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Clouds on the Horizon as ERISA Turns 40

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CUTTING BACK TAX INCENTIVES

How Retirement Plans Affect the Deficit

This article reviews proposals that (1) focus on deficit reduction and tax reform, or (2) make larger systemic changes that will change the role of tax-advantaged retirement plans.

Deficit reduction measures can have a transformative effect on retirement plans. Legislators and policymakers know that the amount of tax revenue forgone on account of retirement plans is very large and this makes them an easy target for revenue raising initiatives. In the 2015 Budget of the United States, the U.S. Office of Management and Budget projected that forgone revenue attributable to defined contribution plans will be \$61 billion for 2015 and increase annually thereafter, so that, for the period 2015–2019, the aggregate expenditure will be \$414 billion. Defined benefit plans are expected to add \$42 billion and \$235 billion, respectively, to these amounts, while IRAs would increase the overall retirement savings tax expenditure by an additional \$17.5 and \$98 billion, respectively.

Retirement saving through a §401(k) plan is tax-advantaged because the government generally taxes

neither the original plan contributions nor the investment returns on those contributions until they are actually paid out. Because the budget process looks at revenues and expenditures within a 10-year window, and the payment of most retirement benefits occurs outside that window, the amount of taxes postponed because of §401(k) contributions tends to be viewed as a permanent expenditure. As pressure builds to control the federal deficit, legislative proposals will be considered to reduce the tax cost of the retirement plan expenditure.

I.R.C. Contribution Limits

The Internal Revenue Code of 1986, as amended (I.R.C.) already contains various limitations on plan contributions that could be adjusted from their 2014 and 2015 levels for the purpose of reducing tax expenditures and raising revenue. For example, in the case of defined contribution plans, the mainstay of the current system, the maximum amount of annual contributions from all sources for any employee will be \$53,000 in 2015, and the limit increases to \$59,000 if the employee is at least 50 years old. The limit on annual contributions includes elective deferrals by participants, which themselves are capped at \$18,000. Another limitation subject to reduction by legislation is the cap on the plan sponsor's deduction for contributions to a §401(k) plan equal to 25% of the compensation otherwise paid during the taxable year to the plan's participants. Further, 2015 compensation in excess of \$265,000 cannot be considered in calculating contributions to a participant's plan account.

Over the years, Congress has raised or lowered these amounts depending on the needs of the time. For example, the last major tax reform effort in 1986

reduced elective deferrals from \$30,000 to \$7,000. The Tax Reform Act of 2014 proposed by Representative Dave Camp, retiring chairman of the House Ways and Means Committee, is less drastic and merely freezes the various limits that apply to defined contribution plans until 2024 at which time they would be allowed to rise in accordance with cost of living increases. It is estimated that this restriction would raise \$63.4 billion in revenue over 10 years. Under the Camp proposal, there would be a further change to the current annual ceiling on elective deferrals (\$18,000 in 2015) under which only half of the contribution (\$9,000 in 2015) could be made on a pre-tax-basis, with the remainder being deferred as after-tax Roth contributions. This would raise an additional \$144 billion in revenue over 10 years by forcing some plan participants to pay higher taxes up-front.

The Obama Administration would also like to reduce tax expenditures related to the private retirement plan system, and its FY 2015 revenue proposals put a new spin on the time-tested technique of reducing limits by seeking to cap the aggregate accumulation in tax-favored retirement plans benefitting an individual at approximately \$3.2 million. The limit is intended to provide a maximum annual annuity payment of \$210,000 for a 62-year-old plan participant. Accordingly, the limit on annual contributions would vary with age and need to be calculated annually. Plan sponsors and IRA trustees would be expected to report account balances and contributions so as to keep tabs on those making excess contributions. Taxpayers would be required to withdraw excess contributions or pay income tax on the excess amount both in the year contributed and when later distributed.

Administration Proposal to Limit the Value of Tax Deductions

The Administration's FY 2015 budget also takes aim at §401(k) tax expenditures in another way, although it is cloaked as a more general tax increase. The Administration proposes to limit the value of specified tax deductions and exclusions to 28% of the amount of the deduction or exclusion that would otherwise reduce taxable income subject to the highest tax bracket of 39.6%. This is not a new concept. What is new is the inclusion of §401(k) contributions (as well as health care contributions), regardless of who makes them, in the list of affected tax items. Thus, a taxpayer subject to the top statutory rate of 39.6% would pay an 11.6% tax (39.6% – 28%) on the value of any §401(k) contributions. Under this regime, those receiving the highest contributions to their §401(k) accounts in 2015 could be subject to an additional \$6,844 (\$59,000 × 11.6%) in tax liability. When originally proposed in the 2013 budget, critics pointed out

that this restriction results in double taxation, because the same plan contributions would be taxed again when withdrawn from the plan. The FY 2015 version of the proposal addresses this by adjusting a taxpayer's basis in the retirement plan to reflect the additional tax imposed.

Tax Reform Proposals

20/20 Proposal. Proposed reforms driven by purely fiscal concerns are illustrated by the December 2010 report of the National Commission on Fiscal Responsibility and Reform that recommended limiting the maximum excludible contribution to a defined contribution plan to the lesser of \$20,000 or 20% of income. This proposal, which covers the exclusion from taxable income of employee elective deferrals, as well as nontaxable employer contributions, is sometimes referred to as the "20/20 Cap." Under this formula, if you earn \$100,000 per year, the most that can be put into your §401(k) account is \$20,000. The 20/20 Cap is hard on high earners.

Refundable Tax Credit. Other proposals are motivated as much by policy concerns as by deficit reduction. There is a much-discussed mechanism to shift the demographics of those receiving the benefits of retirement plan tax expenditures from a perceived slant favoring highly compensated employees. Under this approach, all employer and employee contributions would be included in gross income. Existing deductions and exclusions would be replaced with a flat-rate refundable tax credit to be deposited directly into a participant's plan account. In contrast to other proposals, contribution limits would not change. However, the refundable tax credit would benefit low earners at the expense of the more highly compensated, and critics have noted that this would diminish the incentive many employers have to maintain qualified plans.

Consequences of Cutting Tax Incentives

Employer Reaction. Organizations, such as the Employee Benefit Research Institute (EBRI), that have attempted to analyze the reaction of employers to proposed reductions in the current retirement plan incentive structure have concluded that the result will be either modifications to existing plans that reduce the level of employer contributions or outright plan termination. Plan termination is particularly likely in the case of small plan sponsors that utilize cross-tested plans, because a lower level of employer contributions will not generate enough tax savings to justify continuance of the plan. Even proponents of change admit that the result will be a negative effect on employers' willingness to offer retirement plans.

Wealthy Employees. High-income employees will be the group most affected by scaling back 401(k) contribution or deduction limits, although some argue that this group would have saved for retirement anyway and does not require an incentive to contribute to a plan. As Senator Orrin Hatch has said, however, “Trying to help lower wage workers save for retirement by reducing §401(k) and IRA contribution limits [and thereby penalizing higher-wage workers] is like trying to cure a headache with a guillotine.” Still, if §401(k) and other plans are made less attractive for higher-income households, they can be expected to seek out Roth options, as well as tax-exempt bonds and insurance products that forgo an immediate deduction but can temporarily shelter investment earnings from income tax.

Low-Income Workers. The proposals to reduce §401(k) incentives would likely affect lower-income workers by causing them to reduce their contributions. Surveys indicate that low-income households have a propensity to act in ways that are not necessarily consistent with optimizing financial outcomes. Thus, members of such households have a tendency to view the tax deductions generated by their contributions to a plan as very important and will reduce or eliminate their retirement contributions to the extent that the ability to deduct them is restricted.

The end result of these reactions could be a smaller universe of §401(k) and other retirement plans.

Summing Up Tax Reform

Current tax incentives encourage employers to offer retirement plans on a voluntary basis and motivate individuals to save for retirement. Analysis by EBRI projects that if this support is cut back, reductions in §401(k) balances at retirement will result at all levels of the income spectrum. It turns out that tax incentives are important for low-wage earners, as well as higher-paid employees. In other words, the current system has significantly contributed to retirement security and is popular with all income classes.

There was, for a time, a sense that the Administration’s proposal to impose a broad limit on tax exclusions (including but not limited to §401(k) contributions) was gaining traction and was the cutback on retirement plan incentives most likely to be enacted. This was due to the fact that this proposal does not specifically identify which deductions would be curbed and enables politicians to avoid criticism for undermining the current system.

The Tax Reform Act of 2014 proposed by Chairman Camp contained a general limitation on tax exclusions similar to that proposed by the Administration. This may be the rare issue on which Democrats and Republicans will find agreement. Nevertheless,

certain senior Republican officeholders, such as Senator Hatch, have expressed skepticism regarding proposals that would reduce existing contribution levels, because the current system is seen as having produced beneficial results. It is unclear how this will play out.

PROPOSALS FOR COMPETING SYSTEMS

It is commonly said that under the current private retirement plan system, half of all workers have no pension plan and, of those who do, only 20% have a plan that provides a guaranteed lifetime benefit. It is also argued that §401(k)-style plans have failed to deliver on their potential, not only because many workers lack access to them, but also because savings rates are too low and management fees too high. Further, volatile financial markets threaten to reduce account balances that regained their pre-recession levels only a few years ago, and longer life spans stretch what savings there are even thinner. According to some observers, all this means that fewer than half of American workers will have enough income to adequately maintain living standards in retirement.

This glass half-empty perception drives policymakers and advocates to the conclusion that something needs to be done, particularly to improve accessibility, even though all employees have the underutilized option to make IRA contributions. There is a broad consensus that default mechanisms (i.e., automatic enrollment and automatic escalation of contribution rates) will improve the employee take-up rate. Once government power is brought to bear on this issue, those who believe in the power of regulation seek to do more by proposing mandatory contributions, pooling of assets, government controlled or influenced investments, taxpayer-subsidized investment returns and distributions restricted to lifetime annuities.

Administration Initiatives

In order to promote its goal of greater retirement savings by a broader range of employees, it can be expected that the Obama Administration will continue its push for Automatic IRAs. This proposal utilizes an employer’s payroll system to require salary reduction contributions to IRAs and depends on employee inertia not to opt out. As proposed by the White House, Auto-IRAs would be mandatory for all employers with more than 10 employees if they have been in business for two years and do not maintain a pension plan. Since employees who are at least 18 years old with three months of service would be eligible, most employers would need to modify their plans or have an Auto-IRA plan in addition to a §401(k) plan.

In its FY 2015 version of the proposal, the Administration’s Automatic IRA proposal includes three key

features: First, the bill sets the default contribution at 3% of compensation. Second, employees would have the choice of contributing to either a traditional pre-tax IRA or Roth IRA. If no choice is made, post-tax Roth accounts would be the default vehicle, so that withdrawals would not be taxable. This default rule addresses the greater likelihood that lower-income workers will withdraw money before age 59½. Finally, the Auto-IRA provider would be selected by the employer or the employer could allow each participating employee to designate the provider. A handful of default investments would be prescribed by statute or regulation.

Despite consensus on the need for greater retirement savings, the Auto-IRA has elements that are problematic at either end of the political spectrum, making the prospects for enactment unclear.

MyRA Initiative

To demonstrate executive action encouraging the savings habit pending enactment of Auto-IRA legislation, the President has ordered the Treasury to create a new “starter” retirement savings program called “myRA.” These are Roth accounts for people who do not have employer-sponsored plans. Initially they will be offered through employers who volunteer to participate in the program. Married couples can invest if they make less than \$191,000. Once the balance of a myRA reaches \$15,000 (or after 30 years), however, participants will be required to roll it over to a traditional private-sector IRA.

MyRAs will be invested in a Treasury bond that offers the same interest rate return as the federal Thrift Savings Plan, a rate that historically has ranged from 1½% to 3½% annually. An initial investment can be as low as \$25.00 and subsequent contributions as low as \$5.00. While the overall limits make this a small step in resolving the coverage issue, it is hoped that the low investment thresholds will open up access to tax-advantaged retirement savings vehicles to low-income workers. However, the program has been criticized for using worker money to support government bonds when better returns are available from private-sector investments. The voluntary nature and small scale of the myRA initiative make it seem like a symbolic gesture.

Pension System Reform at the Federal Level

We turn now to efforts aimed at achieving greater retirement saving and broader coverage by establishing new retirement systems. To help prepare workers for retirement, Sen. Tom Harkin has proposed the USA Retirement Funds Act establishing a new univer-

sal retirement system built around the following principles: (1) automatic enrollment; (2) a regular stream of income starting at retirement age; (3) financing through an employer’s payroll system consisting of employee deferrals and voluntary employer contributions; and (4) management by privately run, licensed and regulated entities established pursuant to legislation.

The lifetime annuities to be paid under this new system would be based on the total contributions to a participant’s account supplemented by investment performance and government credits for low-wage earners. Up to \$10,000 per year of participant contributions would be automatically made at the rate of 3% of compensation in 2015 escalating to 6% by 2017. While participants would be allowed to decrease contributions or opt out of the system at any time, such an election would be effective for no more than two years, so that, unless an employee opts out again, employers would need to resume the maximum level of employee deferrals at the end of such period.

Like the Automatic IRA initiative, the Harkin proposal is intended to appeal to employers by relieving them of fiduciary responsibility, although it does entail administrative burdens, such as annual notification of employees and deadlines for depositing contributions. Moreover, employer participation would be mandatory if the employer has 10 or more employees and does not already offer a plan with a 6% level of employee contributions and a lifetime income option. Very few employer-sponsored plans offer both of these features which means that many of these plans would need to be amended if an employer wished to avoid the mandate of the USA Retirement Funds system.

Proposed Expansion of Federal Thrift Savings Plan

Senator Marco Rubio has proposed opening up the federal Thrift Savings Plan to non-government employees. In one sense, this seems similar to Senator Harkin’s USA Retirement Funds writ large. Like a §401(k) plan, the federal Thrift Savings Plan enables participants to make pre-tax deferrals in order to save for retirement. Currently, its participants are limited to federal employees and the military who benefit from the plan’s low fees, diverse investment options and simplicity. Senator Rubio would make the Thrift Savings Plan’s presumed advantages available to workers who do not have access to an employer-sponsored plan. Unfortunately, this could seriously undercut the incentive to establish employer-sponsored plans.

The Thrift Savings Plan is already, by far, the largest defined contribution plan in the nation, but its size could easily double or triple if Senator Rubio’s pro-

posal were to be approved. This growth, however, could cause it to lose some of its touted advantages. A spokesperson for the plan's governing board has indicated that obtaining data from millions of private employers would require a different set of operational capabilities. This observation means that Senator Rubio's proposal could significantly increase costs for all of the plan's participants.

Part of the reason the Thrift Savings Plan's costs are so low is that its decentralized administration is subsidized by the federal agencies that employ its participants and handle administrative matters such as distribution of enrollment materials and processing elections. If the plan is extended to employees of private employers, it is unclear whether the new participants will have to pay for these services. Also, the U.S. Treasury adds value to the Thrift Savings Plan by cutting checks, executing electronic funds transfers and providing accounting services for the government securities fund. Whether these services, currently paid for by taxpayers, would be passed on to private-sector participants is an open question. Government subsidization of these services on behalf of private-sector workers would make it difficult for private employer plans to compete.

State-Sponsored System Reform

NCPERS Proposal. The National Conference on Public Employee Retirement Systems (NCPERS), a trade organization for public-sector pension funds, has proposed amending ERISA and state laws to allow for the establishment of state-administered multiple-employer cash balance plans covering private-sector workers. Variations of the NCPERS proposal are being considered by several state legislatures. The target group this proposal seeks to benefit consists of employees of small employers that do not have access to a pension plan through their employer. The assumption is that they would benefit from a state's bargaining power, experience and expertise. Notwithstanding the substantial role of government in such a plan's operation, however, it would be structured as a multiple-employer plan with respect to which there would be voluntary employer participation and employer contributions. This means that the plan would be subject to ERISA, including the fiduciary duties, minimum funding requirements and reporting it imposes on sponsoring employers.

The NCPERS Secure Choice Pension (SCP) initiative is a bolder variation of prior proposals for state-run plans (involving voluntary contributions to defined contribution plans) in that it entails a defined benefit design under which a periodic fixed benefit would be paid for life. This benefit would be determined by applying actuarial conversion factors to the

value of a hypothetical account maintained for each participant. This account would consist of annual employer and/or employee contributions equal to 6% of compensation plus minimum interest credits of 3% per year, regardless of actual investment earnings. Interest credits equal to a rate determined by the yield on 10-year Treasury Bills plus 2% would be made if this rate exceeded 3%.

There is uncertainty as to how SCP plans would operate where assets are not sufficient to fund the promised lifetime benefit. One possibility that is mentioned in this regard is cutting back benefits, but this may not be realistic if participants have been promised state-backed benefits. Extending amortization periods for funding purposes is another technique that is mentioned. Ultimately, however, the states will be subject to the unfunded liabilities of SCP plans. The possibility that the cost of private-sector pensions would be shifted to taxpayers at a time when states are struggling to meet the demands of their own public employee systems is a major political weakness of the NCPERS proposal.

California SCP. In September 2012, the California legislature took the first steps to authorize an Automatic IRA program to be administered by the state having certain similarities to the NCPERS proposal. Under the California version, employers with five or more employees and no other retirement plan will be required to participate, and their employees will be automatically enrolled and contribute 3% of pay through the employer's payroll system unless they opt out. However, despite the pleas of advocates, no employer contributions will be permitted because of the fear that this would create an ERISA plan and subject contributing employers to ERISA responsibilities.

Like the NCPERS proposal, the California Secure Choice program will provide a guaranteed investment return, but this must be achieved by restricting equity investments, investing in U.S. Treasury securities and purchasing private insurance. Contributions will be pooled and invested by state-selected managers. Implementation of the program is conditioned on receiving an IRS ruling that contributions will be pre-tax and DOL approval that the program is not an ERISA plan.

Other State Initiatives. In Massachusetts, 2012 legislation authorized the state treasurer to create a multiple-employer defined contribution plan that will receive contributions from non-profit employers employing fewer than 20 persons, as well as from their employees. The plan will be managed by the state treasurer separately from the state's public-employee pension fund and will allow employees to direct the investment of their accounts from an investment menu selected by the treasurer. Like its California counterpart, the Massachusetts legislation requires IRS ap-

proval of the plan to ensure that it complies with ERISA.

According to the National Conference of State Legislatures, Connecticut, Illinois, Maryland, Michigan, New York, Pennsylvania, Rhode Island, Vermont, Virginia, Washington State, and West Virginia have also considered pension legislation for private-sector employees, although in some cases such proposals only authorize study of the matter and in others the proposals were defeated or tabled.

Proposals from Academia

Certain advocates would like to replace the current employer-based system with a government-controlled plan along the lines of Social Security. An example of this approach is Professor Teresa Ghilarducci's plan to eliminate existing tax breaks for retirement plans and use the savings to subsidize a 5% contribution on behalf of all employees to retirement accounts serving as a universal supplement to Social Security. Participants in existing employer-sponsored plans could continue such participation if the plan met more stringent standards, such as a contribution rate of at least 5%, a ban on early withdrawals, and conversion into an annuity at retirement. Anyone without an employer plan would automatically be enrolled in a "Guaranteed Retirement Account" to which employees and employers would each contribute 2.5% of pay. The government would then provide participants with a modest tax credit to offset their contributions. Investment returns would be guaranteed by the government at a rate approximating the growth rate in gross domestic product. Individual accounts resulting from this system would be pooled and professionally managed for fees anticipated to be lower than on conventional retirement accounts.

The professor has asked what's not to like about her scheme. The simple answer is that it only provides about half the 10% median contribution rate (consisting of employee and employer contributions) that exists under the current private plan system. In other words, retirement benefits would be downsized when the concern is with increasing them.

Spark Institute's USERP Proposal

Focusing on the under-served market of small employers, the Spark Institute has proposed a Universal Small Employer Retirement Savings Program (USERSP) for employers with fewer than 100 employees. USERSP features include automatic employee contributions and continued escalation with a participant opt-out. The simplified and pre-approved prototype plan receiving these contributions would not be subject to discrimination testing but would have lower

contribution limits than regular §401(k) plans. However, these contributions would be higher than those for IRAs so as to encourage small employers to establish new plans. Unlike some other proposals, the USERSP program entails no mandatory employer contributions.

Investment options could be chosen by either the employer or service provider, but in either case, would be required to meet specified minimum requirements for broad-based investment choices. Where the service provider picks the investment menu, it would need to meet standards established by the DOL which would rely heavily on QDIAs and, therefore, would consist largely of target date funds (TDFs). Since the plan sponsor would need to monitor the service provider offering such an investment line-up, and TDFs are a deceptively complex investment, employers would retain exposure to liability for investment losses, even though a goal of this proposed arrangement is purportedly the reduction of such exposure.

To preserve assets within the system, there would be no plan loans and hardship distributions would have to meet strict standards. Recordkeeping and Form 5500 reporting would be performed at the service provider level, eliminating employer responsibility for these tasks.

SAFE Retirement Act

The SAFE Retirement Act of 2013 proposed by Senator Orrin Hatch attempts to address the need for expanded access to retirement savings programs by focusing on the same elements as the SPARK Institute's plan. Senator Hatch proposes to create a new type of private-sector plan aimed at encouraging plan adoption by small or start-up businesses. Unlike some of the proposals discussed above, this one avoids pooling of assets, guaranteed investment returns and mandatory annuity payments. Senator Hatch's idea is to authorize a retirement savings vehicle, called "Starter §401(k)s," with individual accounts controlled by participants who would be able to contribute up to \$8,000 annually. This relatively modest contribution (which is less than a full §401(k) salary deferral but more than could be put in an IRA) would not be required to meet discrimination testing.

Under the SAFE Retirement Act, there would be no required employer contributions, and to encourage employees to participate, automatic deferrals could range from 3% to 15% of compensation, subject to a participant's opting out. As an alternative to the government mandate of other proposals, Senator Hatch's plan would provide employers with an incentive to establish a Starter §401(k) by increasing the tax credit for adopting a new qualified plan from \$500 to an

amount up to \$5,000, assuming the plan covers at least 20 non-highly compensated employees (i.e., \$250 for each such participant). The credit can apply for up to three years.

The SAFE Retirement Act also repeals unnecessary and costly administrative burdens such as the testing of so-called top-heavy plans made unnecessary by other nondiscrimination tests.

Reviewing Proposed Systemic Changes

Entitlements and Special Rules. Those who distrust financial markets recognize the deficit reduction debate as a rare opportunity to enlarge the role of government in the retirement benefits arena with the ultimate goal of eliminating the role of employers, except as a funding source. The issue is often framed as one of providing access to retirement savings vehicles by low-paid workers of small employers, which is a laudable goal, although these employees have always had the ability to establish IRAs on their own.

Generally speaking, the various state and federal proposals provide for auto-enrollment, mandate employer contributions and either create government responsibility for funding shortfalls or establish a guaranteed minimum return. Creating such entitlements will result in the formation of interest groups that will lobby for benefit enhancements and extending the scope of these programs. In addition, supplementing the private retirement plan system with an expansion of Social Security or various government-controlled retirement programs would diminish support for employer-provided plans and could eventually crowd them out.

There would be another harmful effect from authorizing these parallel retirement programs, particularly those backed by the states, in that each of them would need special rules if they are to insulate employers

and states from fiduciary responsibility. This has the potential to undo the nationwide uniformity in pension laws that was achieved by the 1974 enactment of ERISA. The resulting complexity would add to the expense of compliance and create uncertainty.

Government Influence. Government influence in choosing investment managers or its outright control of investments (e.g., by commingling private plan assets with state pension funds) has the potential to drive many investment providers out of the retirement industry. The Administration's myRA initiative sets an unwelcome precedent in this respect by investing Roth IRA contributions solely in a special U.S. Treasury bond guaranteed by the government. This bond is intended to be similar to the G-Fund obligation under the federal Thrift Savings Plan that invests solely in U.S. savings bonds. Accordingly, it would appear that, like Social Security taxes, contributions to a myRA will go into the Treasury's general fund, and the obligation to the myRA participant will be a government IOU to be held by the custodian of the myRA account. The actual myRA assets will fund general government needs.

Likewise, many of the proposals for parallel retirement systems call for some measure of government control or influence over the pool of capital set aside to fund these new arrangements. USA Retirement Funds, the NCPERS proposal and the California Secure Choice IRA would all carve out a role for government in the allocation of a major portion of the capital now held in private plans. Thus, if these proposals (or iterations thereof) were enacted, there would need to be protections and heightened awareness to guard against undue distortion (e.g., potential over-investing in state bonds and favored industries and geographical locations).

It seems we are at a crossroad and the decisions to be made will shape our retirement system for decades to come. These are indeed interesting times.

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