Notice of Proposed Rulemaking

Corporate Reorganizations; Transfers of Assets or Stock Following a Reorganization

REG–165579–02

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide guidance relating to the effect of certain asset and stock transfers on the qualification of certain transactions as reorganizations under section 368(a). This document also contains proposed regulations that provide guidance relating to the continuity of business enterprise requirement and the definition of a party to a reorganization. These regulations affect corporations and their shareholders.

DATES: Written or electronic comments and requests for a public hearing must be received by June 1, 2004.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–165579–02), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–165579–02), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit comments electronically to the IRS Internet site at *www.irs.gov/regs*.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Rebecca O. Burch, (202) 622–7550; concerning submissions and the hearing, Sonya Cruse, (202) 622–4693 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

To qualify as a reorganization under section 368 of the Internal Revenue Code, a transaction must satisfy certain statutory requirements and nonstatutory requirements, including continuity of business enterprise (COBE). Section 368(a)(2)(C) provides that a transaction otherwise qualifying as a reorganization under section 368(a)(1)(A), (B), (C), or (G) will not be disqualified by reason of the fact that part or all of the acquired assets or stock are transferred to a corporation controlled by the acquiring corporation.

Section 354(a) provides that, in general, no gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization. Section 368(b) provides that the term "a party to a reorganization" includes a corporation resulting from a reorganization, and both corporations, in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another. Section 368(b) further provides that, in the case of a reorganization qualifying under section 368(a)(1)(B) or (C), if the stock exchanged for the stock or properties is stock of a corporation which is in control of the acquiring corporation, the term "a party to a reorganization" includes the corporation so controlling the acquiring corporation. In the case of a reorganization qualifying under section 368(a)(1)(A), (B), (C), or (G) by reason of section 368(a)(2)(C), the term "a party to a reorganization" includes the corporation controlling the corporation to which the acquired assets or stock are transferred. In the case of a reorganization qualifying under section 368(a)(1)(A) or (G) by reason of section 368(a)(2)(D), the term "a party to a reorganization" includes the controlling corporation. Finally, in the case of a reorganization qualifying under section 368(a)(1)(A) by reason of section 368(a)(2)(E), the term "a party to a reorganization" includes the controlling corporation.

On January 28, 1998, final regulations providing guidance regarding the COBE requirement, the definition of "a party to the reorganization," and the effect of certain transfers of acquired assets or stock on the qualification of a transaction as a reorganization under section 368(a)(1)(A), (B), (C), or (G) were published in the **Federal Register** (T.D. 8760, 1998–1 C.B. 803 [63 FR 4174]). Sections 1.368–1(d) and 1.368–2(f) and (k) were among those regulations.

Section 1.368–1(d) generally provides that, for a transaction to satisfy the COBE requirement, the issuing corporation must either continue a significant historic business of the target corporation or use a significant portion of the target corporation's assets in a business. For this purpose, the term issuing corporation generally means the acquiring corporation, but, in the case of a triangular reorganization, it means the corporation in control of the acquiring corporation. In addition, the issuing corporation is treated as holding all of the businesses and assets of all of the members of the qualified group. For this purpose, the qualified group is one or more chains of corporations connected through stock ownership with the issuing corporation, but only if the issuing corporation owns directly stock meeting the requirements of section 368(c) in at least one other corporation, and stock meeting the requirements of section 368(c) in each of the corporations (except the issuing corporation) is owned directly by one of the other corporations.

Section 1.368–2(f) provides that the term "a party to a reorganization" includes a corporation resulting from a reorganization, and both corporations in a transaction qualifying as a reorganization where one corporation acquires stock or properties of another corporation. In the case of a triangular reorganization, a corporation controlling an acquiring corporation is

a party to the reorganization when the stock of such controlling corporation is used in the acquisition of properties. Section 1.368–2(f) further provides that, if a transaction otherwise qualifies as a reorganization, a corporation remains a party to the reorganization even though stock or assets acquired in the reorganization are transferred in a transaction described in §1.368–2(k).

Section 1.368–2(k) provides that, except as otherwise provided, a transaction otherwise qualifying as a reorganization under section 368(a)(1)(A), (B), (C), or (G) (where the requirements of sections 354(b)(1)(A) and (B) are met) will not be disqualified by reason of the fact that part or all of the assets or stock acquired in the transaction are transferred or successively transferred to one or more corporations controlled in each transfer by the transferor corporation. For this purpose, a corporation is a controlled corporation if the transferor corporation owns stock of such corporation constituting control within the meaning of section 368(c). Furthermore, a transaction qualifying under section 368(a)(1)(A) by reason of the application of section 368(a)(2)(E) is not disqualified by reason of the fact that part or all of the stock of the surviving corporation is transferred or successively transferred to one or more corporations controlled in each transfer by the transferor corporation, or because part or all of the assets of the surviving corporation or the merged corporation are transferred or successively transferred to one or more corporations controlled in each transfer by the transferor corporation. Again, for this purpose a corporation is controlled by the transferor corporation if the transferor corporation owns stock of such corporation constituting control within the meaning of section 368(c).

The preamble to the January 28, 1998, regulations explains that assets or stock acquired in certain reorganizations may be transferred among members of a qualified group, and in certain cases to partnerships, without preventing the reorganization from satisfying COBE. It also states that the IRS and Treasury Department believe that the COBE requirements adequately address the remote continuity of interest issues raised in Groman v. Commissioner, 302 U.S. 82 (1937), and Helvering v. Bashford, 302 U.S. 454 (1938), and, therefore, that the final regulations do not separately articulate rules for remote continuity. The preamble also states that §1.368–1(d), being limited to a discussion of the COBE requirement, does not address satisfaction of the explicit statutory requirements of a reorganization, which is the subject of §1.368–2. Finally, the preamble states that no inference is to be drawn as to whether transactions not described in §1.368–2(k) otherwise qualify as reorganizations.

In Rev. Rul. 2001–24, 2001–1 C.B. 1290, and Rev. Rul. 2002–85, 2002–2 C.B. 986, the IRS addressed the effect of certain transfers not described in §1.368–2(k) on certain transactions that otherwise qualify as reorganizations. In Rev. Rul. 2001–24, the IRS considered whether a transfer of the stock of the acquiring corporation to a corporation wholly owned by the issuing corporation following a transaction that otherwise qualified as a reorganization under section 368(a)(1)(A) by reason of section 368(a)(2)(D) (a forward triangular merger) prevented the transaction from qualifying as such. The IRS ruled that the transfer of stock of the acquiring corporation did not cause the issuing corporation to be treated as not in control of the acquiring corporation for purposes of section 368(a)(2)(D), and did not cause the issuing corporation to fail to be treated as a party to the reorganization. In arriving at these conclusions, the ruling notes that section 368(a)(2)(C) and §1.368–2(k) do not specifically address the facts of the ruling and section 368(a)(2)(C) does not preclude the transaction from qualifying as a reorganization. The ruling states that, by its terms, section 368(a)(2)(C) is a permissive, rather than an exclusive or restrictive, section. Therefore, the transfer of acquiring corporation stock to the issuing corporation's wholly owned subsidiary did not prevent the transaction from qualifying as a forward triangular merger.

In Rev. Rul. 2002–85, the IRS considered whether an acquiring corporation's transfer of acquired assets to a subsidiary controlled by the acquiring corporation would prevent the acquiring corporation's acquisition of those assets from qualifying as a reorganization under section 368(a)(1)(D). After noting that section 368(a)(2)(C) is permissive rather than exclusive or restrictive, the ruling reasons that, because §1.368–2(k) restates and interprets section 368(a)(2)(C), §1.368–2(k) also should be viewed as permissive and not exclusive or restrictive. The ruling concludes that the absence of section 368(a)(1)(D) from §1.368–2(k) does not prevent a corporation from remaining a party to a reorganization even if the acquired stock or assets are transferred to a controlled subsidiary. The ruling states that, like reorganizations under sections 368(a)(1)(A) and 368(a)(1)(C), reorganizations under section 368(a)(1)(D) are asset reorganizations. In reorganizations under sections 368(a)(1)(A) and reorganizations under section 368(a)(1)(C), the original transferee is treated as a party to a reorganization, even if the acquired assets are transferred to a controlled subsidiary of the original transferee. Because the differences between reorganizations under section 368(a)(1)(D) on the one hand and reorganizations under sections 368(a)(1)(A) and (C) on the other hand do not warrant treating the original transferee in a transaction that otherwise satisfies the requirements of a reorganization under section 368(a)(1)(D) differently from the original transferee in a reorganization under section 368(a)(1)(A) or (C) for purposes of section 368(b), the ruling concludes that the original transferee in a transaction that otherwise satisfies the requirements of a reorganization under section 368(a)(1)(D) is treated as a party to the reorganization, notwithstanding the original transferee's transfer of acquired assets to a controlled subsidiary of the original transferee. The ruling concludes that the transaction qualifies as a reorganization under section 368(a)(1)(D).

Explanation of Provisions

As described above, in the regulations under section 368 and in revenue rulings, the IRS and Treasury Department have considered the effect of transfers of assets or stock to controlled corporations on the qualification of a transaction as a reorganization in a variety of situations not addressed by section 368(a)(2)(C). In each of these cases, the IRS and Treasury Department have concluded that the transfers did not cause the transaction to fail to qualify as a reorganization. These conclusions reflect the fact that, in all of the situations considered, the transactions, in form, sat-

isfy the statutory requirements of a reorganization and, in substance, constitute readjustments of continuing interests in the reorganized business in modified corporate form. None of the transactions involve the transfer of the acquired stock or assets to a "stranger," a result inconsistent with reorganization treatment. H.R. Rep. No. 83–1337, A134 (1954).

The IRS and Treasury believe that certain transfers of stock and assets to controlled corporations are consistent with reorganization treatment, even though in some cases the transfers involve a type of reorganization not included in section 368(a)(2)(C). The effect of transferring stock or assets to a controlled corporation on the qualification of a transaction as a reorganization should not depend on the specific reorganization provision at issue. Given that section 368(a)(2)(C) was intended to be permissive rather than exclusive with respect to certain transfers of stock or assets to a controlled corporation following a transaction that would qualify as a reorganization without regard to the transfer, the IRS and Treasury believe it is appropriate to extend its principles to certain transfers of stock and assets after all types of reorganizations.

Accordingly, these regulations propose to amend §1.368–2(k) to provide that a transaction otherwise qualifying as a reorganization under section 368(a) will not be disqualified as a result of the transfer or successive transfers to one or more corporations controlled in each transfer by the transferor corporation of part or all of (i) the assets of any party to the reorganization, or (ii) the stock of any party to the reorganization other than the issuing corporation. In addition, these proposed regulations include amendments to the COBE regulations under §1.368–1(d) and amendments to the definition of a party to a reorganization under §1.368–2(f) that reflect §1.368–2(k) as proposed.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and 8 copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Rebecca O. Burch of the Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in their development.

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Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.368–1 is amended as follows:

1. Paragraph (d)(4)(i) is redesignated as paragraph (d)(4)(i)(A) and revised.

2. New paragraph (d)(4)(i)(B) is added.

3. Paragraph (d)(5), introductory text, is redesignated as paragraph (d)(5)(i), and revised.

4. In newly designated paragraph (d)(5)(i), Examples 7, 8, 9, 10, 11, and 12 are redesignated as Examples 8, 9, 10, 11, 12, and 13, respectively.

5. In newly designated paragraph (d)(5)(i), the first sentence in Examples 9, 10, and 12 is revised.

6. In newly designated paragraph (d)(5)(i), a new *Example 7* is added.

7. New paragraph (d)(5)(ii) is added.

The revisions and additions read as follows:

§1.368–1 Purpose and scope of exception of reorganization exchanges.

* * * * *

(d) * * *

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(4) * * *

(i) *Businesses and assets of members of a qualified group*—(A) *In general.* The issuing corporation is treated as holding all of the businesses and assets of all of the members of the qualified group, as defined in paragraph (d)(4)(ii) of this section.

(B) *Special rule.* The issuing corporation is treated as holding all of the businesses and assets of the surviving corporation after a reorganization that otherwise satisfies the requirements of a reverse triangular merger (as defined in §1.358–6(b)(2)(iii)), the acquired corporation after a reorganization that otherwise satisfies the requirements of section 368(a)(1)(B), and the acquiring corporation after a reorganization that otherwise satisfies the requirements of a forward triangular merger (as defined in §1.358–6(b)(2)(i)), a triangular B reorganization (as defined in §1.358–6(b)(2)(iv)), a triangular C reorganization (as defined in §1.358–6(b)(2)(ii)), or a reorganization under section 368(a)(1)(G) by reason of section 368(a)(2)(D), provided that members of the qualified group own, in the aggregate, stock of the surviving, acquired, or acquiring corporation meeting the requirements of section 368(c). This

paragraph (d)(4)(i)(B) applies to transactions occurring after the date these regulations are published as final regulations in the **Federal Register**.

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(5) *Examples*. (i) The following examples illustrate this paragraph (d). All the following corporations have only one class of stock outstanding.

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Example 7. (i) *Facts*. The facts are the same as in *Example 6*, except that, instead of P acquiring the assets of T, HC acquires all of outstanding stock of T in exchange solely for voting stock of P. In addition, as part of the plan of reorganization, HC transfers 10 percent of the stock of T to each of subsidiaries S–1 through S–10. Finally, T will continue to operate an auto parts distributorship. Without regard to whether the transaction satisfies the COBE requirement, the transaction qualifies as a triangular B reorganization.

(ii) *Continuity of business enterprise*. Under paragraph (d)(4)(i)(B) of this section, P is treated as holding all the assets and conducting the business of T because S–1 through S–10, members of the qualified group, own stock of T meeting the requirements of section 368(c). Therefore, the COBE requirement of paragraph (d)(1) of this section is satisfied because P is treated as continuing T's business.

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Example 9. * * * (i) *Facts*. The facts are the same as *Example 8*, except that S–3 transfers the historic T business to PRS in exchange for a 1 percent interest in PRS.

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Example 10. * * * (i) *Facts*. The facts are the same as *Example 8*, except that S–3 transfers the historic T business to PRS in exchange for a 33 1/3 percent interest in PRS, and no member of P's qualified group performs active and substantial management functions for the ski boot business operated in PRS.

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Example 12. * * * (i) *Facts*. The facts are the same as *Example 11*, except that S–1 transfers all the T assets to PRS, and P and X each transfer cash to PRS in exchange for partnership interests. * * *

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(ii) *Effective dates*. Paragraph (d)(5) *Example 6*, and *Example 8* through *Example 13* apply to transactions occurring after January 28, 1998, except that they do not apply to any transaction occurring pursuant to a written agreement which is binding on January 28, 1998, and at all times thereafter. Paragraph (d)(5) *Example 7* applies to transactions occurring after the date these regulations are published as final regulations in the **Federal Register**.

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Par. 3. Section 1.368–2 is amended by:

1. Adding three sentences at the end of paragraph (f).

2. Revising paragraph (k).

The additions and the revision read as follows:

§1.368–2 Definition of terms.

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(f) * * * If a transaction otherwise qualifies as a reorganization under section 368(a)(1)(B) or as a reverse triangular merger (as defined in §1.358–6(b)(2)(iii)), the target corporation (in the case of a transaction that otherwise qualifies as a reorganization under section 368(a)(1)(B)) or the surviving corporation (in the case of a transaction that otherwise qualifies as a reverse triangular merger) remains a party to the reorganization even though its stock or assets are transferred in a transaction described in paragraph (k) of this section. If a transaction otherwise qualifies as a forward triangular merger (as defined in §1.358–6(b)(2)(i)), a triangular B reorganization (as defined in §1.358–6(b)(2)(iv)), a triangular C reorganization (as defined in §1.358–6(b)(2)(ii)), or a reorganization under section 368(a)(1)(G) by reason of section 368(a)(2)(D), the acquiring corporation remains a party to the reorganization even though its stock is transferred in a transaction described in paragraph (k) of this section. The two preceding sentences apply to transactions occurring after the date these regulations are published as final regulations in the **Federal Register**.

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(k) *Certain transfers of assets or stock in reorganizations*—(1) *General rule*. A transaction otherwise qualifying as a reorganization under section 368(a) shall not be disqualified as a result of the transfer or successive transfers to one or more corporations controlled in each transfer by the transferor corporation of part or all of—

(i) The assets of any party to the reorganization; or

(ii) The stock of any party to the reorganization other than the issuing corporation (as defined in §1.368–1(b)).

(2) *Control*. Control is defined under section 368(c).

(3) *Examples*. The following examples illustrate the application of this paragraph (k). P is the issuing corporation and T is the target corporation. P has only one class of stock outstanding. The examples are as follows:

Example 1. Transfers of acquired assets to controlled corporations after a reorganization under section 368(a)(1)(C). (i) *Facts*. T operates a bakery that supplies delectable pastries and cookies to local retail stores. The acquiring corporate group produces a variety of baked goods for nationwide distribution. P owns 80 percent of the stock of S–1. Pursuant to a plan of reorganization, T transfers all of its assets to S–1 solely in exchange for P stock, which T distributes to its shareholders. S–1 owns 80 percent of the stock of S–2, and S–2 owns 80 percent of the stock of S–3, which also makes and supplies pastries and cookies. Pursuant to the plan of reorganization, S–1 transfers all of the T assets to S–2, and S–2 transfers all of the T assets to S–3.

(ii) *Analysis*. Under this paragraph (k), the transaction, which otherwise qualifies as a reorganization under section 368(a)(1)(C), is not disqualified by reason of the fact of the successive transfers of all of the T assets to S–2, and from S–2 to S–3 because, in each transfer, the transferee corporation is controlled by the transferor corporation.

Example 2. Transfers of acquired assets to controlled corporations after a reorganization under section 368(a)(1)(D). (i) *Facts*. The facts are the same as *Example 1* except that P also owns 100 percent of the stock of T before the transaction, and T transfers all of its assets to S–1 solely in exchange for S–1 stock, which T distributes to P.

(ii) *Analysis*. Under this paragraph (k), the transaction, which otherwise qualifies as a reorganization under section 368(a)(1)(D), is not disqualified by reason of the fact of the successive transfers of all of the acquired assets from S–1 to S–2, and from S–2 to S–3 because, in each transfer, the transferee corporation is controlled by the transferor corporation.

Example 3. Transfer of acquiring stock to controlled corporation after a reorganization under section 368(a)(1)(A). (i) *Facts*. The facts are the same as *Example 1* except that P owns 80 percent of the stock of S–4 and, pursuant to the plan of reorganization, S–1 acquires all of the T assets as a result of the merger of T with and into S–1. In addition, in the merger, the T shareholders receive consideration 50 percent of which is stock of P and 50 percent of which is cash. Finally, pursuant to the plan of reorganization, P transfers all of the S–1 stock to S–4.

(ii) *Analysis*. Under this paragraph (k), the transaction, which otherwise qualifies as a reorganization under section 368(a)(1)(A) by reason of section 368(a)(2)(D), is not disqualified by the transfer of all of the S–1 stock to S–4 because, in the transfer, the transferee corporation is controlled by the transferor corporation.

Example 4. Transfers of acquired stock to controlled corporations after a reorganization under section 368(a)(1)(B). (i) *Facts*. The facts are the same as *Example 1* except that S–1 acquires all of the T stock rather than the T assets, and as part of the plan of reorganization, S–1 transfers 50 percent of the T stock to S–2, and S–2 transfers that T stock to S–3.

(ii) *Analysis*. Under this paragraph (k), the transaction, which otherwise qualifies as a reorganization under section 368(a)(1)(B), is not disqualified by the successive transfers of part of the acquired stock from

S–1 to S–2, and from S–2 to S–3 because, in each transfer, the transferee corporation is controlled by the transferor corporation.

Example 5. Transfers of acquiring corporation stock to controlled corporations after a reorganization under section 368(a)(1)(B). (i) *Facts.* The facts are the same as *Example 4* except that P owns 80 percent of the stock of S–4, and S–4 owns 80 percent of the stock of S–5, and, as part of the plan of reorganization, following the acquisition of T stock by S–1, P transfers 10 percent of its S–1 stock to S–4, and S–4 transfers that S–1 stock to S–5.

(ii) *Analysis.* Under this paragraph (k), the transaction, which otherwise qualifies as a reorganization under section 368(a)(1)(B), is not disqualified by reason of the successive transfers of S–1 stock to S–4, and from S–4 to S–5 because, in each transfer, the transferee corporation is controlled by the transferor corporation.

Example 6. Transfer of acquired stock to a partnership. (i) *Facts.* The facts are the same as in *Example 4*. However, as part of the plan of reorganization, S–2 and S–3 form a new partnership, PRS. Immediately thereafter, S–3 transfers all of its T stock to PRS in exchange for an 80 percent partnership interest, and S–2 transfers cash to PRS in exchange for a 20 percent partnership interest.

(ii) *Analysis.* This paragraph (k) describes the successive transfers of T stock to S–3, but does not describe S–3's transfer of T stock to PRS. Therefore, the characterization of this transaction must be determined under the relevant provisions of law, including the step transaction doctrine. *See* §1.368–1(a). The transaction fails to meet the control requirement of a reorganization described in section 368(a)(1)(B) because immediately after the acquisition of the T stock, the acquiring corporation does not have control of T.

(4) *Effective date.* This paragraph (k) applies to transactions occurring after the date these regulations are published as final regulations in the **Federal Register**.

Mark E. Matthews,
Deputy Commissioner for Services and Enforcement.

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