

APPENDIX A

****Checklist for Nongrantor Trust Status= Created by William Friedman, Perkins Coie, Seattle, WA, to whom the authors are very grateful**

Section 671	<ul style="list-style-type: none">• Know your grantor. Be alert where the trust is created or funded by a trust, entity, or individual intermediary.
Section 672	<ul style="list-style-type: none">• Potential grantor trust powers effective only after a notice requirement or the expiration of a period of time may still trigger grantor trust status.• A power of the grantor to remove, substitute, or add a fiduciary (e.g., to remove a trustee and replace him or her) in such a way as to trigger grantor trust status will cause the trust to be a grantor trust.• Remember that an independent trustee is not necessarily an adverse party. Appointing an independent trustee, though it may be helpful, does not guarantee that the trust will be a nongrantor trust.• <u>Remember that powers granted to a grantor's spouse if the two were married at the time the power was created, or if not, during any period after the creation when the pair are married, are treated as held by the grantor.</u>
Section 673	<ul style="list-style-type: none">• Does the grantor (or the grantor's estate) have a 5% or greater reversionary interest in the trust, assuming maximum exercise of discretion in favor of the grantor?
Section 674	<ul style="list-style-type: none">• Does the grantor or a nonadverse party have the power to control the beneficial enjoyment of the trust property, including a power to:<ul style="list-style-type: none">○ Add or eliminate beneficiaries;○ Distribute or withhold corpus or income; or○ Appoint trust property?• If so, does the power to control beneficial enjoyment fit within one of the exceptions to grantor trust status? This may include a power (subject to certain exceptions):<ul style="list-style-type: none">○ To apply income to support a dependent;○ To affect beneficial enjoyment only after the occurrence of an event;○ Exercisable only by will;○ To allocate trust property among charitable beneficiaries;

	<ul style="list-style-type: none"> ○ To distribute corpus subject to a reasonably definite standard; ○ To distribute corpus to or for a current income beneficiary, if that distribution is chargeable against the beneficiary's share of corpus; ○ To withhold income temporarily, provided that the withheld income must ultimately be payable to certain designees; ○ To withhold income during a beneficiary's disability or minority; ○ To allocate between corpus and income; ○ To distribute, apportion, or accumulate income to or for a beneficiary, or to pay corpus to or for a beneficiary, if the trustee is an independent trustee; and ○ To allocate income if that power is limited by a reasonably definite external standard. • Does anyone hold a power to add beneficiaries (e.g., a lifetime power of appointment or trust protector's power to modify the trust)? If so, the above exceptions may not apply. • Can the grantor remove and replace the trustee or amend the trust in such a way that a trust that initially qualifies for the above exception then fails to qualify? If so, the above exceptions may not apply.
Section 675	<ul style="list-style-type: none"> • Does the grantor or a nonadverse party have the power to enable any person to deal with the trust for less than adequate and full consideration? • Does the grantor or a nonadverse party have the power to enable the grantor to borrow from the trust without adequate interest or security (including an indirect borrowing such as an installment sale to the trust)? • Has the grantor actually borrowed (directly or indirectly) from the trust under a loan that does not provide for adequate interest or security or that was made by a trustee related or subordinate to the grantor? • Does any person acting in a nonfiduciary capacity have the right to vote or control the investment of trust shares of a corporation in which the grantor has a significant voting interest? • Does any person acting in a nonfiduciary capacity have the power to acquire trust corpus by substituting other property of equivalent value? • Has the grantor retained the power to amend the administrative provisions of the trust such that the trust would be a grantor trust under Section 675?

Section 676	<ul style="list-style-type: none"> • Does the grantor or a nonadverse party hold the power to revest trust property in the grantor, including a power to reacquire trust property for less than FMV or to make distributions to the grantor?
Section 677	<ul style="list-style-type: none"> • Can trust income be actually or constructively distributed or held for distribution to the grantor or the grantor's spouse, including the payment of their legal obligations? • Can trust income be actually or constructively used to pay premiums on insurance on the life of the grantor or the grantor's spouse?
Section 678	<ul style="list-style-type: none"> • If the trust is otherwise a nongrantor trust, a beneficiary will be treated as the owner of part or all of the trust for income tax purposes if he or she: <ul style="list-style-type: none"> ○ Has a power to vest trust property in himself or herself; or ○ Previously had such a power, partially released or modified it, and after the release or modification retained a power that would cause a grantor to be treated as the trust's income tax owner under Sections 671-677.
During the Trust Administration	<ul style="list-style-type: none"> • Any transaction between a grantor and the trust should be carefully considered to avoid inadvertently triggering grantor trust status, e.g. direct or indirect loans or sales of property, whether to or from the trust. • Actual or constructive distributions to a dependent of the grantor can trigger grantor trust status.