they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 98–CE–61–AD.'' The postcard will be date-stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 98–CE–61–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Discussion

AD 99–05–13, Amendment 39–11061 (64 FR 10560), currently requires installing a placard on the fuel tank selector to warn of the no-flow condition that exists between the fuel tank detents on Raytheon Beech 17, 18, 19, 23, 24, 33, 35, 36/A36, A36TC/B36TC, 45, 50, 55, 56, 58, 58P, 58TC, 60, 65, 70, 76, 77, 80, 88, and 95 series airplanes.

The AD was the result of reports of engine stoppage on the affected airplanes where the cause was considered to be incorrect positioning of the fuel selector. The actions of AD 99–05–13 were intended to prevent a lack of fuel flow to the engine caused by the incorrect positioning of the fuel selector, which could result in loss of engine power.

Events Leading to This Proposed Action

The FAA has since evaluated all information related the subject matter of AD 99–05–13 and has determined that:

—The positioning of the fuel selector is an operational issue and not an unsafe condition under part 39 of the Federal Aviation Regulations (14 CFR part 39) and should be handled by other methods;

—Normal operating and procedural information such as this should be handled through regular revisions to the Airplane Flight Manual (AFM) or Pilot's Operating Handbook (POH); and

—By requiring a placard in an AD to convey normal operating information, the FAA reduces the pilots' sensitivity to true emergency information that should be conveyed by placards.

The FAA's Determination and Provisions of This Proposed Action

Based on the above information, the FAA has determined that there is no need for AD 99–05–13 and that it should be withdrawn.

This proposed action would withdraw AD 99–05–13. Withdrawal of AD 99–05–13 would constitute only such action; and, if followed by a final action, would not preclude the agency from issuing another notice in the future, nor would it commit the agency to any course of action in the future.

Regulatory Impact

Since this proposed action would only withdraw an AD, it is neither a proposed AD nor a final AD and, therefore, is not covered under Executive Order 12866, the Regulatory Flexibility Act, or DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979).

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Withdrawal

Accordingly, AD 99–05–13, Amendment 39–11061, published in the **Federal Register** on March 5, 1999 (64 FR 10560), is proposed to be withdrawn.

Issued in Kansas City, Missouri, on July 26, 1999.

Mike Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99–19745 Filed 7–30–99; 8:45 am]

BILLING CODE 4910–13–U

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4

Performance Data and Disclosure for Commodity Trading Advisors

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rules.

SUMMARY: On June 18, 1998, the Commodity Futures Trading Commission (''CFTC'' or ''Commission'') published in the **Federal Register** a ''Concept Release'' seeking public comment on issues relating to the computation and presentation of rate of return information and other disclosures concerning partially-funded accounts managed by commodity trading advisors (''CTAs''). The Concept Release discussed rules proposed by National Futures Association (''NFA'') as well as several other issues related to the presentation of CTA and commodity pool operator disclosure which appeared to warrant further study and analysis. The Concept Release requested public comment on both the NFA proposal and the other issues. Based on its consideration of comments received in response to the Concept Release, the Commission has determined to propose revisions to its rules concerning the documentation, computation, and disclosure of CTA's past performance information. The rules are intended to simplify the recordkeeping and computational requirements for CTAs who accept partially-funded client accounts, while providing for meaningful and focused disclosure to clients regarding the past performance of the CTA, and the risks attendant upon trading on a partially-funded basis.

DATES: Comments must be received by October 1, 1999.

ADDRESSES: Comments on the proposed rules may be sent to Jean A. Webb, Secretary of the Commission, Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581. In addition, comments may be sent by facsimile transmission to facsimile number (202) 418–5221, or by electronic mail to secretary@cftc.gov. Reference should be made to ''Performance Data and Disclosure for Commodity Trading Advisors.''

FOR FURTHER INFORMATION CONTACT: Robert B. Wasserman, Associate Director, (202) 418–5092, electronic mail: ''rwasserman@cftc.gov,'' or Eileen R. Chotiner, Futures Trading Specialist,

(202) 418–5467, electronic mail: ''echotiner@cftc.gov,'' Division of Trading and Markets, Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. The Concept Release

The Concept Release sought public comment on computational and disclosure matters relating to participation in programs of commodity trading advisors (''CTAs'') on a partially-funded basis and raised specific questions regarding a number of issues: (1) Improving risk profile data for clients considering participation in CTA programs on a partially-funded basis; (2) providing CTA client account information to futures commission merchants (''FCMs'') to aid the FCM's risk management; (3) improving risk profile data on commodity pools; (4) providing a theoretically sound basis of computation and presentation for rate of return (''ROR'') and related risk profile data; (5) improving the presentation of historical performance and risk profile data; and (6) providing periodic statements of program activity and results to CTA clients.

The Commission initially provided a 60-day comment period on the Concept Release, through August 17, 1998. On August 6, 1998, the Commission extended the comment period for 30 days, through September 16, 1998. The Commission received 19 comments on the release: four from firms registered as both CTAs and commodity pool operators (''CPOs''); three from registered CTAs; one from a registered CPO; one from a bar association; one from a futures self-regulatory organization; one from a futures industry trade association; two from academicians; one from an administrative law judge; two from accounting/compliance firms; two from other financial services firms; and one from an individual investor.

The Concept Release addressed in particular rules proposed by the National Futures Association (''NFA'').[1] In the rule submissions, NFA proposed that ROR be computed on the basis of the nominal account size, rather than the beginning net asset value (''BNAV'') of the account, as currently required by Commission Rule 4.35(a)(6). NFA asserted that the amount of actual funding in a client's account does not control the CTA's trading decisions. In the Concept Release, the Commission raised questions about whether nominal account size is a legitimate basis for the computation of ROR, as well as whether NFA's proposed documentation and disclosure requirements were sufficient to address concerns about the impact of partial funding on a client's account.

In response to the questions raised in the Concept Release, some commenters indicated concern regarding the validity of the nominal account size and the ability of clients to interpret and compare performance data presented on a basis other than the actual funds deposited in a client's account. However, the majority of commenters, including NFA, the Managed Funds Association (''MFA''), and several CPOs and CTAs, expressed support for the use of nominal account size as the basis for computing ROR and presenting the CTA's past performance.

The Concept Release also discussed the current requirements for disclosure of draw-down information pursuant to Rules 4.35(a)(1)(v) and (vi), and asked for comment on the possibility of expanding draw-down disclosure in two areas. First, the Concept Release sought comment on the advisability of requiring draw-down percentage data to be presented at two or three partial-funding levels that are representative of those offered by the CTA, in addition to the fully-funded level. Second, the Concept Release sought comment on the concept of enhancing disclosure of a program's historical volatility, possibly by expanding the time period for historical performance disclosure; reducing the amount of monthly data; and requiring more detailed information concerning the volatility of the CTA's program, either through an expanded number of worst draw-down months, or by requiring presentation of the standard deviation of the monthly returns.

A number of commenters expressed concern that requiring too many items of data would result in less attention being paid to that information. The Commission has been attentive to those concerns. In seeking to highlight the increased leverage—and consequent increased risk—in partially funding accounts, the Commission has proposed a set of disclosures that is significantly limited compared to that discussed in the Concept Release.

A number of other ideas discussed in the Concept Release generated substantial opposition from commenters. These include a requirement that a CTA provide a copy of its agreement with the client to the client's FCM and additional reporting requirements for CTAs. The Commission has determined not to include these in the proposed rules.

II. The Proposed Rules

The Commission has carefully considered the comments received, and has determined to revise its rules to provide a comprehensive framework for addressing certain of the issues raised in the Concept Release. In making the current proposal, which incorporates most of the concepts included in the NFA proposal, the Commission seeks to simplify the recordkeeping and computational requirements for CTAs who accept partially-funded client accounts, while providing for meaningful and focused disclosure to clients regarding the past performance of the CTA, and the risks attendant upon trading on a partially-funded basis.

In particular, the Commission has determined to revise its rules to require that ROR be computed by dividing net performance by the nominal account size. This change is intended to reduce regulatory burdens by relieving CTAs of the responsibility for tying nominal account size to actual funding levels, and to permit a uniform method for CTAs to calculate their RORs, regardless of whether they accept partially-funded client accounts. As discussed below, CTAs who wish to measure performance on an actual funds basis may do so by setting the nominal account size equal to the actual funding level.

The risk disclosure requirements included in the proposed rules are intended to highlight critical information without overloading the client with excessive data. Other changes are proposed primarily to codify certain definitions and other information currently contained in Commission advisories.[2]

A. Documentation of Nominal Account Size

In order to address concerns regarding documentation of the nominal account size and other terms of the CTA's trading for clients' accounts, the Commission is proposing to add new paragraph (c) to Rule 4.33. This provision would require that the CTA execute a written agreement with each client that specifies: The nominal account size; the name or description of the trading program in which the client is participating; the basis for the

[1] By letters dated March 15, 1994 and March 15, 1995, NFA submitted to the Commission for its approval, pursuant to Section 17(j) of the Act, NFA Compliance Rule 2–34 and its Interpretive Notice regarding documentation and disclosure for partially-funded accounts. By letter dated February 26, 1998, NFA submitted a revision to NFA Compliance Rule 2–29 regarding the rate of return computation.

[2] CFTC Advisory 87–2 [1986–87 Transfer Binder] Comm. Fut. L. Rep. (CCH) para. 23,624 (June 2, 1987); CFTC Advisory 93–13, 58 FR 8226 (February 12, 1993).

computation fees; how additions or withdrawals of actual funds, or profits and losses will affect each of (a) the nominal account size and (b) the computation of fees; and whether the client will fully or partially fund the account. The provisions of proposed Rule 4.33(c) are substantially similar to the documentation requirements that were included in NFA's Proposal.

These requirements will apply to all CTAs, regardless of whether they accept partially-funded accounts. A CTA that intends to continue to measure its performance using actual funds may establish a nominal account size which is defined on an actual funds basis. The information specified by Rule 4.33(c) need not be contained in a separate agreement, but may be included as part of any other signed written agreement between the CTA and the client.

B. Changes to Calculations

The Commission is proposing to amend and re-order paragraphs (A)—(F) of Rule 4.35(a)(6)(i) to accommodate the use of nominal account size, rather than net asset value, as the basis for performance computation.[3] Rule 4.10(*l*) would also be amended to define the measurement of a CTA's worst peak-to-valley draw-down by net performance relative to nominal account size, rather than changes in net asset value. Proposed Rules 4.35(a)(6)(i)(D) and (E) address the fact that changes to the nominal account size may result either from changes in actual amounts, such as additions, withdrawals, profits or losses; or from changes to the nominal account size, pursuant to the terms of the CTA's agreement with the client in accordance with proposed Rule 4.33(c)(1). Proposed Rule 4.35(a)(6)(i)(B) defines net performance as the sum of the realized gain or loss on positions closed during the period plus the change during the period in unrealized gain or loss, plus interest on funds deposited with the client's FCM, less fees and expenses. This proposed rule also provides that no interest income may be imputed with respect to nominal account sizes or otherwise computed on a pro-forma basis.

Although proposed rule 4.35(a)(6)(i)(B) would include, as part of net performance, interest on actual funds deposited with the client's FCM, this raises questions regarding whether such interest should be credited as part of the CTA's performance where the interest is earned on investments directed by the FCM (as opposed to the CTA). Reasons supporting the inclusion of the interest include the following: (1) Since trading fees are charged against the CTA's performance, even though the commission rate may be negotiated by the client and the FCM, interest earned at the FCM should be credited to the CTA's performance to maintain parity; and (2) the interest is, in a real sense, part of the return on the funds. Reasons against the inclusion of the interest include the following: (1) Since the objective of performance reporting is to convey the results from the trading which a CTA performed on behalf of a client, it may be misleading to include interest earned on investments managed by the FCM (as opposed to the CTA); and (2) as one commenter explained, ''(i)f a CTA agrees with each of several clients to a nominal account size and each account is traded similarly, the performance results of the CTA as they relate to these accounts should be the same.'' But, if interest on the funds on deposit with the client's FCM is included in the CTA's performance results, then the CTA will have different performance results, depending on each client's arbitrarily selected funding level. The Commission solicits comment on this issue.

C. Disclosure of Actual Funding Levels and Funds Under Management

In accepting the use of nominal account size to compute ROR, the Commission intends to permit CTAs to disclose their trading results as they relate to the account size which governs their trading decisions. However, the Commission believes that disclosure of the amount of client assets managed by the CTA—the funds under management—should continue to reflect the amount of actual funds committed by clients to the CTA's trading program, rather than the aggregate of nominal account sizes. It would be misleading to describe ''notional funds,''[4] which the client has chosen not to place in an account over which the CTA has trading authority, as ''funds under management.'' Rule 4.35(a)(1), therefore, would be revised to clarify that the disclosure of funds under management must reflect only the actual funds committed to the CTA's trading program. The term ''Actual Funds'' is defined in new Rule 4.10(n), which codifies the definitions included in Commission Advisories 87–2 and 93–13.[5] Rule 4.35(a)(1) would permit a CTA that does not posses information about the amount of actual funds a client has deposited to meet this disclosure requirement by simply disclosing that lack of information. New provisions, set forth in Rule 4.35(a)(1)(ix), would require that the performance capsule state the percentage of client accounts in the program that are fully funded and specify that any disclosure of aggregate nominal account sizes must be identified clearly as such and presented adjacent to the actual funds amounts.

D. Disclosure Concerning Draw-Downs

If the client funds the account traded by the CTA at a level less than the nominal account size, then gains or losses will represent a greater percentage of the amount funded. In other words, the leverage will be increased. This increased leverage increased both the likelihood that the client will be faced with a margin call and the size of such a potential margin call. It also increases the risk that the client will lose more than the funds it has advanced. In order to indicate clearly to potential clients the increased leverage—and the consequent increased risk—inherent in partial funding, new Rule 4.35(a)(1)(ix)(A) would require CTAs who accept partially-funded accounts to present draw-down figures computed on the basis of the actual funds committed to the CTA's program by the client with the lowest ratio of actual funds to nominal account size in the trading program.[6] If the CTA does not have sufficient information regarding the funding level of its client accounts, or if the lowest ratio is zero, the draw-down information would be presented at a funding level of 20%. These additional draw-down figures would be presented adjacent to the worst monthly and peak-to-valley draw-

[3] For example: Under the current method of calculation, if a CTA's program has beginning net asset value (BNAV) of 100, ending net asset value (ENAV) of 150, additions (ADDS) of 40 and withdrawals (WDRS) of 0, then net performance (NET–PERF) is 10, and ROR is 10%:

NET–PERF = ENAV − BNAV − ADDS + WDRS

10 = 150 − 100 − 40 + 0

ROR = NET–PERF/BNAV

10% = 10/100

Under the proposal, the CTA is not required to monitor net asset values, and thus net performance must be calculated directly. Under the proposed method of calculation, if the total of the nominal account sizes for the CTA's program (BNOM) is 100 at the beginning of the month, the realized gain on positions closed during the period (RG) is 7, the change in unrealized gains (UN–RG) is 5, and fees and expenses (FEES) are 2, then NET-PERF is still 10, and ROR is still 10%:

NET–PERF = RG + UN–RG − FEES

10 = 7 + 5 − 2

ROR = NET–PERF/BNOM

10% = 10/100

[4] The difference between the nominal account size and the actual funding level frequently been referred to as ''notional funds.''

[5] *See supra,* note 2.

[6] For example, if the lowest funding level is 25% and the greatest monthly drawdown is 15%, the drawdown shown on the basis of actual funding would be 60% (15%÷25%).

down percentages based on the aggregate nominal account sizes.

The concept release discussed the Commission's concern regarding disclosure of the historical volatility of CTA programs and suggested that, since extreme market events do not always occur within the five-year time-frame specified by the regulations, this time-frame may permit some CTAs to omit their greatest draw-downs from their historical risk profiles. In order to address these concerns, the Commission proposes to revise Rules 4.35(a)(1)(v) and (vi) to require that the worst monthly and peak-to-valley draw-down, which will be based on the composite of accounts, be included in the performance capsule for the most recent five years and, in addition, for the life of the program, if longer than five years. The Commission does not intend that this requirement create a significant additional recordkeeping burden for CTAs, and is proposing a corresponding change to Rule 4.35(a)(6)(ii) to clarify that only the monthly figures derived from the supporting documentation, and not the supporting documentation itself, must be maintained beyond the five-year period specified in Rule 1.31. However, the Commission specifically invites comment regarding the extent to which the additional draw-down disclosure would provide a benefit to clients and details regarding the extent of any additional burden that is anticipated.[7]

E. Disclosure Concerning Range of Rates of Return

The Commission believes that disclosing the range of RORs for closed accounts in the offered program provides an important measure of the returns experienced by clients and will be useful to prospective clients considering participation in the CTA's program. Therefore, the Commission is also proposing to revise Rule 4.35(a)(1)(viii) to require that the performance capsule for the offered program include, in addition to the number of accounts closed with profits and the number closed with losses, the range of rates of return for the accounts closed with net lifetime profits and accounts closed with net lifetime losses, during the five-year period. As previously noted, Rules 4.35(a)(1)(v) and (vi) would be revised to specify that the worst draw-down information be based on the composite of accounts. Thus, the draw-down figures in the CTA's capsule would not reflect the ROR of a client account that performed worse than other accounts in composite.[8] In light of the proposed changes to Rules 4.35(a)(1)(v) and (vi), the Commission believes that presentation of the range of RORs for closed accounts would provide a valuable additional perspective on the results experienced by individual clients. The Commission does not anticipate a significant additional burden as a result of this change due to the existing requirement of Rule 4.35(a)(1)(viii) that CTAs disclose the number of accounts closed with profits and the number of accounts closed with losses.

F. Disclosure of Monthly Performance

The Commission wishes to explore the possibility of requiring that the monthly RORs be presented in a bar graph, in order to provide a more direct visual representation of the variations in RORs from month to month. Currently, Rule 4.35(a)(2)(ii) specifies that monthly RORs for the offered program must be presented either in a numerical table or in bar graph. Proposed revisions to Rule 4.35(a)(2)(ii) would require the bar graph to be disclosed in addition to the tabular presentation of monthly ROR figures. The Commission is requesting comment regarding whether use of a bar graph may communicate the month-to-month changes in customer returns more effectively than a tabular presentation, as well as whether the bar graph should be required in lieu of the tabular presentation of RORs. In addition, the Commission seeks comment regarding the significance of any additional burden that may result from the requirements.

G. Illustrative Performance Capsule

An example of a performance capsule that would meet the disclosure requirements, modified as discussed in §§ II(C–F) above, is attached as Appendix A. This example is not intended to mandate a particular format, but only to serve as an illustration.

H. Changes to Definitions and Disclosure Requirements

Changes are also being proposed to codify definitions and other information currently contained in Commission advisories as well as to clarify existing rules and definitions in the context of the proposed rule revisions. New Rule 4.34(p), in the main, codifies certain of the requirements currently set forth in Commission Advisory 93-13, and also discussed as part of the NFA Proposal, for disclosure to prospective clients of material information concerning the practice of partially funding an account and the factors considered by the CTA in determining the trading level for a given nominal account size. Definitions of ''nominal account size,'' ''actual funds'' and ''partially-funded account'' are proposed to be added as Rules 4.10(m), (n) and (o), respectively.

Proposed Rule 4.10(p) contains a definition of ''most recent five years'' that is intended to simplify the terminology used to designate the five calendar years and year-to-date time period for which performance is required to be disclosed pursuant to Rules 4.25(a)(5) and 4.35(a)(5). This clarification does not affect the existing provisions of Rules 4.25(a)(7) and 4.35(a)(4) that require performance information in a Disclosure Document to be current as of a date not more than three months preceding the date of the Disclosure Document.

I. Commodity Pool Disclosure

The Concept Release included a detailed discussion of disclosure by CPOs. Due to the complexity of pool performance issues, the Commission is, generally, deferring consideration of changes to the requirements for disclosure of past performance by CPOs, other than changes primarily intended to conform the requirements for presentation of CTA past performance in pool disclosure documents with the revisions to Rule 4.35(a)(1) proposed herein. Other issues relating to pools will be considered in the context of the Commission's implementation of recommendations included in the President's Working Group on Financial Markets' April 1999 study, ''Hedge Funds, Leverage and the Lessons of Long-Term Capital Management.''

In order to highlight a use of leverage by commodity pools, the Commission is proposing one substantive revision to commodity pool disclosure in Rule 4.25(a)(1)(ii)(H). This provision would be applicable only where the CPO allocates, to any of the pool's CTAs, an amount of actual funds which is less than the nominal account size stated in the pool's written agreement with the CTA. In such cases, the CPO would be required to include in the performance capsule for each such CTA, in a column adjacent to the presentation of data based on nominal account size, the draw-down information required by Rule 4.25(a)(1)(ii)(E) and (F), computed on the basis of the ratio of the nominal account size to the pool's actual funds allocated to the CTA's program.

[7] Of course, prior to the effective date of these proposed rule changes, commodity trading advisors would not be obligated to maintain records for this purpose longer than the five years required under Rule 1.31.

[8] However, CTAs would remain subject to the requirement of Rule 4.34(o) to disclose all material information to existing or prospective clients even if such information is not specifically required by these regulations.

III. Transitional Provisions

The Commission proposes to require CTAs and CPOs to comply with the revisions proposed herein, including the requirement to obtain the documentation required by new Rule 4.33(c) for both new and existing clients, by no later than July 1, 2000. The Commission seeks comment on any difficulties anticipated in complying with these proposed requirements by July 1, 2000. CTAs and CPOs would be permitted to adopt these changes immediately upon the effective date of the proposed rules.

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), U.S.C. 606–11 (1994), requires that agencies, in proposing rules, consider the impact of those rules 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 rules on such entities in accordance with the RFA.[9] The Commission previously has determined that registered CPOs are not small entities for the purpose of the RFA.[10] With respect to CTAs, the Commission has 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 any rule.[11] In this regard, the Commission notes that the rule revisions being proposed herein create some changes to the content of the documentation and disclosure requirements for CTAs, but are not expected to increase such requirements, and, in fact, are expected ultimately to ease the computational and recordkeeping requirements for CTAs who manage partially-funded client accounts. The Commission has previously determined that the disclosure requirements governing this category of registrant will not have a significant economic impact on a substantial number of small entities.[12] Therefore, the Acting Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that these proposed regulations will not have a significant economic impact on a substantial number of small entities. Nonetheless, the Commission specifically requests comment on the impact these proposed rules may have on small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (Pub. L. 104–13 (May 13, 1995)) imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by that Act.

The group of rules contained in all of Part 4, ''Commodity Pool Operators and Commodity Trading Advisers,'' of which Rules 4.10, 4.25, 4.33, 4.34 and 4.35 are a part, was approved on September 4, 1998 and assigned OMB control number 3038–0005. The Commission does not anticipate that the proposed revisions to the rules will affect the total burden of this group of rules. The group of rules contained in OMB control number 3038–0005 has the following burden:

Average burden hours per response: 4.95

Number of respondents: 4,624

Frequency of response: On occasion

Copies of the information collection submission to OMB are available from the CFTC Clearance Officer, 1155 21st Street, NW, Washington, DC 20581, (202) 418–5160.

List of Subjects in 17 CFR Part 4

Brokers, Commodity futures, Commodity pool operators, Commodity trading advisors.

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, 6l, 6m, 6n, 6o, 12a and 23.

2. Section 4.10 is proposed to be amended by revising paragraph (l) and adding paragraphs (m), (n), (o) and (p) to read as follows:

§ 4.10 Definitions.

* * * * *

(l) *Worst peak-to-valley draw-down* means:

(1) For a commodity pool, the greatest cumulative percentage decline in month-end net asset value due to losses sustained during any period in which the initial month-end net asset value is not equaled or exceeded by a subsequent month-end net asset value. Such decline must be expressed as a percentage of the initial month-end net asset value, together with an indication of the months and year(s) of such decline from the initial month-end net asset value to the lowest month-end asset value of such decline.

(2) For an account directed by a commodity trading advisor or for a commodity trading advisor's trading program, the greatest negative net performance during any period, beginning at the start of one month, and ending at the conclusion of that month or a subsequent month. The worst peak-to-valley draw-down must be expressed as a percentage of the nominal account size at the beginning of the period, together with an indication of the months and year(s) of such draw-down.

(3)(i) For purposes of paragraph (2) of this section, net performance for a period is defined as the total of:

(A) the realized gain or loss on position closed during the period, plus

(B) The change during the period in unrealized gain or loss, plus

(C) Interest accrued on funds deposited in the client's account at a futures commission merchant, plus

(D) Other income accrued on positions held as part of the CTA's program, minus

(E) Fees and expenses.

(ii) No income may be imputed with respect to nominal account sizes or otherwise computed on a pro-forma basis.

(4) For purposes of §§ 4.25 and 4.35, a peak-to-valley draw-down which began prior to the beginning of the most recent five calendar years is deemed to have occurred during such five-calendar-year period.

(m) *Nominal account size* means the account size, designated in the written agreement specified in § 4.33(c), which establish he client's level of trading in a commodity trading advisor's program.

(n) *Actual funds* means the amount of margin-qualifying assets committed to a commodity trading advisor's program, either:

(1) On deposit in an account at a futures commission merchant to margin the client account for which a commodity trading advisor has trading authority; or

(2) In another account, so long as the commodity trading advisor has written evidence demonstrating the following:

(i) The client owns the funds and has designated such funds as committed to the commodity trading advisor's trading program;

(ii) The futures commission merchant carrying the client's account for which the commodity trading advisor directs trades has the power to transfer the funds readily from the other account for the purpose of meeting margin requirements in connection with such trades, on a routine operational basis

[9] 47 FR 18618–181621 (April 30, 1982).

[10] 47 FR 18619–18620.

[11] 47 FR 18618–18620.

[12] *See* 60 FR 38146, 38181 (July 25, 1995) and 48 FR 35248 (August 3, 1983).

and without advance notice to the client; and

(iii) The commodity trading advisor has ready access to information concerning the designated balance in the account.

(o) Partially-funded account means a client participation in the program of a commodity trading advisor in which the amount of actual funds committed to the trading program is less than the nominal account size.

(p) For purposes of §§ 4.25 and 4.35, the term *most recent five years* means:

(1) The time period beginning January 1 of the calendar year five years prior to the date of the Disclosure Document and ending as of the date of the Disclosure Document or

(2) The life of the trading program, if less than five years.

3. Section 4.25 is proposed to be amended by revising paragraphs (a)(1)(ii)(D)(*1*) and (*2*) and (E) and (F) and by adding paragraph (a)(l)(i)(H) to read as follows:

§ 4.25 Performance disclosures.

(a) * * *

(1) * * *

(ii) * * *

(D)(*1*) The aggregate of actual funds committed to all of the trading programs of the trading advisor or other person trading the account, as of the date of the Disclosure Document or, if the commodity trading advisor does not have sufficient information regarding the funding of its client's accounts to determine the aggregate of actual funds committed to its programs, a statement of that fact;

(*2*) The aggregate of actual funds committed to the specified trading program of the commodity trading advisor, as of the date of the Disclosure Document or, if the commodity trading advisor does not have sufficient information regarding the funding of its clients' accounts to determine the aggregate of actual funds which are committed to the specified trading program, a statement of that fact.

(E) The greatest monthly draw-down for the trading program specified, expressed as a percentage of aggregate nominal account sizes, and indicating the month and year of the draw-down during the most recent five years.

(F) The greatest peak-to-valley draw-down for the trading program specified, expressed as a percentage of aggregate nominal account sizes, and indicating the month(s) and year(s) of the draw-down during the most recent five years.

* * * * *

(H) In addition to the information specified in § 4.25(a)(1)(ii)(A)–(G), where the CPO allocates, to any of the pool's, CTAs, an amount of funds which is less than the nominal account size states in the written agreement with the CTA, the performance capsule for each such CTA must include, in a column adjacent to the presentation of data based on nominal account size, the draw-down information required by § 4.25(a)(1)(ii)(E) and (F), computed on the basis of the ratio of the nominal account size to the pool's actual funds allocated to the commodity trading advisor's program.

4. Section 4.33 is proposed to be amended by adding paragraph (c) to read as follows:

§ 4.33 Recordkeeping.

* * * * *

(c) A commodity trading advisor must obtain a written agreement signed by each client which, at a minimum, clearly specifies:

(1) The nominal account size;

(2) The name or description of the trading program in which the client is participating;

(3) The basis for the computation of fees;

(4) How each of the following will affect each of the nominal account size and the computation of fees: additions or withdrawals of actual funds or profits or losses; and

(5) Whether the client will deposit, maintain or make accessible to the FCM an amount equal to or less than the nominal account size, i.e., to fully or partially fund the account.

5. Section 4.34 is proposed to be amended by adding paragraph (p) to read as follows:

§ 4.34 General disclosures required.

* * * * *

(p) *Additional Disclosure by Commodity Trading Advisors Accepting Partially-funded Accounts.* A commodity trading advisor that accepts a partially-funded account (as defined in § 4.10(o)) must disclose:

(1) How the management fees will be computed, expressed as a percentage of the nominal account size, and an explanation of the effect of partially funding an account on the management fees as a percentage of actual funds.

(2) An estimated range of the commissions generally charged to an account expressed as a percentage of the nominal account size and an explanation of the effect of partially funding an account on the commissions as a percentage of actual funds;

(3) A statement that partial funding increases leverage, that leverage will magnify both profits and losses, and that the greater the disparity between the nominal account size and the amount deposited, maintained or made accessible to the futures commission merchant, the greater the likelihood and frequency of margin calls, and the greater the size of margin calls as a percentage of the amount of actual funds committed to the commodity trading advisor's program; and

(4) A description of the factors considered by the commodity trading advisor in determining the level of trading for a given nominal account size in the offered trading program and an explanation of how those factors are applied.

6. Section 4.35 is proposed to be amended by revising paragraphs (a)(1)(iv) through (a)(1)(ix), (a)(2), (a)(6)(i) and (a)(6)(ii) to read as follows:

§ 4.35 Performance disclosures.

* * * * *

(a) * * * (1) * * *

(iv)

(A) The aggregate of actual funds committed to all of the trading programs of the trading advisor or other person trading the account, as of the date of the Disclosure Document, of, if the commodity trading advisor does not have sufficient information regarding the funding of its clients' accounts to determine the aggregate of actual funds committed to its programs, a statement of that fact;

(B) The aggregate of actual funds committed to the specified trading program of the commodity trading advisor, as of the date of the Disclosure Document, or, if the commodity trading advisor does not have sufficient information regarding the funding of its client accounts to determine the aggregate of actual funds which are committed to the specified trading program, a statement of that fact.

(v) The greatest monthly draw-down for the trading program specified, expressed as a percentage of aggregate nominal account sizes, and indicating the month and year of the draw-down during each of the following periods:

(A) The most recent five years and

(B) If the commodity trading advisor has traded client accounts pursuant to the trading program for longer than the most recent five years, since the commodity trading advisor began trading the program for client accounts.

(vi) The greatest peak-to-valley draw-down for the trading program specified expressed as a percentage of aggregate nominal account sizes, and indicating the month(s) and year(s) of the draw-down, during each of the following periods:

(A) The most recent five years and

(B) If the commodity trading advisor has traded client accounts pursuant to

the trading program for longer than the most recent five years, since the commodity trading advisor began trading the program for client accounts.

(vii) Subject to § 4.35(a)(2) for the offered trading program, the annual and year-to-date rate-of-return for the program for each of the five most recent calendar years and year-to-date, computed on a compounded monthly basis; and

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

(A)(*1*) 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 lifeline performance (profits) as of the date the account was closed, and

(*2*) The range of rates of return for the accounts closed with net lifetime profits; and

(B)(*1*) 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 lifeline performance (losses) as of the date the account was closed, and

(*2*) The range of rates of return for the accounts closed with net lifetime profits; and

(ix) In addition to the information specified in § 4.35(a)(1)(i)–(viii), where the commodity trading advisor accepts partially-funded accounts, the performance capsule must include:

(A) A statement that rates of return are based on nominal account size.

(B) In a column adjacent to the presentation of data based on nominal account size, the draw-down information required by § 4.35(a)(1)(v) and (vi), divided by the percentage of actual funds committed to the commodity trading advisor's program by the client with the lowest ratio of actual funds to nominal account size in the trading program.

(*1*) If the commodity trading advisor does not have sufficient information regarding the funding level of its client accounts to determine the lowest ratio, or if the lowest ratio is zero, present this information at a funding level of 20 percent.

(*2*) The percentage basis of the computation, i.e., the actual funds ratio or the optional 20 percent, must be disclosed in the heading of the column.

(C) A statement of the percentage of client accounts in the program for which the actual funds committed equal the nominal account size. If the commodity trading advisor does not have sufficient information regarding the amount of actual funds committed by its clients to the trading program to determine the percentage of client accounts which have actual funding equal to the nominal account size, the commodity trading advisor must state that fact.

(D) If the commodity trading advisor elects to include the aggregate of the nominal account sizes of the client accounts in the trading program specified, this information must be placed adjacent to the disclosure of actual funds under management by the commodity trading advisor as required by § 4.35(a)(1)(iv).

(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 most recent five years, in a numerical table and in bar graph.

(iii) (The 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 monthly increments on the horizontal axis; and

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

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

(6) *Calculation of, and recordkeeping concerning, performance information.*

(i) * * *

(A) The nominal account size at the beginning of the period, defined as the previous period's ending nominal account size;

(B)(*1*) The net performance for the period, which is defined as the total of:

(*i*) the realized gain or loss on positions closed during the period plus

(*ii*) the change during the period in unrealized gain or loss, plus

(*iii*) interest accrued on funds deposited in the client's account at a futures commission merchant, plus

(*iv*) other income accrued on positions held as part of the CTA's program, minus

(*v*) fees and expenses.

(*2*) no income may be imputed with respect to nominal account sizes or otherwise computed on a proforma a basis.

(C) The nominal rate of return for the period, which shall be calculated by dividing the net performance by the nominal account size at the beginning of the period.

(D) Changes to the nominal account size during the period, pursuant to the terms of the CTA's agreement with the client in accordance with § 4.33(c)(4). The records should clearly delinate the source of each change (additions or withdrawals of actual funds, profits or losses, or otherwise).

(E) Changes to the nominal account size pursuant to the terms of the CTA's agrement with the client in accordance with § 433(c)(1). The records should clearly delineate the source of each change (the opening or closing of accounts during the period or changes to nominal account size specifically directed by a client in writing.) If a client and the advisor agree that a nominal account size be changed effective at the beginning of a period, the change shall be reflected during the prior period.

(F) The nominal account size at the end of the period, defined the sum of the nominal account size at the beginning of the period (§ 4.35(a)(6)(i)(A)) and the changes specified in this § 4.35(a)(6)(i) (D) and (E).

(ii) All supporting documents necessary to substantiate the computation of such amounts must be maintained in accordance with § 1.31. With respect to the disclosures required by § 4.34(a)(1)(v)(B) and § 4.35(a)(1)(vi)(B), the monthly figures referred to in § 4.35(a)(6)(i)(a–F) must be maintained for five years subsequent to the last date on which disclosure document reflecting the specified trading program is prepared.

Issued in Washington, D.C. on July 26, 1999 by the Commission.

Jean A. Webb,

Secretary of the Commission.

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APPENDIX A
ILLUSTRATIVE EXAMPLE OF PERFORMANCE CAPSULE

PAST PERFORMANCE IS NOT NECESSARILY INDICATIVE OF FUTURE RESULTS

Name of CTA:	XYZ Inc.
Name of Trading Program:	Diversified Program
CTA Began Trading Client Accounts:	February 1989
CTA Began Trading Client Accounts in this Program:	March 1992
Current Number of Accounts in Program:	37
Actual Funds Managed by CTA in All Programs:	$12,749,420
Actual Funds Managed by CTA in Diversified Program:	$9,309,600
Aggregate Nominal Account Sizes —	
All Programs	$63,747,100
Diversified Program	$46,548,000

	Nominal Account Size	*20% Actual Funding Level*
Largest Monthly Draw-down — Last Five Years:	Jan 1994: -24%	-120%
Life of Program:	Dec 1992: -30%	-150%
Worst Peak to Valley Draw-down — Last Five Years:	Apr 98-Jun 98: -29%	-145%
Life of Program:	Jun 92-Apr 93: -34%	-170%

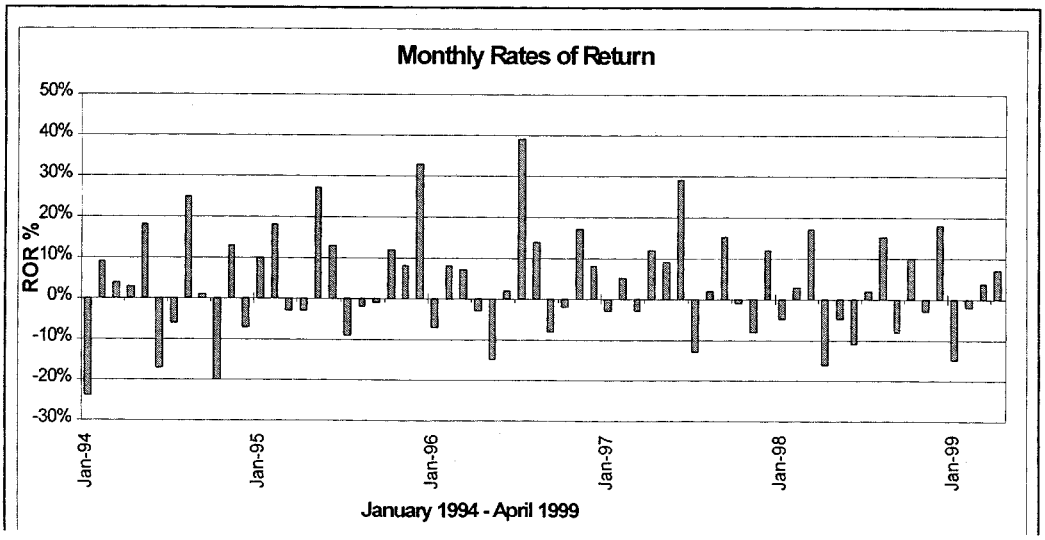
Annual Rates of Return:

1999 (YTD)	1998	1997	1996	1995	1994
-7%	10%	62%	63%	149%	-13%

Number of Accounts Closed with Profits:	25
Range of RORs for Accounts Closed with Profits:	35% — 123%
Number of Accounts Closed with Losses:	15
Range of RORs for Accounts Closed with Losses:	-12% — -68%

Rates of Return are Based on Nominal Account Size

As of May 31, 1999, 5% of the accounts in this program have actual funds equal to their nominal account size.



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MONTHLY RATES OF RETURN (JANUARY 1994–APRIL 1999)

[In percent]

	1999	1998	1997	1996	1995	1994
January	−15	−5	−3	−7	10	−24
February	−2	3	5	8	18	9
March	4	17	−3	7	−3	4
April	7	−16	12	−3	−3	3
May	.....	−5	9	−15	27	18
June	.....	−11	29	2	13	−17
July	.....	2	−13	39	−9	−6
August	.....	15	2	14	−2	25
September	.....	−8	15	−8	−1	1
October	.....	10	−1	−2	12	−20
November	.....	−3	−8	17	8	13
December	.....	18	12	8	33	−7
Annual/YTD	−7	10	62	63	149	−13

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DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Parts 12, 113 and 141

RIN 1515–AC45

Assessment of Liquidated Damages Regarding Imported Merchandise That is Not Admissible Under the Food, Drug and Cosmetic Act

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to provide for the assessment of liquidated damages equal to the domestic value of the merchandise in the case of merchandise that is not admissible under the provisions of the Food, Drug and Cosmetic Act and that is not treated or otherwise disposed of in accordance with that Act. The document also proposes to amend various provisions of the Customs Regulations pertaining to customs bonds to provide for liquidated damages of three times the appraised value of the merchandise in the case of merchandise that is restricted or prohibited from entry. Finally, the document sets forth a proposed editorial correction within one of the sections of the Customs Regulations pertaining to Customs bonds. The substantive changes reflected in the proposed amendments are intended to enhance the effectiveness of the affected regulatory provisions by increasing and clarifying the potential liability for the payment of liquidated damages by principals and sureties on customs bonds.

DATES: Comments must be received on or before October 1, 1999.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Jeremy Baskin, Penalties Branch (202-927–2344).

SUPPLEMENTARY INFORMATION:

Background

Section 801 of the Food, Drug and Cosmetic Act, as amended (21 U.S.C. 381), and the regulations promulgated thereunder, provide the basic legal framework governing the importation of foodstuffs into the United States. Under 21 U.S.C. 381(a), the Secretary of Health and Human Services is authorized to refuse admission of, among other things, any article that is adulterated, misbranded or has been manufactured, processed or packed under insanitary conditions. The Secretary of the Treasury is required by section 381(a) to cause the destruction of any article refused admission unless the article is exported, under regulations prescribed by the Secretary of the Treasury, within 90 days of the date of notice of the refusal or within such additional time as may be permitted pursuant to those regulations.

Under 21 U.S.C. 381(b), pending decision as to the admission of an article being imported or offered for import, the Secretary of the Treasury may authorize delivery of such article to the owner or consignee upon the execution of a good and sufficient bond providing for the payment of liquidated damages in the event of default as may be required pursuant to regulations of the Secretary of the Treasury. In addition, section 381(b) allows the owner or consignee in certain circumstances to take action to bring an imported article into compliance for admission purposes, under such bonding and other requirements as the Secretary of the Treasury may prescribe by regulation.

Based upon the above statutory authority, imported foodstuffs are conditionally released under bond while determinations as to admissibility are made; *see* § 12.3 of the Customs Regulations (19 CFR 12.3). Under § 141.113(c) of the Customs Regulations (19 CFR 141.113(c)), Customs may demand the return to Customs custody of most types of merchandise that fail to comply with the laws or regulations governing their admission into the United States (also referred to as the redelivery procedure). The condition of the basic importation and entry bond contained in § 113.62(d) of the Customs Regulations (19 CFR 113.62(d)) sets forth the obligation of the importer of record to timely redeliver released merchandise to Customs on demand and provides that a demand for redelivery will be made no later than 30 days after the date of release of the merchandise or 30 days after the end of the conditional release period, whichever is later. Failure to meet the obligation to redeliver contained in § 113.62(d) will create a potential liability for the payment of liquidated damages under the terms of the bond.

Use of the Domestic Value Standard for Liquidated Damages

In an April 1998 report to the Chairman of the Permanent Subcommittee on Investigations, Committee on Governmental Affairs, U.S. Senate, on the subject of food