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Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:4/PLR-118199-99
Date:
November 1, 2000

Re:

Legend:

Master Trust -

Subtrust 1 -

Subtrust 2 -

Independent Trustee -
Trustee 1 -
Trustee 2 -
Trustee 3 -
Decedent -
Child 1 -
Child 2 -
State X -
Cite 1 -

Cite 2 -

Dear :

This is in reference to your October 19, 2000, correspondence, and prior submissions, requesting rulings regarding the effect of the division of trust assets and the judicial construction and modification of the trust instrument for federal income, estate, gift, and generation-skipping transfer tax purposes.

The facts submitted are as follows:

Decedent, a resident of State X, died testate in 1962, survived by a

spouse, three children, and several grandchildren. Decedent's spouse died in 1964. Child 1 and Child 2, two of Decedent's children, are still living. Child 1 has four children, each of whom have issue. Child 2 also has four children, three of whom have issue.

Under the terms of Decedent's will, the residue of Decedent's estate was divided between Trust No. 1 (a marital trust) and Trust No. 2 (a by-pass trust). Paragraph 7-a of the Decedent's will provides that assets of Trust No. 1 that were not withdrawn by the Decedent's spouse during her lifetime or appointed by the spouse pursuant to the exercise of a testamentary general power of appointment passed to Trust No. 2 upon her death. Paragraph 7-a also provides that, upon the spouse's death, the combined assets of Trust No. 1 and Trust No. 2 (hereinafter referred to as "Master Trust") is to be apportioned in two equal shares in trust (Subtrust 1 and Subtrust 2), one share for the benefit of Child 1, or those representing him, and the other share for the benefit of Child 2, or those representing her. Subtrust 1 and Subtrust 2 may be kept in a consolidated fund by the trustee for administrative and investment convenience. Both shares are to continue in Subtrust 1 and Subtrust 2 until the death of the last to die of Child 1 and Child 2. Under Paragraph 7-e(1), the independent trustee of the Master Trust has the discretion to distribute part or all of the income from Subtrust 1 and Subtrust 2 to or for the benefit of the trust beneficiaries for their maintenance, support, and education. In addition, under Paragraph 8-k, the independent trustee may distribute corpus of any trust established under Decedent's will for the proper support, maintenance or comfort of any income beneficiary of that trust.

Paragraph 7-b of Decedent's will provides that, upon the death of the last to die of Child 1 and Child 2, "the entire corpus of the trust estate . . . shall be reapportioned in trust in equal parts, one such equal part being apportioned in trust for the benefit of each of my grandchildren then living who is a child of [Child 1] or [Child 2]" and one share for the benefit of the representatives of each predeceased child of Child 1 and Child 2. Each separate share shall be held in a separate trust for the benefit of each respective beneficiary. As with Subtrust 1 and Subtrust 2, these separate trusts may be kept in a consolidated fund by the trustee for administrative and investment convenience. Each separate trust for a female beneficiary will terminate when the beneficiary reaches age 35 and each separate trust for a male beneficiary will terminate when the beneficiary reaches age 25. Upon termination, the corpus and any accumulated income of each separate trust will be distributed to the trust beneficiary. Under Paragraph 7-c, no trust may continue beyond twenty-one years after the death of Decedent,

Decedent's spouse or children, or any descendant of Decedent living at the time of Decedent's death. Paragraph 7-e(ii) provides that, during the term of each trust, income from each respective trust may be distributed at the discretion of the independent trustee for the maintenance, support, and education of the trust beneficiary, until the beneficiary reaches age 21, at which time the entire income will be distributed to the beneficiary.

Finally, notwithstanding the language of Paragraph 7-b possibly indicating a per capita distribution on the death of the last to die of Child 1 and Child 2, Paragraph 7-f states, in part:

> In the event of the death of a descendant of mine, all and every share and interest hereunder which such descendant would have taken or retained hereunder if living, shall be apportioned, and shall continue in trust (subject to the terms hereof) for the use and benefit of the descendants, per stirpes, of such beneficiary; but if there be no surviving descendant of such beneficiary, then for the use and benefit of the then living brothers and sisters of such beneficiary, and the descendants, per stirpes, of any deceased such brothers or sisters; . . .

The Master Trust, and all other trusts established under the terms of Decedent's will, are governed by the laws of State X. The trustees, in accordance with the authority granted under Decedent's will, kept the corpus of Subtrust 1 and Subtrust 2 consolidated in the Master Trust fund. The current trustees of the Master Trust are Independent Trustee and Trustee 1.

The applicable law of State X that addresses a judicial division of trusts provides that:

> (a) Upon petition by a trustee, beneficiary or any party in interest, for good cause shown, a court having jurisdiction over a trust, after a hearing on notice to all parties in interest, in such manner as the court may direct, may divide a trust into two (2) or more single trusts or consolidate two (2) or more trusts into a single trust, upon such terms and conditions as it deems appropriate, if the consolidation or division:
>
> > (1) Is not inconsistent with the intent of the trustor with regard to any trust to be consolidated or divided;
> > (2) Would facilitate administration of the trust(s); and

> (3) Would be in the best interest of all beneficiaries and not materially impair their respective interests.
>
> (b) This section applies to all trusts whenever created, whether inter vivos or testamentary, created by the same or different instruments, by the same or different persons, and regardless of where created or administered.
>
> (c) This section shall not limit the right of a trustee acting in accordance with the applicable provisions of the governing instrument to divide or consolidate the trusts.

See State X Code Ann. § 35-50-117 (1996).

The trustees have obtained a court order dividing the Master Trust assets equally between Subtrust 1 and Subtrust 2. The assets will be partitioned on a pro rata basis taking into account the assets' bases and holding periods. After the division of the Master Trust assets, Independent Trustee will remain the independent trustee of both Subtrust 1 and Subtrust 2. Trustee 2 and Trustee 3 will be appointed to serve as co-trustees with Independent Trustee of Subtrust 1 and Trustee 1 will continue to serve as the co-trustee with Independent Trustee of Subtrust 2.

The order also resolved the conflict between Paragraphs 7-b and 7-f and construed the Master Trust as providing that the apportionment required under Paragraphs 7-a and 7-f will control the apportionment of Subtrust 1 and Subtrust 2 after the death of the last to die of Child 1 and Child 2. Accordingly, under the order, on the death of the last to die of Child 1 and Child 2, Subtrust 1 will be apportioned into trust shares for the benefit of the descendants of Child 1, per stirpes, and Subtrust 2 will be apportioned into trust shares for the benefit of descendants of Child 2, per stirpes. In addition, the court order construed the Master Trust as providing that, during the lives of Child 1 and Child 2, the independent trustee has the discretion to distribute the net income of each share to the beneficiaries of that share. The court order also amended the Master Trust consistent with this construction.

You have requested the following rulings:

1. The construction of the Master Trust regarding the apportionment upon the death of the last to die of Child 1 and Child 2 between their descendants, per

stirpes, will not cause the Master Trust to become subject to the generation-skipping transfer tax.

2. The division of the assets of the Master Trust between Subtrust 1 and Subtrust 2 will not cause the Master Trust to lose its exempt status for generation-skipping transfer tax purposes.

3. Following the division of the Master Trust assets between Subtrust 1 and Subtrust 2, neither Subtrust 1 nor Subtrust 2 will be subject to the generation-skipping transfer tax.

4. The division of the Master Trust assets between Subtrust 1 and Subtrust 2 will not constitute a taxable termination, taxable distribution, or a direct skip to any beneficiary subject to the generation-skipping transfer tax.

5. The division of the Master Trust assets between Subtrust 1 and Subtrust 2 will not cause any trust beneficiary to have made a transfer that constitutes a taxable termination, taxable distribution or a direct skip subject to the generation-skipping transfer tax and distributions from Subtrust 1 and Subtrust 2 will be exempt from generation-skipping transfer tax.

6. The division of the Master Trust assets between Subtrust 1 and Subtrust 2 will not cause the interest of any trust beneficiary to be includible in the beneficiary's gross estate for federal estate tax purposes.

7. The division of the Master Trust assets between Subtrust 1 and Subtrust 2 will not constitute a transfer by any beneficiary that will be subject to the gift tax under § 2501.

8. Following the division of the Master Trust assets between Subtrust 1 and Subtrust 2, Subtrust 1 and Subtrust 2 will each continue to be treated as a separate taxpayer under § 643(f).

9. The division of the Master Trust assets between Subtrust 1 and Subtrust 2 will not result in the realization by any of the trusts of any income under § 61 and, specifically, will not be considered to be a sale or other disposition of property by the trusts which would result in the realization of any gain or loss under § 1001.

10. Following the division of the Master Trust assets between Subtrust 1 and

Subtrust 2, each asset of Subtrust 1 and Subtrust 2 received from the Master Trust by reason of the division will have the same basis it had when held by the Master Trust.

11. Following the division of the Master Trust assets between Subtrust 1 and Subtrust 2, each asset of Subtrust 1 and Subtrust 2 received from the Master Trust by reason of the division will have the same holding period as the asset had when held by the Master Trust.

12. Following the division of the Master Trust assets between Subtrust 1 and Subtrust 2, the resignation of Trustee 1 as individual co-trustee of Subtrust 1 and the appointment of Trustees 2 & 3 as individual co-trustees of Subtrust 1 will not subject the Master Trust, Subtrust 1, Subtrust 2, or any beneficiary of those trusts to the generation-skipping transfer tax.

13. The appointment of Trustees 2 & 3 as individual co-trustees of Subtrust 1 will not result in Trustees 2 & 3 possessing a general power of appointment within the meaning of §§ 2514 or 2041, and the value of Subtrust 1 will not be includible in the gross estate of either Trustees 2 or 3 under § 2041 for federal estate tax purposes.

Ruling Requests #1 through #5, and #12: Federal Generation-Skipping Transfer Tax Consequences

Section 2601 of the Internal Revenue Code imposes a tax on every generation-skipping transfer (GST) made after October 26, 1986.

A generation-skipping transfer is defined under § 2611(a) as (1) a taxable distribution, (2) a taxable termination, and (3) a direct skip.

Section 2612(a) provides that the term taxable termination means a termination (by death, lapse of time, release of a power, or otherwise) of an interest in property held in trust where the property passes to a skip person with respect to the transferor of the property. Section 2612(b) provides that the term taxable distribution means any distribution from a trust to a skip person other than a taxable termination or a direct skip. Under § 2612(c)(1), a direct skip is a transfer subject to federal estate or gift tax made by a transferor to a skip person.

Section 2613 defines a "skip person" as 1) a natural person who is

assigned to a generation which is two or more generations below that of the transferor, 2) a trust in which all the interests are held by skip persons, or 3) a trust where, after that transfer, no trust distributions may be made to a non-skip person.

Under § 26.2601-1(b)(1)(i) of the Generation-Skipping Transfer Tax Regulations, the GST tax does not apply to any generation-skipping transfer under a trust that was irrevocable on September 25, 1985. However, this exemption does not apply to additions (actual or constructive) that are made to the trust after September 25, 1985.

Section 26.2601-1(b)(1)(iv) states that, if an addition is made after September 25, 1985, to a trust which was irrevocable on September 25, 1985, a pro rata portion of subsequent distributions from (and terminations of interests in property held in) the trust is subject to the GST tax provisions.

A modification of a trust that is otherwise exempt for GST tax purposes will generally not result in a loss of its "grandfathered" exempt status if the modification does not change the quality, value, or timing of any powers, beneficial interests, rights or expectancies originally provided for under the terms of the trust.

In the present case, the Master Trust was irrevocable on September 25, 1985. You have represented that no additions, actual or constructive, have been made to the trust after that date. Therefore, unless the amendment to the Master Trust is deemed an addition to the Master Trust or the amendment changes the quality, value, or timing of the interests or powers provided for under the terms of the Master Trust, the Master Trust will remain exempt from the GST tax.

The court order construed the Master Trust and, pursuant to that construction, amended the terms of the Master Trust regarding the apportionment of Subtrust 1 and Subtrust 2 after the death of the last to die of Child 1 and Child 2. The court order also divided the Master Trust assets between Subtrust 1 and Subtrust 2. In addition, the court order provides that Trustee 2 and Trustee 3 will be appointed to serve as co-trustees with Independent Trustee of Subtrust 1, and Trustee 1 will continue to serve as the co-trustee with Independent Trustee of Subtrust 2.

Under applicable State X law, as set forth in Cite 1, the important

consideration in the construction of the a instrument is to determine the intention of the settlor as evidenced by all the provisions of the instrument, giving no portion any greater emphasis than any other. In determining this, the peculiar facts and circumstances are considered to determine what is this intention. It is not necessarily so much the language that is used by the settlor as it is his or her evident intention that governs. One clause in the instrument which might be in conflict another clause will not necessarily prevail over the other unless there is an evident and clear intention on the part of the maker that one clause should prevail over the other. Further, State X courts have expressed a preference for interpreting an ambiguous instrument as providing for per stirpes, rather than per capita distributions, in the circumstances considered in those cases. Cite 2.

In this case, based on a review of the instrument as a whole, we conclude that the court's construction of the inconsistent terms of Paragraphs 7-b and 7-f of Decedent's will governing Master Trust as providing for a per stirpes distribution of Subtrust 1 and Subtrust 2 on the death of the last to die of Child 1 and Child 2 is consistent with applicable State X law. Accordingly, the construction and amendment of the Master Trust pursuant to the court order will not constitute a change in the quality, value or timing of any beneficial interest provided for under the terms of Master Trust. The modification appointing Trustee 2 and Trustee 3 to serve with the Independent Trustee with respect to Subtrust 1 is administrative in nature and does not confer any additional powers, interests, rights or expectancies upon the trustees or beneficiaries or change the quality, value or timing of any of the existing powers, interests, rights or expectancies.

The division of the Master Trust assets between Subtrust 1 for the benefit of Child 1 and his descendants and Subtrust 2 for the benefit of Child 2 and her descendants, is authorized under the terms of Decedent's will. After the division, each Subtrust will have substantive terms identical to those in the Master Trust. Thus, the parties beneficial interests in the subtrusts will not change. We conclude that the division will not alter the quality, value or timing of any powers, or beneficial interests, rights or expectancies originally provided for under the terms of the Master Trust.

Therefore, based on the facts submitted and representations made, we conclude that the construction and amendment of Master Trust and the division of the Master Trust assets will not be deemed an addition to Master Trust, Subtrust 1 or Subtrust 2 or a change in the quality, value, or timing of any beneficial interest under the terms of Master Trust, Subtrust 1 or Subtrust 2.

Accordingly, the terms of the Master Trust, as modified pursuant to the court order, will not affect the GST status of the Master Trust or Subtrust 1 or Subtrust 2 and will not result in a transfer of property that will subject the Master Trust or Subtrust 1 or Subtrust 2 to the generation-skipping transfer tax imposed under § 2601. In addition, the division of the Master Trust assets between Subtrust 1 and Subtrust 2 will not subject those trusts or any other trust created under their terms to the generation-skipping transfer tax. Likewise, the amendment to Master Trust and division of the Master Trust assets will not constitute a taxable termination, taxable distribution, or a direct skip to any beneficiary of the Master Trust, Subtrust 1, Subtrust 2, or any trust created thereunder that is subject to the generation-skipping transfer tax.

Ruling Requests #6 & #7: Federal Estate and Gift Tax Consequences

Section 2001(a) imposes a tax on the transfer of a taxable estate of a decedent who is a citizen or resident of the United States. Section 2033 includes within the definition of a decedent's gross estate, the value of all property in which the decedent held an interest at the time of the decedent's death.

Section 2501 imposes a tax on the transfer of property by gift by an individual. Section 2511 provides that the tax imposed by § 2501 applies whether the transfer is in trust or otherwise, whether the gift is direct or indirect and whether the property is real or personal, tangible or intangible.

Section 2512(a) provides that, if a gift is made in property, the value thereof at the date of the gift will be considered the amount of the gift. Section 2512(b) states that where property is transferred for less than adequate and full consideration in money or money's worth, the amount by which the value of the property exceeds the value of the consideration received shall be deemed a gift.

In this case, as discussed above, the court's construction of the conflicting terms of the Master Trust is consistent with applicable state law. Similarly, as described above, the division of the Master Trust assets between Subtrust 1 and Subtrust 2 will not result in any change in the beneficial interests of any of the trust beneficiaries.

Accordingly, based on the facts submitted and the representations made, the amendment of the Master Trust and division of the Master Trust assets will not cause any beneficiary of the Master Trust, Subtrust 1, Subtrust 2, or any

trust created under the terms of those trusts, to have made a taxable gift for Federal gift tax purposes under § 2501.

Likewise, because there has been no change in the beneficial interests of the beneficiaries, the amendment and division will not result in the inclusion under § 2033 of any beneficiary's interest in the beneficiary's gross estate for federal estate tax purposes (except to the extent that any interests may otherwise be includible).

Ruling Request #8: Separate Trust Ruling

Section 643(f) provides that, for purposes of subchapter J, 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. For purposes of the preceding sentence, a husband and wife shall be treated as one person.

While Subtrust 1 and Subtrust 2 have the same grantor, they have different primary beneficiaries. Therefore, based on the facts and representations submitted, we conclude that Subtrust 1 and Subtrust 2 will be treated as separate trusts for federal income tax purposes under § 643(f), and should continue to file separate federal fiduciary income tax returns.

Ruling Requests #9 through #11: Federal Income Tax Consequences

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

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

Section 1.1001-1(a) of the Income Tax Regulations provides that, generally, the gain or loss realized from a conversion of property into cash, or

from an exchange of property for other property differing materially either in kind or extent, is treated as income or as loss sustained.

Rev. Rul. 69-486, 1969-2 C.B. 159, holds that a non-pro rata distribution of trust corpus in kind by mutual agreement of the beneficiaries is subject to gain or loss recognition under § 1001. In the revenue ruling, there was no provision in the trust instrument allowing the trustee to make non-pro rata distributions, and local law did not authorize the trustee to make a non-pro rata distribution of property in kind. Because neither the trust instrument nor local law authorized the trustee to make a non-pro rata distribution, the beneficiaries were viewed as having an absolute right to a ratable in kind distribution. Accordingly, the revenue ruling holds that the distribution was equivalent to a ratable distribution to the beneficiaries followed by an exchange of property between the beneficiaries that was subject to § 1001.

Rev. Rul. 56-437, 1956-2 C.B. 507, holds that the severance of a joint tenancy in stock under a partition action provided for by state law to compel issuance of separate stock certificates is not a sale or exchange. Under applicable state law the right of the owners of the property to pursue such a result is an inherent ownership right each had in the property involved.

An exchange of property results in the realization of gain or loss under § 1001 if the properties exchanged are materially different. Cottage Savings Association v. Commissioner, 499 U.S. 554 (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.

You have represented that the division of the Master Trust assets into equal shares in the two trusts will be pro rata and take into account the assets' bases and holding periods. Thus, in this case, unlike the situation in Rev. Rul. 69-486, the formal division of assets in the Master Trust will be pro rata, with each trust receiving its ratable portion of each asset of the Master Trust. A pro rata division of jointly owned property is not a sale or other disposition of property where, as here, the co-owners of the joint property sever their joint interests, but do not acquire new or additional interests as a result.

The Independent Trustee, joined by all interested persons, has sought judicial construction and amendment of the trust provisions to more accurately reflect the intentions of decedent. The appropriate local court has granted the relief sought by the Independent Trustee including division of the assets

between separate trusts. Assuming that any distribution of the assets will be pro rata (taking into account the basis and holding period of the assets), the division does not constitute a sale or other disposition for purposes of § 1001. The interests of the beneficiaries after the construction, amendment, and division will be the same as they were before. The exchanged properties are not materially different, because they do not embody legal entitlements that are different in kind or confer different rights and powers.

We conclude that the division of the assets of the Master Trust between Subtrust 1 and Subtrust 2 will not result in the realization by any of the trusts of any income under § 61 of the Code and, specifically, will not be considered to be a sale or other disposition of property by the trusts that would result in the recognition of any gain or loss under § 1001.

Section 1223(2) provides that, in determining the period for which the taxpayer has held property however acquired, there shall be included in the period for which the property was held by any other person, if under Chapter 1 such property has, for the purpose 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.

If the assets will have the same basis after the division as before the division, under § 1015, we conclude that, following the proposed division of the assets of the Master Trust between Subtrust 1 and Subtrust 2, each asset of Subtrust 1 and Subtrust 2 received from the Master Trust by reason of the division will have the same holding period as the asset had when held by the Master Trust.

Ruling Request #13: Power of Appointment Ruling

Section 2041(a)(2) provides that the gross estate includes the value of any property with respect to which the decedent has 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 general power of appointment by a transfer that, had the property been owned by the decedent, would cause the property to be includible in the decedent's gross estate under §§ 2035 through 2038.

Section 2041(b)(1) defines a general power of appointment as a power that is exercisable in favor of the individual possessing the power, his estate, his creditors, or the creditors of his estate. An exception is provided under

§ 2041(b)(1)(A) for powers held by an individual that are limited by an ascertainable standard relating to health, education, support, or maintenance of the holder of the power.

Section 2514(b) provides that the exercise or release of a general power of appointment created after October 21, 1942, is deemed to be a transfer of property by the individual possessing the power for gift tax purposes. The definition of a general power of appointment under § 2514(c) is generally the same as provided in § 2041(b)(1).

Section 20.2041-1(b)(1) of the Estate Tax Regulations states that 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 such fiduciary duties is not a general power of appointment. Section 25.2514-1(b)(1) of the Gift Tax Regulations contains a similar provision applicable for gift tax purposes.

Section 25.2511-1(g)(1) states that a transfer by a trustee of trust property in which he has no beneficial interest does not constitute a gift by the trustee. However, if the trustee has a beneficial interest in trust property, § 25.2511-1(g)(2) provides that a transfer of property by the trustee is not a taxable transfer if it is made pursuant to a fiduciary power the exercise or nonexercise of which is limited by a reasonably fixed or ascertainable standard which is set forth in the trust instrument.

In this case, discretionary distributions may be made from corpus of any trust created under Decedent's will for the proper support, maintenance, and comfort of any beneficiary. These discretionary distributions of corpus may only be made by the Independent Trustee. Trustee 2 and Trustee 3 may not participate in any decision to make these discretionary distributions. Thus, although Trustees 2 and 3 will be trustees over a trust in which they have a beneficial interest, Trustees 2 and 3 may not make discretionary distributions from Subtrust 1 to benefit themselves either directly or indirectly.

Accordingly, the appointment of Trustee 2 and Trustee 3 as individual co-trustees of Subtrust 1 will not result in Trustee 2 and Trustee 3 possessing a general power of appointment within the meaning of §§ 2514 or 2041, and the value of Subtrust 1 will not be includible in the gross estate of either Trustee 2 or

3 under § 2041 for federal estate tax purposes.

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.

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 the 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. Except as specifically ruled above, no opinion is expressed as to the federal tax consequences of the facts described above under the cited provisions or any other provisions of the Code or regulations.

A copy of this letter should be attached to any gift, estate, or generation-skipping transfer tax returns that you may file relating to these matters.

Sincerely yours,
GEORGE MASNIK, Chief, Branch 4
Office of the Associate Chief Counsel
Copy for (Passthroughs and Special Industries)

Enclosure:
Copy of §6110 purposes

cc: