REVISIONS TO IFR ALTITUDES CHANGEOVER POINTS—AMENDMENT 466—Continued

[Effective date March 15, 2007]

From	To	MEA
BENNY, MI FIX *2200—MOCA.	BANJO, MI FIX	*3000
BANJO, MI FIX *2900—MOCA.	ZABLE, MI FIX	*5000
ZABLE, MI FIX *5000—MRA.	*RONDO, MI FIX	3000
*RONDO, MI FIX *5000—MRA. **2400—MOCA.	OTREE, MI FIX	**3000
OTREE, MI FIX *2400—MOCA.	PELLSTON, MI VORTAC	*3000

Airway segment		Changeover points	
From	To	Distance	From
§ 95.8003 VOR Federal Airway Changeover Points is Amended to Modify Changeover Point			
WHITE CLOUD, MI VOR/DME	MANISTEE, MI VOR/DME	28	WHITE CLOUD.

[FR Doc. E7–3051 Filed 2–22–07; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4

RIN 3038–AC35

Advertising by Commodity Pool Operators, Commodity Trading Advisors, and the Principals Thereof

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rules.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) has amended Regulation 4.41, which governs advertising by commodity pool operators (CPOs), commodity trading advisors (CTAs), and the principals thereof, (1) To restrict the use of testimonials, (2) to clarify the required placement of the prescribed simulated or hypothetical performance disclaimer, and (3) to include within the regulation's coverage advertisement through electronic media (Amendments). This action is in furtherance of the Commission's longstanding view that all advertisements by CPOs, CTAs, and their principals must not be fraudulent, deceptive or misleading.

EFFECTIVE DATE: March 26, 2007.

FOR FURTHER INFORMATION CONTACT: Barbara S. Gold, Associate Director, or Peter B. Sanchez, Staff Attorney, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581, telephone numbers: (202) 418–5450 or (202) 418–5237, respectively; facsimile number: (202) 418–5528; and electronic mail: *bgold@cftc.gov* or *psanchez@cftc.gov*, respectively.

SUPPLEMENTARY INFORMATION:

I. Background

A. Regulation 4.41

Part 4 of the Commission's regulations governs the operations and activities of CPOs and CTAs.[1] In particular, Regulation 4.41 pertains to advertising by CPOs, CTAs, and the principals[2] thereof, an issue first addressed by the Commission over 25 years ago. The Commission originally proposed that CPOs, CTAs, and their principals could not advertise their actual past performance results in a format other than that which the CPO or CTA was required to use in its Disclosure Document,[3] and that the presentation of simulated or hypothetical performance of a CPO, CTA, or the principals thereof would be prohibited.[4] In response to the comments received and its further deliberations on these proposals, the Commission adopted less restrictive advertising regulations.[5]

With respect to the presentation of actual past performance, the Commission explained that it had adopted in Regulation 4.41(a) ''a rule that leaves to the discretion of the [CPO, CTA, or principal] advertising performance results—whether actual, simulated or hypothetical—the format of that presentation, so long as that format is not false, misleading or deceptive.''[6] With regard to the presentation of simulated or hypothetical performance results, the Commission explained that it had adopted in Regulation 4.41(b) ''a rule that allows the presentation of those results, provided that the presentation is accompanied by the statement prescribed in the rule,'' whose purpose was ''to alert prospective customers to the limitations inherent in simulated and hypothetical past performance

[1] 17 CFR Part 4 (2006). The Commodity Exchange Act (Act), 7 U.S.C. 1 *et seq.* (2000), and the Commission's regulations issued thereunder may be accessed through the Commission's Web site, at *http://www.cftc.gov/cftc.cftclawreg.htm*.

[2] The definition of the term ''principal'' is set forth in Regulation 4.10(e)(1), which cross-references the definition of the term in Regulation 3.1(a). An example of a principal of a CPO organized as a corporation would be the corporation's chief executive officer.

[3] Regulations 4.21 and 4.24–4.26 and 4.31 and 4.34–4.36 concern the Disclosure Document that registered CPOs and CTAs, respectively, must prepare, deliver, and file.

[4] 45 FR 51600 (Aug. 4, 1980).

[5] 46 FR 26004 (May 8, 1981).

[6] While acknowledging that it was not possible to identify every advertisement that was prohibited by new Regulation 4.41, the Commission nonetheless gave notice in the **Federal Register** release announcing the adoption of the rule that it would consider the following, non-exclusive list of advertisements, to be prohibited:

(1) References only to successful trades, if during the same time period, trades which were unsuccessful were also recommended or executed; (2) references to the results during a specific time period, if the results claimed were not fairly representative of results achieved for comparable periods; (3) suggestions, assurances or claims of profit potential that do not also fairly present the possibility of loss; (4) statements of opinions or predictions which are not clearly labeled as such or which have no reasonable basis in fact; and (5) failure to disclose whether, and to what extent, fees, commissions and other expenses are reflected in the past performance results. *Id.* at 26012.

results.''[7] The Commission also noted the scope of new Regulation 4.41—that it applied to both oral and written communications and regardless of whether a CPO or a CTA was exempt from registration under the Act.[8]

B. The Proposal

Based upon its experience with the operation of Regulation 4.41 over the course of the past 25 years, on August 23, 2006, the Commission published for comment proposed amendments to the regulation (Proposing Release).[9] Specifically, the Commission proposed to amend Regulation 4.41: (1) To restrict the use of testimonials; (2) to clarify the required placement of the prescribed simulated or hypothetical performance disclaimer; and (3) to include within the regulation's coverage advertisement through electronic media (Proposal).

C. The Comments on the Proposal

The Commission received six comment letters in response to the Proposal, as follows:[10] one from a registered futures association; one from a bar association; one from a futures industry trade association; and three from unregistered CTAs.[11] The first three commenters supported the Proposal, stating that it would further the goals of Regulation 4.41. The CTAs, however, questioned the Commission's authority to adopt and maintain Regulation 4.41 altogether.

Specifically, they objected to Regulation 4.41 on the grounds that it violates the First Amendment as applied to some CTAs. However, as the Commission explained in the Proposing Release, false, deceptive or misleading commercial speech is not protected by the First Amendment, and disclosure requirements to ensure that commercial speech is not false, deceptive or misleading are a constitutionally permissible form of regulation.[12] Thus, the Commission continues to believe that, because Regulation 4.41 applies to forms of communication used by CTAs and CPOs for marketing their services, the regulation is subject to the constitutional standards for commercial speech and it complies with those standards.

In light of the foregoing and the specific comments the Commission received on the Proposal, which are discussed more fully below, the Commission is adopting the revisions to Regulation 4.41 as proposed. In the Proposing Release, the Commission provided a detailed explanation of each revision it had proposed to make. Accordingly, the scope of this **Federal Register** release generally is restricted to responding to the comments received on the Proposal. The Commission invites interested persons to read the Proposing Release for a fuller discussion of the purpose of each of the amendments contained in the Proposal.

II. Responses to the Comments

A. New Regulation 4.41(a)(3): Testimonials on Actual Past Performance of CPOs, CTAs, and Their Principals

As proposed and as adopted, Regulation 4.41(a)(3) requires advertisements of the actual past performance of a CPO, CTA, or a principal thereof that refer to a testimonial to prominently disclose specified information about the testimonial—*e.g.*, that it may not be representative of the experience of other clients. As the Commission noted, it modeled this provision upon Rule 2210(d)(2) of the National Association of Securities Dealers, Inc. (NASD), which sets similar limits on the use of testimonials in advertisements and other marketing materials applicable to NASD members—*i.e.*, persons who are registered as securities broker-dealers under the Securities Exchange Act of 1934 (BDs).[13]

One commenter questioned why the Commission proposed to regulate the use of testimonials along the lines of the NASD requirement for BDs, as opposed to adopting an outright prohibition against their use—as the Securities and Exchange Commission has done with respect to persons registered or required to be registered as investment advisers.[14] The same commenter asked the Commission to explain its rationale for how it approached the use of testimonials—*e.g.*, whether the Commission had based its approach on problems the Commission had observed or on requests for clarification from CPOs and CTAs.

The purpose of this amendment, as with all of the Amendments, is to ''modernize and clarify'' the Commission's regulations concerning communications with the public—which was the same purpose of the NASD in proposing its Rule 2210(d)(2).[15] While the Commission based this amendment on the observations of its staff, those observations were not of a nature so as to justify the adoption of an outright ban on testimonials at this time. In addition, the Commission notes that, as proposed and as adopted, Regulation 4.41(a)(3) applies to *all* CPOs and CTAs, not solely to those CPOs and CTAs subject to registration.

B. Amended Regulation 4.41(b): The Statement That Must Accompany Simulated or Hypothetical Performance of CPOs, CTAs, and Their Principals

1. Regulation 4.41(b)(1): The Text of the Statement

Regulation 4.41(b)(1) prohibits the presentation of simulated or hypothetical performance results of a CPO, CTA, or principal thereof unless that presentation is accompanied by either: (1) The statement prescribed by the regulation; or (2) a statement prescribed by a registered futures association. The National Futures Association (NFA) currently is the sole registered futures association, and it has prescribed such a statement in its Compliance Rule 2–29(c).[16] As proposed, the Commission has amended Regulation 4.41(b)(1) so as to clarify the meaning of the term ''accompanied by'' in the context of the statement prescribed by the regulation.[17]

One of the commenters on the Proposal questioned the need for alternative statements under the regulation. In response, the Commission notes that the availability of alternative statements provides a meaningful option for compliance with the regulation. Indeed, in the more than ten years following NFA's adoption of

[7] *Id.*

[8] Section 4m(1) of the Act, 7 U.S.C. 6m(1) (2000), generally requires the registration of CPOs and CTAs. Regulation 4.13 provides exemptions from CPO registration for certain persons, and Sections 4m(1) and 4m(3) and Regulation 4.14 provide exemptions from CTA registration for certain other persons.

[9] 71 FR 49387. The Proposing Release may be accessed through the Commission's Web site, at *http://www.cftc.gov/files/foia/fedreg06/foi060823a.pdf.*

[10] The comments on the Proposal similarly may be accessed through the Commission's Web site, at *http://www.cftc.gov/foia/comment06/foi06—005_1.htm.*

[11] It appears that each of these CTAs is exempt from registration pursuant to Regulation 4.14(a)(9), which provides an exemption from registration for a CTA who does not direct client accounts or who does not provide commodity interest trading advice based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients.

[12] 71 FR at 49389, citing *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985), and *Pearson* v. *Shalala*, 164 F.3d 650, 655 (D.C. Cir. 1999).

[13] 71 FR at 49388 n.9.

[14] *See* 17 CFR 275.206(4)–1(a)(1) (2006).

[15] *See* 68 FR 27116 at 27117 (May 19, 2003).

[16] All of NFA's rules can be accessed through NFA's Web site, *www.nfa.futures.org.*

[17] The Commission additionally has conformed the reference to performance in the statement to the references throughout Regulation 4.41(b), so the statement now refers to ''simulated or hypothetical'' performance (whereas previously it referred to ''hypothetical or simulated'' performance).

Compliance Rule 2–29(c),[18] the Commission has not been made aware of any compliance or other issues arising from the existence of alternative cautionary statements in Regulation 4.41(b)(1).[19] Accordingly, the Commission has not adopted the recommendation of this commenter that it abandon its own prescribed statement in favor of the prescribed NFA statement.

Two commenters recommended that the Commission adopt an exception to its prescribed statement where advertisements are directed solely to persons who meet the definition of ''qualified eligible person'' (QEP) in Commission Regulation 4.7.[20] They claimed adoption of such an exception would be consistent with NFA Compliance Rule 2–29(c)(6). However, based upon its review of the record of the adoption of the NFA rule, the Commission has concluded that the NFA rule does not provide for any such exception.

In its Notice to Members announcing the adoption of amendments to, and a formal interpretation of, Compliance Rule 2–29(c), NFA stated:

> Compliance Rule 2–29(c) and the Interpretative Notice do not apply to promotional materials directed exclusively to [QEPs] as defined in CFTC Regulation 4.7. However, CFTC Regulation 4.41(b) requires CPOs and CTAs to provide *all* potential pool participants or clients with either the disclaimer in NFA Compliance Rule 2–29(c) or the shorter disclaimer in CFTC Regulation 4.41(b)(1)(i) *if they are using hypothetical performance results.* Therefore, promotional materials directed to QEPs by CPOs and CTAs should continue to include the disclaimer in CFTC Regulation 4.41(b)(i) (unless they include the disclaimer in Compliance Rule 2–29(c)) (emphasis in the original).[21]

Moreover, given the nature of simulated or hypothetical performance results, the Commission does not believe that it is appropriate to extend the approach of fewer disclosures to QEPs in this instance. Due to their financial sophistication and/or wealth, QEPs may justifiably be presumed to be better equipped to obtain information regarding industry professionals and to scrutinize the risks and rewards for particular investments. However, it is not clear that QEPs, solely by virtue of their being QEPs, are able to identify each instance in which otherwise unexplained performance results are simulated or hypothetical.

Accordingly, the Commission has not adopted the recommendation of these commenters.

2. Regulation 4.41(b)(2): The Meaning of ''In Immediate Proximity''

Regulation 4.41(b)(2) requires that the statement prescribed by Regulation 4.41(b)(1) be ''prominently disclosed'' if the simulated or hypothetical performance that is presented is other than oral. In order to make clear that simulated or hypothetical performance is clearly identified as such, as proposed and as adopted, Regulation 4.41(b)(2) specifies that the prescribed disclaimer also must be ''in immediate proximity to the simulated or hypothetical performance being presented.''

One commenter suggested that the proposed amendment lacked specificity as to the term ''in immediate proximity.'' The commenter requested that the Commission either define the term ''in immediate proximity'' or provide examples of how compliance with that requirement would be assessed in practice.

In determining what constitutes ''in immediate proximity'' for the purpose of Regulation 4.41(b), the Commission does not believe that a bright-line test is practical for all circumstances. Rather, the Commission believes that, in determining what would constitute ''in immediate proximity'' to the simulated or hypothetical performance being advertised, the person providing the prescribed statement should use its best judgment. If it would be clear to someone viewing the simulated or hypothetical performance results that the statement is intended to refer to those particular performance results, then the statement would be ''in immediate proximity'' to the performance results.[22] Thus, placing the statement on the cover page of a document would not be sufficient, because it would be on a different page from the simulated or hypothetical performance being shown. Similarly, if simulated or hypothetical performance results appear on several pages, the statement should appear on a sufficient number of pages so as to leave no doubt as to the nature of the performance results as they appear on each of those several pages.

II. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[23] requires that agencies, in proposing regulations, consider the impact of those regulations on small businesses. The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its regulations on such entities in accordance with the RFA.[24]

With respect to CTAs, the Commission has previously stated that it would evaluate within the context of a particular rule proposal whether all or some affected CTAs would be considered to be small entities and, if so, the economic impact on them of the proposal.[25] Moreover, the Commission stated that CPOs would be considered small entities if they are exempt from registration by virtue of Regulation 4.13(a).[26] The Commission does not believe that the Amendments will have a significant impact on affected CTAs,

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[18] *See* NFA Notice to Members, Notice I–95–24 (Dec. 28, 1995).

[19] The Commission also notes that the use of alternative cautionary statements is not restricted to the presentation of simulated or hypothetical performance results. Commission Regulation 1.55(b) sets forth the risk disclosure statement to be made to customers by futures commission merchants (FCMs) and introducing brokers (IBs). Regulation 1.55(a) provides, however, that the Commission may approve a risk disclosure statement authorized by one or more foreign regulatory agencies or self-regulatory organizations. In 1994, the Commission approved the use of an alternative risk disclosure for use by FCMs and IBs for trading in futures and options in the United States, the United Kingdom, and Ireland. 59 FR 34376 (Jul. 5, 1994). The Commission similarly is unaware of any compliance or other problems arising from the existence of such dual general risk disclosures.

[20] Regulation 4.7 makes relief from otherwise applicable disclosure, reporting and recordkeeping requirements available to registered CPOs and CTAs whose participants and clients are solely QEPs—*e.g.*, certain Commission and SEC registrants, ''knowledgeable employees'' and ''qualified purchasers,'' and accredited investors who have investments with an aggregate market value of $2 million.

[21] *See supra* n. 18.

This NFA advice was issued pursuant to the Commission's letter approving the amendments and interpretation, which stated:

> Under recently-amended Commission Regulation 4.41, persons who present commodity interest hypothetical trading results in their promotional material must include in such materials either the disclaimer specified in Commission Regulation 4.41(b)(1)(i) or a disclaimer which complies with the rules promulgated by a registered futures association pursuant to Section 17(j) of the Act. Accordingly, NFA should inform its members that while new NFA Compliance Rule 2–29(c)(4) would not require members to provide [QEPs] with any disclaimer under Rule 2–29, members would be required to provide QEPs with a disclaimer pursuant to Commission Regulation 4.41(b)(1)(i). Letter from Jean A. Webb, Secretary of the Commission, to Daniel J. Roth, NFA's General Counsel, dated Dec. 12, 1995.

[22] Additional guidance regarding unacceptable practices can be gleaned from past enforcement actions concerning violations of Section 4*o* of the Act and Regulation 4.41. *See, e.g., CFTC* v. *Vartuli*, 228 F.3d 94 (2d Cir. 2000) (prescribed statement appears on a separate page from the hypothetical trading results), and *CFTC* v. *Heffernan*, 245 F.Supp.2d 1276 (S.D. Ga. 2003) (statement on a webpage, but not included in the original advertisement containing the hypothetical performance).

[23] 5 U.S.C. 601 *et seq.*

[24] 47 FR 18618 (Apr. 30, 1982).

[25] *Id.* at 18620.

[26] *Id.*

CPOs, and their principals. This is because the only burden that will be imposed by the Amendments will be in furtherance of the obligation to comply with the antifraud provisions of Section 4*o* of the Act when presenting the past performance of CTAs, CPOs, and their principals—whether by way of actual, simulated or hypothetical performance or through the use of testimonials. Assuming *arguendo*, however, that compliance with Section 4*o* will constitute a significant burden, the burden is neither new nor additional, because the Amendments are consistent with the Commission's longstanding interpretation of Section 4*o* as applicable to all advertisements by CTAs, CPOs, and their principals, including advertisements that are viewed electronically, and with the requirement that such advertisements must not be false or misleading.

The Commission did not receive any comments relative to its analysis of the application of the RFA to the Proposal.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)[27] imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The Amendments do not require a new collection of information on the part of any entities.

The Commission did not receive any comments relative to its analysis of the application of the PRA to the Proposal.

C. Cost-Benefit Analysis

Section 15(a) of the Act[28] requires the Commission to consider the costs and benefits of its action before issuing a new regulation under the Act. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the proposed regulation outweigh its costs. Rather, Section 15(a) simply requires the Commission to ''consider the costs and benefits'' of its action.

Section 15(a) further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: Protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. Accordingly, the Commission could in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular regulation was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The Commission did not receive any comments relative to its cost-benefit analysis of the Proposal.

List of Subjects in 17 CFR Part 4

Advertising, Commodity pool operators, Commodity trading advisors, Commodity futures, Commodity options, Customer protection, Reporting and Recordkeeping.

■ For the reasons presented above, the Commission hereby amends chapter I of Title 17 of the Code of Federal Regulations as follows:

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

■ 1. The authority citation for part 4 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 4, 6b, 6c, 6*l*, 6m, 6n, 6*o*, 12a, and 23.

■ 2. Section 4.41 is amended by removing ''or'' at the end of paragraph (a)(1), removing the period and adding a semi-colon and ''or'' at the end of paragraph (a)(2), adding new paragraph (a)(3), and revising paragraphs (b)(1)(i), (b)(2), and (c)(1) to read as follows:

§ 4.41 Advertising by commodity pool operators, commodity trading advisors, and the principals thereof.

(a) * * *

(3) Refers to any testimonial, unless the advertisement or sales literature providing the testimonial prominently discloses:

(i) That the testimonial may not be representative of the experience of other clients;

(ii) That the testimonial is no guarantee of future performance or success; and

(iii) If, more than a nominal sum is paid, the fact that it is a paid testimonial.

(b) * * *

(1) * * *

(i) The following statement: ''These results are based on simulated or hypothetical performance results that have certain inherent limitations. Unlike the results shown in an actual performance record, these results do not represent actual trading. Also, because these trades have not actually been executed, these results may have under- or over-compensated for the impact, if any, of certain market factors, such as lack of liquidity. Simulated or hypothetical trading programs in general are also subject to the fact that they are designed with the benefit of hindsight. No representation is being made that any account will or is likely to achieve profits or losses similar to these being shown.'' ; or

* * * * *

(2) If the presentation of such simulated or hypothetical performance is other than oral, the prescribed statement must be prominently disclosed and in immediate proximity to the simulated or hypothetical performance being presented.

(c) * * *

(1) To any publication, distribution or broadcast of any report, letter, circular, memorandum, publication, writing, advertisement or other literature or advice, whether by electronic media or otherwise, including information provided via internet or e-mail, the texts of standardized oral presentations and of radio, television, seminar or similar mass media presentations; and

* * * * *

Issued in Washington, DC, on February 16, 2007, by the Commission.

Eileen A. Donovan,

Acting Secretary of the Commission.

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[27] 44 U.S.C. 3501 *et seq.*

[28] 7 U.S.C. 19(a) (2000).

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

19 CFR Part 123

Advance Electronic Presentation of Cargo Information for Truck Carriers Required To Be Transmitted Through ACE Truck Manifest at Ports in the States of Michigan and New York

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Pursuant to section 343(a) of the Trade Act of 2002 and implementing regulations, truck carriers and other eligible parties are required to transmit advance electronic truck cargo information to the Bureau of Customs and Border Protection (CBP) through a CBP-approved electronic data interchange. In a previous notice, CBP designated the Automated Commercial Environment (ACE) Truck Manifest System as the approved interchange and announced that the requirement that advance electronic cargo information be transmitted through ACE would be