

CFTC Letter No. 01-69

July 2, 2001

Interpretation

Division of Trading and Markets

Re: Rules 4.7(a)(1)(v); 4.7(a)(2)(ix); 4.7(a)(3)(ix); Request for an Interpretation that the Assets of a Revocable Grantor Trust may be Considered in Determining whether the Grantor and thus the Trust are Qualified Eligible Persons

Dear:

This is in response to your letter dated May 1, 2001 to the Commodity Futures Trading Commission ("Commission"), as supplemented by electronic mail message dated June 8, 2001 and telephone conversations between you and your colleague, "A", and staff of the Division of Trading and Markets ("Division"). By your correspondence, you request, on behalf of "B", the sole grantor and a trustee of a revocable grantor trust ("Trust"), an interpretation that the assets of the Trust may be considered in determining whether the grantor and thus the Trust are qualified eligible persons ("QEPs") within the meaning of Commission Rule 4.7.^[1]

Based upon your and "A's" representations, we understand the facts to be as follows. "B" established the Trust over one year ago in order to segregate from his other assets funds that he inherited several years ago from his parents. It is a grantor trust pursuant to relevant provisions of the Internal Revenue Code.^[2] As such, all of the income, gains and losses attributable to the Trust are the property of the grantor and are reportable by him on his personal income tax return. The Trust also is a revocable trust, because the grantor (*i.e.*, "B") has retained the right to amend or revoke the terms of the Trust.

There are three trustees of the Trust, including "B". The other trustees, both of whom are attorneys, are long-time advisors to "B's" family. Nevertheless, "B", who is completing course work for an MBA degree from "C", has retained the power to direct all the investments of the Trust and to make other decisions, notwithstanding the votes of these other trustees.

As of May 31, 2001, the Trust owned securities with a market value in excess of \$2 million. If these securities are included in the calculation of "B's" net worth, his net worth exceeds \$2.2 million.

On August 4, 2000, the Commission adopted major technical and substantive revisions to Rule 4.7. Rule 4.7(a)(2)(ix), which was added by the amendments, defines as a QEP^[3] a trust that is not formed for the specific purpose of either participating in an exempt pool or opening an exempt account where the trustee or other person authorized to make investment decisions with respect to the trust and each

grantor or other person who has contributed assets to the trust also is a QEP.^[4] Based upon the facts you have presented, *i.e.*, that the Trust was not formed for the specific purpose of participating in an exempt pool or opening an exempt account and “B” is the sole source of funding for the Trust and is solely responsible for making investment decisions for the Trust, the Trust is a QEP if “B” is a QEP.

Rule 4.7(a)(3)(ix) defines as a QEP a natural person who satisfies the “Portfolio Requirement^[5]” and who has an individual net worth that exceeds \$1 million. “B” is a QEP, and thus, the Trust is a QEP, only if the assets of the Trust are included in the calculation of “B’s” net worth and for the purposes of determining whether “B” meets the Portfolio Requirement.^[6]

In support of your request, you included with your correspondence an opinion from staff of the Securities and Exchange Commission (“SEC”) dated January 5, 2001. In that opinion, the SEC agreed with your view that in determining the net worth of an individual accredited investor under Rule 501(a)(5) of Regulation D under the Securities Act of 1933,^[7] the assets of a revocable grantor trust may be included in the calculation.^[8] An interpretation that is consistent with the SEC’s position would coordinate the Commission’s QEP rules with the SEC’s rules applicable to accredited investors -- which is one of the purposes of Rule 4.7.^[9]

In light of the foregoing, it is the Division’s view that the assets of a revocable grantor trust may be treated as belonging to the grantor for the purposes of determining whether the grantor has sufficient net worth, meets the Portfolio Requirement and thus qualifies as a QEP. Based upon the facts you have provided, “B” qualifies as a QEP. Moreover, because “B” qualifies as a QEP, the Trust also is a QEP under Rule 4.7(a)(2)(ix).

This letter, and the interpretation contained herein, is based upon the representations you and “A” have made to us. Any different, changed or omitted material facts or circumstances might render this interpretation void. You must notify us immediately in the event that the facts you have presented change in any material way. Further, this letter represents the position of the Division only. It does not necessarily reflect the views of the Commission or any other division or office of the Commission.

This letter does not excuse “B”, any CPO in whose pools “B” participates, or any CTA with whom “B” opens an exempt account, from compliance with any otherwise applicable requirements contained in the Commodity Exchange Act (the “Act”) or in the Commission’s regulations thereunder. For example, each such CPO or CTA remains subject to all antifraud provisions of the Act and the Commission’s regulations, the reporting requirements for traders set forth in Parts 15, 18, and 19 of the regulations, and all other provisions of Part 4.

If you have any questions concerning this correspondence, please contact Helene D. Schroeder, an attorney on my staff, at (202) 418-5450.

Very truly yours,

John C. Lawton
Acting Director

[1] Commission rules referred to herein are found at 17 C.F.R. Ch. I (2001).

[2] *See* 26 U.S.C. §§ 671-78 (1994).

[3] The QEP definition was added by the amendments to Rule 4.7 and supersedes the terms “qualified eligible participant” and “qualified eligible client.” Thus, under the amended rule, both a commodity pool operator (“CPO”), which previously could claim relief with respect to qualified eligible participants, and a commodity trading advisor (“CTA”), which could claim relief with respect to qualified eligible clients, can claim relief with respect to persons who are QEPs.

[4] Prior to the amendments to Rule 4.7, a trust was a “qualified eligible participant” only if it was not formed for the purpose of investing in an exempt pool and it had total assets in excess of \$5 million.

[5] In amending Rule 4.7, the Commission added a definition of “Portfolio Requirement.” Actually, the definition was taken virtually intact from existing text that set forth a portfolio test with respect to certain persons who were qualified eligible participants or qualified eligible clients.

[6] Other than the Trust, “B’s” personal assets and income are insufficient to qualify him as a QEP under the rules that apply to natural persons, Rules 4.7(a)(1)(3)(ix) and (x).

[7] 17 CFR § 230.501(a)(5) (2000).

[8] The SEC also stated that where such an accredited investor is the sole grantor and source of funding for a revocable grantor trust, that person is the equity owner of the trust, and the trust is thereby accredited by virtue of Rule 501(a)(8), 17 CFR § 230.501(a)(8).

[9] *See, e.g.*, 65 FR 47848, 47849 (Aug. 4, 2000).