

for each trading program that it offers or that it intends to offer within 21 calendar days of the date upon which the trading advisor first knows or has reason to know of the defect requiring the amendment.

[Added July 25, 1995, 60 F.R. 38146 (¶ 26,453), effective Aug. 24, 1995; amended Apr. 15, 1997, 62 F.R. 18265 (¶ 27,002), effective Apr. 15, 1997; Oct. 2, 2000, 65 F.R. 58648 (¶ 28,250), effective Nov. 1, 2000; Dec. 18, 2002, 67 F.R. 77409 (¶ 29,241), effective Jan. 1, 2003; March 5, 2009, 74 F.R. 9568, effective April 6, 2009..]

Subpart D—Advertising

§ 4.40 [Reserved.]

[¶ 2224L]

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

(a) No commodity pool operator, commodity trading advisor, or any principal thereof, may advertise in a manner which:

(1) Employs any device, scheme or artifice to defraud any participant or client or prospective participant or client;

(2) Involves any transaction, practice or course of business which operates as a fraud or deceit upon any participant or client or any prospective participant or client; or

(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) No person may present the performance of any simulated or hypothetical commodity interest account, transaction in a commodity interest or series of transactions in a commodity interest of a commodity pool operator, commodity trading advisor, or any principal thereof, unless such performance is accompanied by one of the following:

(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

(ii) A statement prescribed pursuant to rules promulgated by a registered futures association pursuant to section 17(j) of the Act.

(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) The provisions of this section shall apply:

(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

(2) Regardless of whether the commodity pool operator or commodity trading advisor is exempt from registration under the Act.

[Added May 8, 1981, 46 F.R. 26004 (¶ 21,188), effective July 1, 1981; amended July 25, 1995, 60 F.R. 38146 (¶ 26,453), effective Aug. 24, 1995; amended Feb. 23, 2007, 72 F.R. 14413 (¶ 30,449), effective Mar. 26, 2007.]

[¶ 2224M]

➤➤➤ *Amended by 77 F.R. 11252 (¶ 32,152), effective Apr. 24, 2012. See 77 F.R. 11252 (¶ 32,152 for information on compliance deadlines.*

➤➤➤ *The following text is effective until Apr. 23, 2012.*

Appendix A to Part 4 — GUIDANCE ON THE APPLICATION OF RULE 4.13(A)(3) IN THE FUND-OF-FUNDS CONTEXT

The following provides guidance on the application of the trading limits of Rule 4.13(a)(3)(ii) to commodity pool operators (CPOs) who operate “fund-of-funds.” For the purpose of this Appendix A, it is presumed that the CPO can comply with all of the other requirements of Rule 4.13(a)(3). It also is presumed that where the investor fund CPO is relying on its own computations, the investor fund is participating in each investee fund that trades commodity interests as a passive investor, with limited liability (e.g., as a limited partner of a limited partnership or a non-managing member of a limited liability company). Fund-of-fund CPOs who seek to claim exemption from registration under Rule 4.13(a)(1), (a)(2) or (a)(4) may do so without regard to the trading engaged in by an investee fund, because none of the registration exemptions set forth in those rules concerns limits on or levels of commodity interest trading. Persons whose fact situations do not fit any of the scenarios below should contact Commission staff

to discuss the applicability of the registration exemption in Rule 4.13(a)(3) to their particular situations.

1. Situation: An investor fund CPO allocates the fund's assets to one or more investee funds, none of which meets the trading limits of Rule 4.13(a)(3) and each of which is operated by a registered CPO. It does not allocate any of the investor fund's assets directly to commodity interest trading.

Application: The investor fund CPO may claim relief under Rule 4.13(a)(3) provided the investor fund itself meets the trading limits of Rule 4.13(a)(3)(ii)(A).

2. Situation: An investor fund CPO allocates the fund's assets to one or more investee funds, each having a CPO who is either: (1) itself claiming exemption from CPO registration under Rule 4.13(a)(3); or (2) a registered CPO that is complying with the trading restrictions of Rule 4.13(a)(3). It does not allocate any of the investor fund's assets directly to commodity interest trading.

Application: The investor fund CPO fund may rely upon the representations of the investee fund CPOs that they are complying with the trading limits of Rule 4.13(a)(3).

3. Situation: An investor fund CPO allocates the fund's assets to investee funds, each of which operates under a percentage restriction on the amount of margin or option premiums that may be used to establish its commodity interest positions (whether pursuant to Rule 4.12(b), Rule 4.13(a)(3)(ii)(A) or otherwise), by, *e.g.*, contractual agreement. It does not allocate any of the investor fund's assets directly to commodity interest trading.

Application: The CPO of the investor fund may multiply the percentage restriction applicable to each investee fund by the percentage of the investor fund's allocation of assets to that investee fund to determine whether the CPO is operating the investor fund in compliance with Rule 4.13(a)(3)(ii)(A).

4. Situation: An investor fund CPO allocates the fund's assets to one or more investee funds,

and it has actual knowledge of the trading limits and commodity interest positions of the investee funds, *e.g.*, where the CPO or one or more affiliates of the CPO operate the investee funds. (For this purpose, an "affiliate" is a person who controls, who is controlled by, or who is under common control with, the CPO.) It does not allocate any of the investor fund's assets directly to commodity interest trading.

Application: The investor fund CPO may aggregate commodity interest positions across investee funds to determine compliance with the trading restrictions of Rule 4.13(a)(3). For this purpose, the aggregate assets of the investee funds would be compared to the aggregate of their commodity interest positions (as to margin or as to net notional value). The investor fund CPO should use the results of this computation to determine its compliance with the trading limits of Rule 4.13(a)(3).

5. Situation: An investor fund CPO allocates no more than 50 percent of the fund's assets to investee funds that trade commodity interests (without regard to the level of commodity interest trading engaged in by those investee pools). It does not allocate any of the investor fund's assets directly to commodity interest trading.

Application: The investor fund CPO may claim relief under Rule 4.13(a)(3).

6. Situation: An investor fund CPO allocates the fund's assets to both investee funds and direct trading of commodity interests.

Application: The investor fund CPO must treat the amount of investor fund assets committed to such direct trading as a separate pool for purposes of determining compliance with Rule 4.13(a)(3)(ii), such that the commodity interest trading of that pool must meet the criteria of Rule 4.13(a)(3)(ii) independently of the portion of investor fund assets allocated to investee funds.

➤➤➤ *The following text is effective on Apr. 24, 2012. (77 F.R. 11252, ¶ 32,152) See 77 F.R. 11252 (¶ 32,152 for information on compliance deadlines.*

Appendix A to Part 4—Form CPO-PQR