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In re:

Legend

Settlor	=
A	=
B	=
C	=
D	=
BB	=
Trust 1	=
Subtrust 1-B	=
Subtrust 1-C	=
Subtrust 1-D	=
Trust 2	=
Subtrust 2-B	=
Subtrust 2-C	=
Subtrust 2-D	=
Trustee	=

Date 1 =
Date 2 =
State A =
State B =
State A Court =
State B Court =
State A Statute =
State B Statute =

Dear :

This letter responds to your authorized representative's letter of November 12, 2010, requesting rulings on the federal income, gift, estate, and generation-skipping transfer (GST) tax consequences of the proposed division of Trust 1 and Trust 2.
The facts submitted and representations are as follows. On Date 1, a date before September 25, 1985, Settlor created Trust 1, an irrevocable trust for the benefit of the descendants of Settlor's child, A. Under Article III, Section 3.02 of Trust 1, income is distributable to A's children and the descendants of any deceased child of A. Under Section 3.02(1), the trustee may withhold distribution of income. The withheld income may be accumulated and added to principal, set aside for future distribution, or distributed to or for the benefit of the beneficiaries then entitled to the income. Under Section 3.02(2), the trustee, in exercising the power to withhold or distribute income, is to take into account the needs and other income and resources of the beneficiaries, including those for health, medical care, support, and education. Under Section 3.08, if, in the trustee's opinion, the share of income to which a child of A is entitled is insufficient for the child's proper care, education and support, and in particular cases of severe or protracted illness, the deficiency may be made up by payments of principal. The trustee may require that the advances be restored from future income.

Section 3.03 provides that trust principal and accumulated income is to be distributed to A's children, per stirpes, one year after A's death. Under Section 3.04, if, at final distribution of the trust, a child of A has died without surviving descendants, that child's share is to be reallocated to his or her siblings per stirpes. Section 3.05 provides that if a beneficiary is under age 21 at the time of distribution, his or her share is to be held, and the income is to be applied to his or her education, support and maintenance. The trustee may accumulate the income as deemed necessary. The beneficiary's share is to be distributed outright on his or her reaching age 21.

Section 5 of Exhibit "A" of Trust 1 provides that the trustee is expressly authorized to make any division, distribution or partition of property in cash or otherwise, and to allot any property, including an undivided interest therein, to any trust or share. Section 3.10 provides that where any portion of Trust 1 is designated as a separate trust for the benefit of a grandchild of Settlor, the share is to constitute a separate fund. Article IV, Section 4.01 provides that the trust is to be interpreted under the laws of State A.

On Date 2, a date before September 25, 1985, Settlor created Trust 2, another irrevocable trust for the benefit of A's descendants. The provisions of Trust 2 are identical to those of Trust 1, except in the following respects: Trust 2 does not provide for distributions to the descendants of any deceased child of A during the trust term, and, under Article III, Section 3.02(3) of Trust 2, A's children have a non-cumulative right, exercisable within 60 days after receiving notice, to withdraw a pro rata portion of property transferred to Trust 2 during a calendar year.

Trustee proposes to divide Trust 1 into Subtrust 1-B (for B and B's descendants), Subtrust 1-C (for C and C's descendants), and Subtrust 1-D (for D and D's descendants). Each Subtrust will be funded with a pro rata share of each asset of Trust 1.

The provisions of Trust 1 will govern Subtrust 1-B, Subtrust 1-C, and Subtrust 1-D, except that a respective Subtrust will be held exclusively for the benefit of the child (and the child's descendants) for whom that Subtrust was created. Under the provisions of each Subtrust (i) income will be payable to the respective child or accumulated, in the trustee's discretion; (ii) if the child dies before termination of the Subtrust with any descendant living, income will be payable to the child's descendants, or accumulated, in the trustee's discretion; (iii) prior to the termination of the Subtrust, principal may be distributed to the child in accordance with Section 3.08 of Trust 1; (iv) the Subtrust will terminate one year after A's death; and (iv) the Subtrust property will be distributed to the respective child, if living, otherwise per stirpes to the child's then-living descendants.

Likewise, Trustee proposes to divide Trust 2 into Subtrust 2-B (for B and B's descendants), Subtrust 2-C (for C and C's descendants), and Subtrust 2-D (for D and D's descendants). Each Subtrust will be funded with a pro rata share of each asset of Trust 2.

The provisions of Trust 2 will govern Subtrusts 2-B, 2-C, and 2D, except that a respective Subtrust will be held exclusively for the benefit of the child (and the child's descendants) for whom that Subtrust was created. Under the provisions of each Subtrust (i) income will be payable to the respective child or accumulated, in the trustee's discretion; (ii) additions to the Subtrust will be subject to the child's withdrawal right under Section 3.02(3) of the Trust 2 agreement; (iii) if the child dies before termination of the Subtrust with any descendant living, income will be accumulated; (iv) prior to termination of the Subtrust, principal may be distributed to the child in accordance with Section 3.08 of Trust 2; (v) each Subtrust will terminate one year after A's death; and (vi) the Subtrust property will be distributed to the respective child, if living, otherwise per stirpes to the child's then-living descendants.

Pursuant to an order of State A Court, the administration and situs of Trust 1 and Trust 2 were moved to State B. Trustee is now administering the trusts in State B. Therefore, the division of Trust 1 and Trust 2 will be effected pursuant to a proceeding in and by order of State B Court, which will apply State A law to construe the trusts.

State A Statute provides, in part, that, on petition by a trustee, the court may divide a trust into

two or more separate trusts, whether or not their terms are similar, if the court determines that it is in the best interest of the beneficiaries and will not defeat or substantially impair the accomplishment of the trust purposes or the rights of the beneficiaries.

State B Statute provides, in part, that to the extent there is no conflict of interest between the representative and the person represented, a minor or unborn person may be represented by and bound by another individual having a substantially identical interest with respect to the particular question or dispute. If all primary beneficiaries of a trust are adults, or have representatives who are adults, the actions of such primary beneficiaries, or their respective representatives, shall represent and bind all other persons who have a successor, contingent, future, or other interest in the trust and who would become primary beneficiaries only by reason of surviving a primary beneficiary.

It is represented that no additional contributions have been made to Trust 1 or Trust 2 from and after September 25, 1985. A has three adult children (B, C, and D) and one minor grandchild (BB).
You have requested the following rulings.

(1) The division of Trust 1 and Trust 2 into Subtrusts will not cause Trust 1, Trust 2, or a post-division Subtrust to lose its “grandfathered” status for purposes of the GST tax.

(2) The Subtrusts resulting from the division of Trust 1 and Trust 2 will be treated as separate trusts for federal income tax purposes.

(3) The division of Trust 1 and Trust 2 will not cause Trust 1, Trust 2, a post-division Subtrust, or any beneficiary to recognize gain or loss from a sale or other disposition of property under § 61, § 662, or § 1001 of the Internal Revenue Code.

(4) The tax basis of the Subtrust assets received from Trust 1 and Trust 2 will be the same as the tax basis in those assets of Trust 1 and Trust 2; and the Subtrusts’ holding periods in those assets will include the holding periods in those assets of Trust 1 and Trust 2.

(5) The division of Trust 1 and Trust 2 and the pro rata allocation of Trust 1 and Trust 2 assets to the Subtrusts will not cause those assets to be includible in a beneficiary’s gross estate.

(6) The division of Trust 1 and Trust 2 and the pro rata allocation of Trust 1 and Trust 2 assets to the Subtrusts will not constitute a transfer subject to federal gift tax.

Ruling 1:

Section 2601 imposes a tax on every generation-skipping transfer, which is defined under § 2611 as a taxable distribution, a taxable termination, or a direct skip.

Under § 1433 of the Tax Reform Act of 1986 (Act), GST tax is generally applicable to generation-skipping transfers made after October 22, 1986. However, under § 1433(b)(2)(A) of the Act and § 26.2601-1(b)(1)(i) of the Generation-Skipping Transfer Tax Regulations, the tax does not apply to a transfer under a trust that was irrevocable on September 25, 1985, except to the extent the transfer is made out of corpus added to the trust by an actual or constructive addition after September 25, 1985.

Section 26.2601-1(b)(4)(i) provides rules for determining when a modification, judicial construction, settlement agreement, or trustee action with respect to a trust that is exempt from the generation-skipping transfer tax under § 26.2601-1(b) will not cause the trust to lose its exempt status. These rules are applicable only for purposes of determining whether an exempt trust retains its exempt status for generation-skipping transfer tax purposes. The rules do not apply in determining, for example, whether the transaction results in a gift subject to gift tax, or may cause the trust to be included in the gross estate of a beneficiary, or may result in the realization of capital gain for purposes of § 1001.

Section 26.2601-1(b)(4)(i)(D)(1) provides that a modification of the governing instrument of an exempt trust (including a trustee distribution, settlement, or construction that does not satisfy § 26.2601-1(b)(4)(i)(A), (B), or (C) of this section) by judicial reformation, or nonjudicial reformation that is valid under applicable state law, will not cause an exempt trust to be subject to the GST tax, if the modification does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation (as defined in § 2651) than the person or persons who held the beneficial interest prior to the modification, and the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust.

Section 26.2601-1(b)(4)(i)(D)(2) provides that, for purposes of this section, a modification of an exempt trust will result in a shift in beneficial interest to a lower generation beneficiary if the modification can result in either an increase in the amount of a GST transfer or the creation of a new GST transfer. To determine whether a modification of an irrevocable trust will shift a beneficial interest in a trust to a beneficiary who occupies a lower generation, the effect of the instrument on the date of the modification is measured against the effect of the instrument in existence immediately before the modification. If the effect of the modification cannot be immediately determined, it is deemed to shift a beneficial interest in the trust to a beneficiary who occupies a lower generation (as defined in § 2651) than the person or persons who held the beneficial interest prior to the modification. A modification that is administrative in nature that only indirectly increases the amount transferred (for example, by lowering administrative costs or income taxes) will not be considered to shift a beneficial interest in the trust.

Section 26. 2601-1(b)(4)(i)(E), Example 5, considers a situation in which, in 1980, Grantor established an irrevocable trust for the benefit of his two children, A and B, and their issue. Under the terms of the trust, the trustee has the discretion to distribute income and principal

to A, B, and their issue in such amounts as the trustee deems appropriate. On the death of the last to die of A and B, the trust principal is to be distributed to the living issue of A and B, per stirpes. In 2002, the appropriate local court approved the division of the trust into two equal trusts, one for the benefit of A and A's issue and one for the benefit of B and B's issue. The trust for A and A's issue provides that the trustee has the discretion to distribute trust income and principal to A and A's issue in such amounts as the trustee deems appropriate. On A's death, the trust principal is to be distributed equally to A's issue, per stirpes. If A dies with no living descendants, the principal will be added to the trust for B and B's issue. The trust for B and B's issue is identical (except for the beneficiaries), and terminates at B's death at which time the trust principal is to be distributed equally to B's issue, per stirpes. If B dies with no living descendants, principal will be added to the trust for A and A's issue. The division of the trust into two trusts does not shift any beneficial interest in the trust to a beneficiary who occupies a lower generation (as defined in § 2651) than the person or persons who held the beneficial interest prior to the division. In addition, the division does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust. Therefore, the two partitioned trusts resulting from the division will not be subject to the provisions of chapter 13.

In the present case, Trust 1 and Trust 2 were irrevocable on September 25, 1985. It is represented that no trust additions have been made after September 25, 1985.

The proposed division of Trust 1 into Subtrust 1-B, Subtrust 1-C, and Subtrust 1-D, and Trust 2 into Subtrust 2-B, Subtrust 2-C, and Subtrust 2-D are substantially similar to the situation described in Example 5 of § 26. 2601-1(b)(4)(i)(E). Under the proposed division, the Trust 1 Subtrusts will, except as described above, be administered under the original terms of Trust 1. Likewise, the Trust 2 Subtrusts will, except as described above, be administered under the original terms of Trust 2.

Based on the facts submitted and the representations made, and provided the State A Court order is effective under State A law and includes the division as described above, we conclude that the proposed division of Trust 1 and Trust 2 will not shift a beneficial interest in the respective Trusts to any beneficiary who occupies a lower generation than the persons holding the beneficial interests prior to the divisions. In addition, the proposed division will not extend the time for vesting of any beneficial interest in the Subtrusts beyond the period provided in the original terms of Trust 1 and Trust 2, respectively. Accordingly, the proposed division will not cause Trust 1, Trust 2, or the Subtrusts to lose their exempt status and will not cause any distribution from or termination of any interests in Trust 1, Trust 2, or the Subtrusts to be subject to GST tax under § 2601.

Ruling 2:

Section 643(f) provides that, for purposes of subchapter J of chapter 1 of subtitle A, under regulations prescribed by the Secretary, two or more trusts shall be treated as one trust if (1) such trusts have substantially the same grantor or grantors and substantially the same

primary beneficiary or beneficiaries, and (2) a principal purpose of such trusts is the avoidance of the tax imposed by chapter 1.

Section 1806(b) of the Tax Reform Act of 1986 provides § 643(f) shall apply to taxable years beginning after March 1, 1984; except that, in the case of a trust that was irrevocable on March 1, 1984, it shall apply only to that portion of the trust that is attributable to contributions to corpus after March 1, 1984.

The trustee represents that each trust created from Trust 1 will have a different beneficiary, and each trust created from Trust 2 will have a different beneficiary. The trustee also represents that no portion of the principal of Trust 1 or Trust 2 was contributed after March 1, 1984. Based on the facts submitted and the representations made, we conclude that as long as the new Subtrusts are separately managed and administered, they will be treated as separate trusts for federal income tax purposes.

Ruling 3:

Section 61(a)(3) provides that gross income includes gains derived from dealings in property.

Section 661(a) provides that in any taxable year a deduction is allowed in computing the taxable income of a trust (other than a trust to which subpart B applies), for the sum of (1) the amount of income for such taxable year required to be distributed currently; and (2) any other amounts properly paid or credited or required to be distributed for such taxable year, but such deduction shall not exceed the distributable net income (DNI) of the estate or trust.

Section 1.661(a)-2(f) of the Income Tax Regulations provides that gain or loss is realized by the trust or estate (or the other beneficiaries) by reason of a distribution of property in kind if the distribution is in satisfaction of a right to receive a distribution of a specific dollar amount, of specific property other than that distributed, or of income as defined under § 643(b) and the applicable regulations, if income is required to be distributed currently.

Section 662(a) provides that there shall be included in the gross income of a beneficiary to whom an amount specified in § 661(a) is paid, credited, or required to be distributed (by an estate or trust described in § 661), the sum of the following amounts (1) the amount of income for the taxable year required to be distributed currently to such beneficiary, whether distributed or not; and (2) all other amounts properly paid, credited, or required to be distributed to such beneficiary for the taxable year. If the sum of (A) the amount of income for the taxable year required to be distributed currently to all beneficiaries, and (B) all other amounts properly paid, credited, or required to be distributed to all beneficiaries exceeds the DNI of the estate or trust, then, in lieu of the amount provided in the preceding sentence, there shall be included in the gross income of the beneficiary an amount which bears the same ratio to DNI (reduced by the amounts specified in (A)) as the other amounts properly paid, credited, or required to be distributed to all beneficiaries.

Section 1001(a) provides that the gain from the sale or other disposition of property is the excess of the amount realized on the disposition over the adjusted basis provided in § 1011 for determining gain, and the loss is the excess of the adjusted basis provided in § 1011 over the amount realized.

Section 1001(b) defines the amount realized from the sale or disposition of property as the sum of any money received plus the fair market value of any property received.

Section 1001(c) provides that, except as otherwise provided in subtitle A, the entire amount of gain or loss determined under § 1001 on the sale or exchange of property must be recognized.

Section 1.1001-1(a) provides, as a general rule, that except as otherwise provided in subtitle A, the gain or loss realized from the conversion of property into cash or from the exchange of property for other property differing materially either in kind or in extent, is treated as income or loss sustained.

Section 1.1001-1(h)(1) provides that the severance of a trust (including without limitation a severance that meets the requirements of § 26.2642-6 or of § 26.2654-1(b) of this chapter) is not an exchange of property for other property differing materially either in kind or in extent if:: (i) An applicable state statute or governing instrument authorizes or directs the trustee to sever the trust; and

(ii) Any non-pro rata funding of the separate trusts resulting from the severance (including non-pro rata funds as described in § 26.2642-6(d)(4) or § 26.2654(b)(1)(ii)(C) of this chapter), whether mandatory or in the discretion of the trustee is authorized by an applicable state statute or the governing instrument.

An exchange of property results in the realization of gain under § 1001 if the properties are materially different. Cottage Savings Association v. Commissioner, 499 U.S. 1991. There is a material difference when the exchanged properties embody legal entitlements “different in kind or extent” or if they confer “different rights and powers.” 499 U.S. at 565.

Rev. Rul. 56-437, 1956-2 C.B. 507, holds that a partition of jointly owned property is not a sale or other disposition of property where the co-owners of the joint property sever their joint interests in order to extinguish their survivorship interests.

Trustee will divide Trust 1 and Trust 2 by allocating a pro rata portion of each and every asset of the trusts among the respective Subtrusts. Since the trust beneficiaries will hold essentially the same interests before and after the division of the two trusts into Subtrusts, there will be no exchange of property interests that can be characterized as materially different under § 1001, nor any amount includible in gross income under § 61.

Moreover, § 1.1001-1(h) expressly provides that the pro rata division (or severance) of any trust pursuant to authority in an applicable state statute is not an exchange of property differing materially either in kind or extent. In this case, the applicable statutes of State A permit severance of the two trusts. Also, Section 5 of Trust 1 and Trust 2 permits the trustee to make any division, distribution or partition of property, in cash or otherwise, to any trust or share. In addition, Section 3.10 anticipates the possible division of Trust 1 and Trust 2.

Therefore, the proposed division of Trust 1 and Trust 2 each into three Subtrusts, one for each of A's children, will not cause Trust 1, Trust 2, any of the post-division Subtrusts, or the beneficiaries to recognize any gain or loss from the sale or other disposition of property under § 61 or 1001. We also conclude that the proposed division is not a distribution under § 661 or § 1.661(a)-2(f). Accordingly, the proposed division will not cause Trust 1, Trust 2, the six new Subtrusts, or the beneficiaries to recognize any income, gain, or loss under § 662.

Ruling 4:

Section 1015(b) provides that if property is acquired after December 31, 1920, by a transfer in trust (other than a transfer in trust by a gift, bequest, or devise), the basis shall be the same as it would be in the hands of the grantor increased in the amount of gain or decreased in the amount of loss recognized to the grantor on such transfer.

Section 1.1015-2(a)(1) provides that in the case of property acquired after December 31, 1920, by transfer in trust (other than by transfer in trust by gift, bequest, or devise), the basis of property so acquired is the same as it would be in the hands of the grantor increased in the amount of gain or decreased in the amount of loss recognized to the grantor on the transfer under the law applicable to the year in which the transfer was made. If the taxpayer acquired the property by transfer in trust, this basis applies whether the property is in the hands of the trustee or the beneficiary, and whether acquired prior to termination of the trust and distribution of the property, or thereafter.

Section 1223(2) provides that in determining the period for which the taxpayer has held property however acquired, there shall be included the period for which the property was held by any other person, if under Chapter 1 of the Code such property has, for the purposes of determining gain or loss from a sale or exchange, the same basis in whole or in part in the taxpayer's hands as it would have in the hands of such other person.

Based on the facts submitted and representations made, we conclude that because § 1001 does not apply to the division of Trust 1 and Trust 2, under § 1015 the basis of the assets received by the six Subtrusts from Trust 1 and Trust 2 will be the same after the division as the basis of those assets in the hands of Trust 1 and Trust 2 before the division. Likewise, the holding period of the post-division Subtrusts in each asset received from Trust 1 and Trust 2 will include the holding period of Trust 1 or Trust 2 in that asset.

Ruling 5:

Section 2035(a) provides that if (1) the decedent made a transfer (by trust or otherwise) of an interest in any property, or relinquished a power with respect to any property, during the 3-year period ending on the date of the decedent's death, and (2) the value of such property (or an interest therein) would have been included in the decedent's gross estate under § 2036, 2037, 2038, or 2042 if such transferred interest or relinquished power had been retained by the decedent on the date of the decedent's death, the value of the gross estate shall include the value of any property (or interest therein) that would have been so included.

Section 2036(a) provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Section 2037 provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time after September 7, 1916, made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, if (1) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent, and (2) the decedent has retained a reversionary interest in the property (but in the case of a transfer made before October 8, 1949, only if such reversionary interest arose by the express terms of the instrument of transfer), and the value of such reversionary interest immediately before the death of the decedent exceeds 5 percent of the value of such property.

Section 2038(a)(1) provides that the value of the decedent's gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished during the 3-year period on the date of the decedent's death.

In the present case, the distribution, management, and termination provisions of the Subtrusts will be substantially similar to the current distribution, management, and distribution provisions of the respective Trust. Accordingly, based on the facts submitted and the representations made, the division of Trust 1 and Trust 2 will not cause any property of Trust 1, Trust 2, or the Subtrusts to be includible in the gross estate of any beneficiary of any

such trust under § 2035, 2036, 2037, or 2038.

Ruling 6:

Section 2501 imposes a tax for each calendar year on the transfer of property by gift during such calendar year by any individual, resident or nonresident.

Section 2511 provides that, subject to certain limitations, the gift tax applies whether the transfer is in trust or otherwise, direct or indirect, and whether the property transferred is real or personal, tangible or intangible.

Section 2512(a) provides that if the gift is made in property, the value thereof at the date of the gift is considered the amount of the gift.

Section 2512(b) provides that where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration is deemed a gift that is included in computing the amount of gifts made during the calendar year.

In this case, the beneficiaries of the Subtrusts will have substantially the same interests after the proposed division that they had as beneficiaries under Trust and Trust 2. Because the beneficial interests, rights, and expectancies of the beneficiaries are substantially the same, both before and after the proposed division, no transfer of property will be deemed to occur as a result of the division. Accordingly, based on the facts submitted and the representations made, we conclude that the division of Trust 1 and Trust 2, as described above, will not result in a transfer by any beneficiary of Trust 1, Trust 2, or the Subtrusts that will be subject to federal gift tax under § 2501.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Leslie H. Finlow
Senior Technician Reviewer, Branch 4
Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosure
Copy for section 6110 purposes