounts directed by the trading advisor or other person trading the account pursuant to the trading program specified, as of the date of the Disclosure Document;

(iv) (A) The total assets under the management of the trading advisor or other person trading the account, as of the date of the Disclosure Document; and

(B) The total assets traded pursuant to the trading program specified, as of the date of the Disclosure Document;

(v) The largest monthly draw-down for the account or trading program specified during the most recent five calendar year and year-to-date expressed as a percentage of client funds and indicating the month and year of the draw-down (the capsule must include a definition of "draw-down" that is consistent with § 4.10(k));

(vi) The worst peak-to-valley draw-down for the trading program specified during the most recent five calendar year and year-to-date, expressed as a

percentage of net asset value and indicating the months and year of the draw-down;

(vii) Subject to § 4.35(a)(2) for the offered trading program, the annual and year-to-date rate-of-return for the program specified for the five most recent calendar years and year-to-date, computed on a compounded monthly basis; *Provided, however*, That performance of the offered trading program must include monthly rates of return for such period; and

(viii) In the case of the offered trading program:

(A) The number of accounts traded pursuant to the offered trading program that were closed during the period specified in § 4.35(a)(5) with positive net performance (profits) as of the date the account was closed; and

(B) The number of accounts traded pursuant to the offered trading program that were closed during the period specified in § 4.35(a)(5) with negative net performance (losses) as of the date the account was closed.

(2) *Additional requirements with respect to the offered trading program.*

(i) The performance of the offered trading program must be identified as such and separately presented first;

(ii) The rate of return of the offered trading program must be presented on a monthly basis for the period specified in § 4.35(a)(5), either in a numerical table or in a bar graph;

(iii) A bar graph used to present monthly rates of return for the offered trading program:

(A) Must show percentage rate of return on the vertical axis and one-month increments on the horizontal axis;

(B) Must be scaled in such a way as to clearly show month-to-month differences in rates of return; and

(C) Must separately display numerical percentage annual rates of return for the period covered by the bar graph; and

(iv) The commodity trading advisor must make available to prospective and existing clients upon request a table showing at least quarterly the information required to be calculated pursuant to § 4.35(a)(6).

(3) *Composite presentation.* (i) Unless such presentation would be misleading, the performance of accounts traded pursuant to the same trading program may be presented in composite form on a program-by-program basis, using the format set forth in § 4.35(a)(1).

(ii) Accounts that differ materially with respect to rates of return may not be presented in the same composite.

(iii) The commodity trading advisor must discuss all material differences