

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
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Date:
April 21, 2005

Legend

- Trust Company =
- Date 1 =
- State 1 =
- Patriarch =
- Trust 1 =
- Date 2 =
- Trustee 1 =
- Trustee 2 =
- Trustee 3 =
- Statute =
- Trust 2 =
- Child 1 =
- Date 3 =

Dear :

This letter responds to your letter, dated January 28, 2004, requesting rulings regarding the income and estate tax consequences of naming Trust Company, a family-owned trust company, as trustee of a trust.

Trust Company was formed on Date 1 as a corporation under the laws of State 1. Trust Company has two classes of stock, Class A Voting stock and Class B Non-Voting stock. Each class of stock has identical economic rights with respect to current distributions and liquidation value. The holders of Class A Voting stock are permitted to vote on shareholder and corporate matters, while the holders of Class B Non-Voting are not. Patriarch owns all of the Class B Non-Voting shares of Trust Company. Trust 1, an irrevocable trust established by Patriarch, owns all of the Class A Voting shares of Trust Company. Trust Company will not solicit trust customers from the public-at-large.

Article 5.1 of the Trust Company Articles of Incorporation provides in relevant part that there shall be no fewer than three and no more than five directors on the Board of Directors. There must always be at least one “independent” director. Article X provides that an “independent director” shall mean an individual who is not: (a) a grantor of or donor to any trust of which Trust Company is trustee, nor the spouse of any such grantor or donor; (b) a current or contingent beneficiary of any trust of which Trust Company is trustee, nor the spouse of any such beneficiary; and (c) “related or subordinate” to any such grantor, donor, or beneficiary. A current beneficiary of a trust is any person who (i) is entitled or eligible to receive a mandatory or discretionary distribution of income or principal of such trust, (ii) has a right to withdraw property from such trust, or (iii) is entitled or eligible to use or otherwise enjoy any asset of such trust. Article X further provides that “related or subordinate” shall have the meaning attributed in § 672(c) of the Internal Revenue Code and any Treasury Regulations promulgated thereunder.

Article VI, paragraph 1 of the Trust Company Bylaws provides that to the extent a trust indenture confers any “discretionary distribution powers” on Trust Company as trustee of a trust, the powers shall be exercised by a Distribution Committee of the Trust Company. A “discretionary distribution power” includes any power exercisable by Trust Company as the trustee that pertains to (i) any non-mandatory distribution of income or principal for the benefit of one or more beneficiaries of the trust, regardless whether the distribution is to be made pursuant to an ascertainable standard as that term is used in § 2041 of the Internal Revenue Code and the Treasury Regulations promulgated thereunder or (ii) the granting or withholding of permission to use or otherwise enjoy any asset of the trust.

Article VI, paragraph 2 of the Trust Company Bylaws provides that the Distribution Committee shall be composed of not less than one nor more than three members, all of whom shall be “independent” directors of the Trust Company as defined in the Trust Company Articles of Incorporation. The number of Distribution Committee members shall be determined from time to time by the Board of Directors. Each committee member shall be appointed by a majority vote of the Board of Directors and shall serve at the discretion of the Board of Directors.

Article VI, paragraph 3 of the Trust Company Bylaws provides that at no time shall a majority of the members of the Distribution Committee also be employees or officers of the Trust Company. Further, no Distribution Committee member may participate in the exercise of any discretionary distribution power with respect to any trust beneficiary to whom a legal obligation of support is owed by the member (as an individual), the member’s spouse, or an individual to whom such member is related or subordinate.

Article IX, paragraph 1(a) of the Trust Company Bylaws provides that no director, officer or committee member of the Trust Company shall participate or vote in a Trust Company decision, nor be present during any board or committee discussion of, or vote

on a decision, involving the power to exercise any incidence of ownership of any life insurance policy insuring the life of such director, officer or committee member.

Article IX, paragraph 1(b) of the Trust Company Bylaws provides that if a director, officer or committee member of the Trust Company has transferred voting stock of any corporation to a trust of which the Trust Company is serving as trustee, then such director, officer or committee member shall not participate or vote in a Trust Company decision, or be present during any board or committee discussion of or vote on such a decision, involving the exercise of the power: (1) to vote the shares of stock of such corporation as to which such director, officer or committee member is the transferor, if the corporation is a "controlled corporation" (as defined in § 2036(b)(2)) as to the transferor, or would become a "controlled corporation" as to the transferor if he were permitted to participate in the vote of such shares; or (2) to vote the shares of stock of such corporation as to which any other director, officer or committee member is the transferor, if such corporation is a "controlled corporation" (as defined in § 2036(b)(2)) as to such transferor, or would become a "controlled corporation" as to such transferor if such director, officer or committee member were permitted to participate in the vote of the shares.

Trust 1 was created on Date 2. The current trustees are Trustee 1, Trustee 2, and Trustee 3. Trustee 1 is the only "independent" trustee as defined by the terms of the Trust 1 agreement.

During Patriarch's lifetime, the property held by Trust 1 is held as a single trust for the benefit of Patriarch's lineal descendants. The trustees of Trust 1 may distribute income or principal to Patriarch's lineal descendants for a beneficiary's "needs" or "welfare" to the extent they determine that such distributions will not jeopardize Trust 1's stated purpose of holding the voting stock of Trust Company. Article II, paragraph 2 provides that the trustees shall make discretionary payments for a person's need's from time to time in such amounts as they deem proper for his support, health (including lifetime residential or nursing home care) and education (at all levels). The trustees shall make discretionary payments for a person's "welfare" from time to time in such amounts as they deem proper for his "needs" and also for his advancement in life (including assistance in the purchase of a home or the establishment or development of any business or professional enterprise or investment program which the trustees believe to be reasonably sound), happiness, general well-being and for any other purpose the trustees deem to be in such person's best interests.

Upon Patriarch's death, the trustees of Trust 1 will pay such amounts of its principal to or for the benefit of such of Patriarch's lineal descendants as Patriarch appoints by will. Such testamentary power of appointment shall not be exercisable with respect to any "Accumulations" in Trust 1, defined as that part of the trust consisting of the gross income of the trust, including proceeds from capital gains, undistributed income which the trustees have added to principal, and other corpus income, which income was earned or generated during Patriarch's life. Article II, paragraph 3(k)

provides in part that “accumulations” include all income (within the meaning of § 674(b)(3)). The unappointed portion of Trust 1 shall continue to be held in trust for the benefit of Patriarch’s lineal descendants. Article IV, paragraph 5 provides that Patriarch acknowledges that the reserved testamentary power of appointment over Trust 1 will cause Trust 1 to be includable in Patriarch’s gross estate for federal estate tax purposes. Article I, paragraph 6 provides that if at any time after Patriarch’s death in the opinion of the trustees the special purpose of the family trust is no longer served by Trust 1 and Trust 1 is too small to justify the expense of its retention, the trustees may terminate the trust and pay it among Patriarch’s then living descendants, per stirpes.

Article III, paragraph 3(c) of the Trust 1 instrument provides that Trust 1 may have up to five trustees, however, there shall be at least one “independent” trustee at all times. Paragraph 3 provides that no donor to Trust 1 may serve as a trustee of Trust 1 and Patriarch’s spouse may not serve as a trustee of Trust 1. Paragraph 3(c) provides that upon the resignation or removal, or if a trustee ceases to be trustee, the following persons or groups of persons who are then living and not disabled, successively in the order named, may appoint as successor “independent” trustee a suitable individual or corporation qualified to act as such: Patriarch, Patriarch’s spouse, a majority of Patriarch’s lineal descendants of the eldest generation with a member then living. Patriarch and Patriarch’s spouse may only appoint a successor trustee that is not “related or subordinate” to Patriarch within the meaning of § 672(c). Paragraph 3(f) provides that no “beneficially interested” trustee may make or participate in making any “discretionary payment” to himself or another beneficially interested trustee, or make or participate in making any discretionary payment to any person who he or another beneficially interested trustee (as an individual) is then legally obligated to support, but such payments may be made by the “independent” trustee. A trustee or other person is “beneficially interested” during any period when discretionary payments may be made to him or to any person whom he (as an individual) is then legally obligated to support. A “discretionary payment” is a payment of income or principal for a person’s “welfare” in excess of his “needs” or a payment of income or principal as a result of an early termination of the trust. An “independent” trustee is a trustee who is (i) not beneficially interested in any trust held under the Trust 1 agreement and (ii) not a lineal descendant of Patriarch nor a spouse of any such lineal descendant, nor “related or subordinate” to Patriarch, a lineal descendant of Patriarch or such a descendant’s spouse within the meaning of § 672(c).

Article I, paragraph 8 of the Trust 1 instrument provides that anything to the contrary notwithstanding, unless a trust created under the Trust 1 agreement (including any trust created by the exercise of a power of appointment given any beneficiary) is excepted from the application of Statute, such trust shall in any and all events terminate not later than the latest period prescribed in Statute, as amended after the date of the Trust 1 agreement; provided, however, that if Statute is amended or repealed in a manner that would result in any interest of Trust 1 violating the provisions of Statute, then no trust created under the Trust 1 agreement shall continue for a period longer

than twenty-one years after the death of the last survivor of the group composed of Patriarch and the beneficiaries of Trust 1 living on Date 2.

Patriarch created Trust 2 for the benefit of Child 1 and Child 1's lineal descendants on Date 3. Child 1 serves as trustee of Trust 2, and Patriarch's spouse serves as "trust protector" under the terms of the trust. Trust 2 is the maker of a promissory note payable to Patriarch (hereinafter "Promissory Note") dated Date 3.

Article 1-3.1 of the Trust 2 instrument provides that during any period where there is a remaining balance on Promissory Note, the trustee may pay to Child 1 such amount(s) of the income and principal of Trust 2 as the trustee, in his sole discretion, shall determine to be necessary or advisable to provide for Child 1's support, maintenance, health, and education, after first having obtained the consent of the trust protector.

Article 1-3.2 of the Trust 2 instrument provides that after the Promissory Note has been paid in full the trustee shall distribute all of the net Trust 2 income to the Beneficiary at least quarter annually; and the trustee may pay to Child 1 such amounts of the principal as the trustee, in its sole discretion, shall determine to be necessary or advisable to provide for Child 1's support, maintenance, health, and education.

Article 1-3.4 of the Trust 2 instrument provides that Trust 2 shall terminate upon the death of Child 1. Upon termination, Child 1 shall have a special power to appoint the Trust 2 property, exercisable by Child 1's will, to or for the benefit of Child 1's descendants, Patriarch's descendants, Child 1's spouse, or any organization(s) for which a charitable deduction is permitted pursuant to §§ 170, 2055, and 2522, in such amounts, equal or unequal, and such lawful interest and estates as he shall specify and appoint by a will. If, and to the extent that, Child 1 does not exercise his special power to appoint the Trust 2 property, then the trust assets shall be divided in the manner required to create one share for each living child of Child 1, and one share for the living descendants, as a group, of any deceased child of Child 1 (such share to be further divided among such descendants, by representation). If there shall be no descendant of Child 1 living at the termination date, such share shall be distributed to Patriarch's descendants by representation.

Article 2-1 of the Trust 2 instrument provides that Patriarch may not be appointed trustee of Trust 2. Article 2-3 provides that Child 1 may remove any trustee. If Child 1 is not living and competent, then a majority of all living vested beneficiaries of a trust created under the Trust 2 agreement may remove the trustee of the trust. Any trustee that may be removed may be removed without cause and without notice. Article 2-4 provides that if a trustee for any reason fails to qualify or ceases to act, then Child 1 may appoint a successor trustee. If Child 1 is not then living or competent and has failed to appoint a successor trustee, then a majority of all living vested beneficiaries of legal capacity of a trust created under the Trust 2 agreement shall appoint a successor. In the event no successor trustee is so appointed within a thirty-day period, then any

beneficiary may petition the court of jurisdiction in which the trust's administrative situs is situated, ex parte, to name a successor trustee.

Article 3-8.1 of the Trust 2 instrument appoints Patriarch's spouse as trust protector. If Patriarch's spouse fails or ceases to act as trust protector and no successor trust protector has been designated, then Trustee 1 may designate a successor trust protector.

It is represented that upon receipt of a favorable private letter ruling, Trustee 1 will appoint Trust Company as successor and resign as trustee of Trust 2.

RULINGS REQUESTED

You have requested the following rulings: (1) Patriarch's reserved testamentary limited power of appointment will not cause Patriarch to be treated as the owner of any portion of Trust 1 under § 674(a). (2) Trust Company is not a "related or subordinate party" to the Patriarch within the meaning of § 672(c) with respect to Trust 2. (3) Trust Company is an independent trustee within the meaning of § 674(c) with respect to Trust 2. (4) Neither the appointment of Trust Company as successor trustee of Trust 2, nor its exercise of distribution powers under Trust 2, will cause any beneficiary of Trust 2 to be treated as the owner of any part of the trust under § 678(a)(i). (5) Neither the appointment of Trust Company as successor trustee of Trust 2, nor its exercise of distribution powers under these trusts, will result in the inclusion of any portion of Trust 2 in Patriarch's estate under §§ 2036 or 2038. (6) Neither the appointment of the Trust Company as successor trustee of Trust 2, nor its exercise of distribution powers under these trusts, will cause any beneficiary of Trust 2 to be deemed to possess a general power of appointment over the trust under § 2041.

RULING 1

Section 674(a) provides, in general, that the grantor shall be treated as the owner of any portion of a trust in respect of which the beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition, exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any adverse party.

Section 674(b)(3) provides that § 674(a) shall not apply to a power exercisable only by will, other than a power in the grantor to appoint by will the income of the trust where the income is accumulated for such disposition by the grantor or may be so accumulated in the discretion of the grantor or a nonadverse party, or both, without the approval or consent of any adverse party.

Section 674(b)(5)(A) provides that § 674(a) shall not apply to a power to distribute corpus to or for a beneficiary or beneficiaries or to or for a class of beneficiaries (whether or not income beneficiaries) provided that the power is limited by a reasonably definite standard which is set forth in the trust instrument.

Section 674(c) provides that § 674(a) shall not apply to a power solely exercisable (without the approval or consent of any other person) by a trustee or trustees, none of whom is the grantor, and no more than half of whom are related or subordinate parties who are subservient to the wishes of the grantor (1) to distribute, apportion, or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries; or (2) to pay out corpus to or for a beneficiary or beneficiaries or to or for a class of beneficiaries (whether or not income beneficiaries).

Section 674(d) provides that § 674(a) shall not apply to a power solely exercisable (without the approval or consent of any other person) by a trustee or trustees, none of whom is the grantor or spouse living with the grantor, to distribute, apportion, or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries, whether or not the conditions of §§ 674(b)(6) or (7) (relating to powers to withhold income temporarily or during disability) are satisfied, if such power is limited by a reasonably definite external standard which is set forth in the trust instrument. A power does not fall within the powers described in § 674(d) if any person has a power to add to the beneficiary or beneficiaries or to a class of beneficiaries designated to receive the income or corpus except where such action is to provide for the after-born or after-adopted children.

Based solely on the facts and representations submitted, we conclude that neither Patriarch's testamentary power of appointment under Trust 1, Trustee 2 and Trustee 3's ability as trustees to participate in making discretionary distributions subject to an ascertainable standard, nor the power of Trustee 1 as independent trustee to make distributions of income or principal in excess of those governed by an ascertainable standard will cause Patriarch to be treated as the owner of any portion of Trust 1 under §§ 671 and 674.

RULINGS 2 & 3

Section 672(c)(2) provides that for purposes of subpart E of part I of subchapter J, the term "related or subordinate party" means any nonadverse party who is any one of the following: the grantor's father, mother, issue, brother or sister; an employee of the grantor; a corporation or any employee of a corporation in which the stockholdings of the grantor and the trust are significant from the viewpoint of voting control; a subordinate employee of a corporation in which the grantor is an executive.

Based solely on the facts and representations submitted, including the provisions of the Trust Company Bylaws that grant all discretionary distribution powers to the Distribution Committee that must be solely comprised of independent directors and the provisions of Trust 1 regarding the restriction of certain voting rights to an independent trustee, we conclude that Trust Company is not a "related or subordinate" party to Patriarch, within the meaning of § 672(c)(2) and is an independent trustee within the meaning of § 674(c). Therefore, Trust Company may exercise the powers described in

§ 674(c) with regard to Trust 2 without causing Patriarch to be treated as the owner of any portion of those trusts under § 674(a).

RULING 4

Section 671 of the Internal Revenue Code provides that where it is specified in subpart E of Part I of subchapter J that the grantor or another person shall be treated as the owner of any portion of a trust, there shall then be included in computing the taxable income and credits of the grantor or the other person those items of income, deductions, and credits against tax of the trust that are attributable to that portion of the trust to the extent that such items would be taken into account under chapter 1 in computing taxable income or credits against the tax of an individual.

Section 678(a) provides, in general, that a person other than the grantor shall be treated as the owner of any portion of a trust with respect to which (1) such person has a power exercisable solely by himself to vest the corpus or the income therefrom in himself, or (2) such person has previously partially released or otherwise modified such a power and after the release or modification retains such control as would, within the principles of §§ 671 to 677, inclusive, subject a grantor of a trust to treatment as the owner thereof.

Based on the facts and representations submitted, including the provisions of the Trust Company Bylaws that preclude any beneficiary from serving on the Distribution Committee and the provisions of Trust 1 regarding the restriction of certain voting rights to an independent trustee, we conclude that, after the appointment of Trust Company as trustee of Trust 2, no beneficiary of Trust 2 will have the power to vest the corpus or income from Trust 2 in themselves. Therefore, we further conclude that the appointment of Trust Company as trustee of Trust 2, and its exercise as trustee of any discretionary distribution powers, will not cause any beneficiary of Trust 2 to be treated as an owner of any portion of Trust 2 under § 678(a), during the lifetime of Patriarch.

RULINGS 5 & 6

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 the case of a bona fide sale for an 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 that 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 2036(b)(1) provides that for purposes of § 2036(a)(1), the retention of the right to vote (directly or indirectly) shares of stock of a controlled corporation shall be considered to be a retention of the enjoyment of transferred property.

Section 2036(b)(2) provides in part that for the purposes of § 2036(b)(1), a corporation shall be treated as a controlled corporation if, at any time after the transfer of the property and during the three-year period ending on the date of the decedent's death, the decedent owned (with the application of § 318), or had the right (either alone or in conjunction with any person) to vote, stock possessing at least twenty percent of the total combined voting power of all classes of stock.

Section 20.2036-1(b)(3) provides in part that if a decedent reserved the unrestricted power to remove or discharge a trustee at any time and to appoint himself as trustee, the decedent is considered as having the powers of the trustee.

Section 2038(a)(1) 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 the case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where 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 the power), to alter, amend, revoke, or terminate, or where any power is relinquished during the three-year period ending on the date of decedent's death.

Section 20.2038-1(a)(3) provides in part that if a decedent had the unrestricted power to remove or discharge a trustee at any time and appoint himself trustee, the decedent is considered as having the powers of the trustee.

Section 2041(a)(2) provides that the value of the gross estate shall include the value of all property to the extent of any property with respect to which the decedent has, at the time of his death, a general power of appointment created after October 21, 1942, or with respect to which the decedent has at any time exercised or released a power of appointment by a disposition that is of such nature that if it were a transfer of property owned by the decedent the property would be includible in the decedent's gross estate under §§ 2035 to 2038, inclusive. For purposes of § 2041(a)(2), the power of appointment shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised.

Section 2041(b)(1) provides that a general power of appointment is a power that is exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate. However, a power to consume, invade, or

appropriate property for the benefit of the decedent that is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

Section 20.2041-1(b)(1) provides, in part, that a donee may have a power of appointment if he has the power remove or discharge a trustee and appoint himself. For example, if under the terms of the instrument, the trustee or his successor has the power to appoint the principal of the trust for the benefit of individuals including himself, and the decedent has the unrestricted power to remove or discharge the trustee at any time and appoint any other person including himself, the decedent is considered as having a power of appointment. However, the mere power of management, investment, custody of assets, or the power to allocate receipts and disbursements as between income and principal, exercisable in a fiduciary capacity, whereby the holder has no power to enlarge or shift any of the beneficial interests therein except as an incidental consequence of the discharge of the fiduciary duties is not a power of appointment.

Rev. Rul. 95-58, 1995-2 C.B. 191, holds that a decedent/grantor's reservation of an unqualified power to remove a trustee and to appoint an individual or corporate successor trustee that is not related or subordinate to the decedent within the meaning of § 672(c), is not considered a reservation of the trustee's discretionary powers of distribution over the property transferred by the decedent/grantor to the trust. Accordingly, the trust corpus is not includable in the decedent's gross estate under §§ 2036 or 2038. The ruling notes that the Eighth Circuit in Estate of Vak v. Commissioner, 973 F.2d 1409 (8th Cir. 1992), concluded that the decedent had not retained dominion and control over assets transferred to a trust by reason of his power to remove and replace the trustee with a party that was not related or subordinate to the decedent. Accordingly, the court held that under § 25.2511-2(c), the decedent made a completed gift when he created the trust and transferred assets to it.

Section 672(c) defines the term "related or subordinate party" to mean any nonadverse party who is (1) the grantor's spouse if living with the grantor; or (2) any one of the following: the grantor's father, mother, issue, brother or sister; an employee of the grantor; a corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control; a subordinate employee of a corporation in which the grantor is an executive.

In order for §§ 2036-2038 to apply, the decedent must have made a transfer of property or any interest therein (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth) under which the decedent retained an interest in, or power over, the income or corpus of the transferred property. For purposes of §§ 2036 and 2038, it is immaterial in what capacity the power was exercisable by the decedent.

The governing trust instrument of Trust 2 precludes Patriarch from directly participating in any distribution decisions. Furthermore, the governing trust instrument

limits all distributions by an ascertainable standard. Once Trust Company is named as the trustee of Trust 2, distribution decisions will be made by a Distribution Committee of the Board of Directors. The Trust Company Bylaws and Articles of Incorporation require that the members of the Distribution Committee be members who: (a) are not grantors of or donors to any trust of which the Trust Company is trustee, nor the spouse of any grantor or donor; (b) are not current or contingent beneficiaries of any trust of which the Trust Company is trustee, nor the spouse of any such beneficiary; and (c) are not related or subordinate, as defined in § 672(c), to a grantor, donor or any current beneficiary of any trust of which the Trust Company is trustee. The Articles of Incorporation define a current beneficiary of a trust as any person who (i) is entitled or eligible to receive a mandatory or discretionary distribution of income or principal of the trust, (ii) has a right to withdraw property from the trust, or (iii) is entitled or eligible to use or otherwise enjoy any asset of the trust. Under these circumstances, Patriarch and the beneficiaries of Trust 2 will be prohibited from participating in decisions regarding distributions.

With respect to whether naming Trust Company as trustee of Trust 2 will cause Trust 2 to be included in Patriarch's estate, the combination of the firewall provision in the Trust Company Articles of Incorporation, Trust Company Bylaws, and the trustee provisions in Trust 2 preclude Patriarch from having the retained dominion and control contemplated by §§ 2036 or 2038. Patriarch, therefore, will not be considered as having the powers of the trustees under §§ 20.2036-1(b)(3) or 20.2038-1(a)(3) solely as a result of being a shareholder in or participating in the daily activities of Trust Company as he is precluded from participating in distribution decisions with respect to Trust 2, both directly by the trust agreements and indirectly when made by Trust Company. Therefore, neither the appointment of Trust Company as trustee of Trust 2 nor its exercise of the distribution powers to beneficiaries of Trust 2 will result in the inclusion of any portion of Trust 2 in Patriarch's gross estate for federal estate tax purposes. Accordingly, based on the facts submitted and the representations made, we conclude that the appointment of Trust Company as a trustee of Trust 2 will not result in the inclusion of any portion of the trusts in Patriarch's estate under §§ 2036 or 2038.

With respect to whether naming Trust Company as trustee of Trust 2 will cause Trust 2 to be included in a beneficiary's estate, the combination of provisions also preclude a beneficiary from having the power to affect the beneficial enjoyment of the trust property as contemplated by § 2041. While a beneficiary is currently serving as trustee of Trust 2, he will be precluded from participating, directly or indirectly, in distribution decisions once Trust Company is named as trustee of Trust 2 and he resigns as trustee. Furthermore, under the terms of the Trust 2 trust agreement, distributions are limited by an ascertainable standard. No beneficiary, therefore, will be considered as having a general power of appointment under § 2041 solely as a result of being a shareholder in and participating in the daily activities of Trust Company. Therefore, neither the appointment of Trust Company as trustee of Trust 2 nor its exercise of the distribution powers with respect to Trust 2 will result in the inclusion of any portion of Trust 2 in the respective estate of a beneficiary. Accordingly, based on

the facts submitted and the representations made, we conclude that the appointment of Trust Company as an independent trustee of Trust 2 will not result in the inclusion of any portion of the trusts in the estate of a beneficiary under § 2041.

Except as expressly provided herein, no opinion is expressed or implied concerning the federal tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, we make or imply no ruling as to whether any beneficiary of Trust 1 shall be treated as the owner of any portion of the trust after the death of Patriarch and the possible exercise of Patriarch's testamentary power of appointment under Trust 1. Additionally, no opinion is implied or expressed as to whether Trust 2 is currently treated as a trust owned by Patriarch under §§ 674 or 675 because of any provision of Trust 2. If Trust 2 is currently treated as a trust owned by Patriarch by reason of any such power, and ceases to be treated as a trust owned by Patriarch by reason of Patriarch's death or the waiver or release of any power under §§ 674 or 675, no opinion is expressed or implied concerning whether the termination of such grantor trust treatment results in a sale or disposition of any property within the meaning of § 1001(a), a change in the basis of any property under §§ 1012 or 1014, or any deductible administration expense under § 2053. No opinion is expressed or implied on the application of § 2702 to the execution of the promissory note by Trust 2. Finally, we make or imply no rulings on whether Trust 1 will be included in Patriarch's or a beneficiary's estate.

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.

Pursuant to the Power of Attorney on file with this office, a copy of this letter is being sent to your attorney.

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

Sincerely,

James F. Hogan
Senior Technician Reviewer, Branch 9
(Passthroughs & Special Industries)

Enclosure

Copy of this letter for § 6110 purposes