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BENEFITS REPORT

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1980 – 2020

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The Importance of Including Exhaustion Requirements in Plan Documents: Taking a Closer Look at the Sixth Circuit's Decision in *Wallace v. Oakwood Healthcare, Inc.*

ANGEL L. GARRETT

AUGUST 2020

A recent decision by the U.S. Court of Appeals for the Sixth Circuit reminds plan fiduciaries once again of the importance of including claims and appeals procedures and administrative exhaustion language in their plans. See *Wallace v. Oakwood Healthcare, Inc.*, 954 F.3d 879 (6th Cir. 2020). Often, plan fiduciaries assume that this language setting forth the plan's claims and appeals process and requiring administrative exhaustion is already in the plan document. However, in light of this decision, plan fiduciaries should review their plan documents, including summary plan descriptions (SPDs), to ensure that such language is included. As the Sixth Circuit, which covers the states of Kentucky, Michigan, Ohio and Tennessee, points out in its decision, failure to do so may allow the claimant to head straight to court without exhausting his or her administrative remedies.

INDIVIDUAL ARTICLES WILL BE AVAILABLE AT TRUCKERHUSS.COM/PUBLICATIONS

IN THIS ISSUE...

Best Lawyers® 2021 Recognizes Six Trucker ✦ Huss Attorneys for Employee Benefits (ERISA) Law and ERISA Litigation

We are pleased to announce that six of the firm's attorneys were recently selected by their peers for inclusion in *The Best Lawyers in America*® 2021

The following were recognized in the areas of Employee Benefits (ERISA) Law and ERISA Litigation:

R. Bradford Huss
Employee Benefits (ERISA) Law and ERISA Litigation

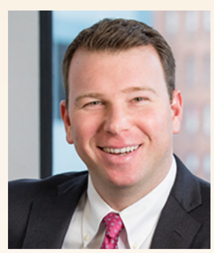
Charles A. Storke
Employee Benefits (ERISA) Law

Tiffany N. Santos
Employee Benefits (ERISA) Law

Clarissa A. Kang
ERISA Litigation

In addition, two attorneys were selected as 2021 Best Lawyers "Ones to Watch":

Freeman L. Levinrad
Employee Benefits (ERISA) Law



Dylan D. Randolph
Employee Benefits (ERISA) Law

Trucker Huss was previously recognized as one of the 2020 Best Law Firms by U.S. News & World Report and Best Lawyers in the areas of Employee Benefits (ERISA) Law and ERISA Litigation.

Since it was first published in 1983, Best Lawyers has become universally regarded as the definitive guide to legal excellence. Best Lawyers lists are compiled based on an exhaustive peer-review evaluation. Lawyers are not required or allowed to pay a fee to be listed; therefore, inclusion in Best Lawyers is considered a singular honor. *Corporate Counsel* magazine has called Best Lawyers "the most respected referral list of attorneys in practice."

Administrative Exhaustion

The Employee Retirement Income Security Act of 1974 (ERISA) requires that employee benefit plans provide any participant whose claim for benefits has been denied the right to appeal such denial. ERISA regulations require that employee benefit plans establish and maintain reasonable procedures for filing benefit claims, notifying participants of benefit determinations, and appealing adverse benefit determinations.[1] In general, plan participants must complete or "exhaust" these steps before filing a lawsuit — this step is often referred to as "administrative exhaustion." Although ERISA does not explicitly require administrative exhaustion, courts have held that administrative exhaustion is typically necessary before a participant can file a lawsuit.

The Sixth Circuit's Decision

The Sixth Circuit's decision in *Wallace v. Oakwood Healthcare, Inc.* ("*Wallace*") highlights the importance of including internal procedures and administrative exhaustion in the plan document and summary plan description. In March 2020, the Sixth Circuit affirmed the district court's decision that Wallace, a participant in the Oakwood Healthcare, Inc. Employee Welfare Benefit Plan ("Plan") which provided long-term disability (LTD) benefits, did not have to exhaust her administrative remedies before commencing litigation in court.

Wallace was a registered nurse who contracted an illness while traveling in Belize. After she returned from her trip, she began suffering from various medical conditions including hypothyroidism, hormone deficiencies, immune suppression disorder, and arrythmia of the heart. Consequently, she took medical leave from work in October 2012. She returned to work in April 2013, but took another medical leave a month later in May 2013. Subsequently, Wallace applied for LTD benefits. She submitted her claims to two insurance companies — The Hartford Life and Accident Insurance Company ("Hartford"), which funded and insured the Plan through December 31, 2012, and Reliance Standard ("Reliance"), which became the Plan's insurer beginning January 1, 2013. Both companies denied Wallace's claims. Although Wallace appealed the denial from Hartford, she did not appeal Reliance's claim denial. Wallace then filed a lawsuit against the insurance companies in the Eastern District of Michigan.

At the district court level, the court granted Wallace's motion for judgment for benefits and awarded Wallace LTD benefits and attorney's fees. Reliance appealed the decision.

One of the key issues that the Sixth Circuit reviewed on appeal was whether the district court erred in determining that Wallace was not required to exhaust her administrative remedies before filing a lawsuit against Reliance.[2] Reliance argued that exhaustion is required, regardless of whether exhaustion is expressly stated in the Plan document. Reliance also argued that even though the exhaustion language was not in the Plan document, that language was set forth in the denial letter and that it had "substantially complied" with ERISA's notice requirements. The court rejected Reliance's arguments. The Sixth Circuit held that simply including the exhaustion requirement in the denial letter was not sufficient because "for a plan fiduciary to avail itself of this Court's exhaustion requirement, its underlying plan document must — at minimum — detail its required internal appeal procedures."[3] The court also rejected Reliance's argument that it had "substantially complied" with ERISA because "a plan document that does not include either procedures for review of denied benefits claims or the remedies for such claims is wholly non-compliant."[4] The court further pointed out that the plan document not only failed to contain any information about the review procedures or remedies available for denied claims, but was "actively misleading" because ERISA and the internal claims and appeals process was only mentioned in the section discussing arbitration, which was not applicable to Wallace's benefit claim.[5] As the Sixth Circuit explained, "one of ERISA's central goals is to enable beneficiaries to learn their rights and obligations at any time including before a denial of benefits"[6] — and, therefore, Congress required that plans be established and maintained pursuant to a written instrument so the beneficiaries are aware of their rights and obligations upon review of such plan-related documents. Because Reliance's plan document failed to establish any internal claims procedures consistent with ERISA regulations, the court deemed Plaintiff's administrative remedies exhausted.

Notably, in issuing its decision, the court explained that it was not deciding whether a plan document "must explicitly and affirmatively require exhaustion" but that at a minimum, Reliance's plan document must "detail claims review procedures and remedies and must not mislead an employee into believing there are no administrative remedies or that those remedies must not be exhausted."[7] Essentially, if participants are required to complete an internal claims process, plan fiduciaries notify them of such requirement by including these procedures in the plan documents and SPDs.

Interestingly, Judge Thapar issued a concurring opinion questioning ERISA's exhaustion requirement. He found it "troubling to have no better reason for a rule of law than that the courts made it up for policy reasons."[8] Taking a textualist approach, Judge Thapar explained that the statute itself is silent about administrative exhaustion: "ERISA requires plans to offer fair and reasonable internal-review procedures for claims they deny. But the statute nowhere says claimants must take advantage of those procedures as a precondition to informing their rights in court."[9] Although Judge Thapar urged "[f]ederal courts [to] reconsider when — or even where — it's legitimate to apply this judge-made doctrine,"[10] he agreed that Wallace had no notice that she could lose her right to benefits by failing to appeal the denial of her claim because Reliance's plan document not only failed to mention an exhaustion requirement but also lacked an internal claims-review procedure.

The Importance of Administrative Exhaustion

As long as courts continue to apply the administrative exhaustion doctrine to benefit claims, plan fiduciaries should review their plan documents and SPDs to ensure that a claims and appeals procedure, including administrative exhaustion language, is included in these documents. Administrative exhaustion is beneficial for several reasons — (1) it allows the parties to resolve their benefit dispute without costly and time-consuming litigation, (2) it reduces the number of frivolous lawsuits and, (3) if the benefit claim is litigated, the administrative process creates an administrative record that eliminates or limits the need for discovery. Ultimately, until the courts reconsider the administrative exhaustion doctrine, as Judge Thapar suggested, and decide to no longer apply such a doctrine, plan documents should include clear claims procedures requiring exhaustion and do so in language that is readily understood by a reasonable participant.

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[1] 29 CFR § 2560.503-1 *et seq.*

[2] The Sixth Circuit also addressed the issues of whether the district court erred in granting Wallace LTD benefits and attorney's fees.

[3] *Id. at* 888.

[4] *Id. at* 889.

[5] *Id. at* 888.

[6] *Id. at* 887.

[7] *Id. at* 889.

[8] *Id. at* 900.

[9] *Id.*

[10] *Id.*

IRS Guidance on Coronavirus-Related Distributions and Plan Loans

BRYAN J. CARD

AUGUST 2020

On June 19, 2020, the Internal Revenue Service (IRS) issued Notice 2020-50 (the "Notice"), which provided much needed guidance on Section 2202 of the Coronavirus Aid, Relief and Economic Security Act (the "CARES Act"). Section 2202 of the CARES Act provides economic relief to certain individuals who have been negatively impacted by the COVID-19 pandemic by providing increased access to their retirement plan assets.

CARES Act Retirement Plan Relief

Under the CARES Act, certain "qualified individuals" are eligible to take a distribution from an eligible retirement plan (e.g., 401(k) or 403(b) plan) up to $100,000 that is exempt from the 10% early withdrawal penalty (a Coronavirus-Related Distribution [CRD]).[1] CRDs are permitted to be included in taxable income ratably over three years and may be recontributed to an eligible retirement plan. The CARES Act also increased the maximum plan loan amount, permitted the suspension of plan loan repayments, and extended the term of the loan repayment period for "qualified individuals." The CARES Act also provided for a waiver of 2020 required minimum distributions (RMDs).

For additional information on the relief provided by the CARES Act provisions affecting retirement plans, please refer to our newsletter article, "Impact of the Historic Coronavirus Aid, Relief and Economic Security Act on Retirement Plans — and Action Items for Plan Sponsors."

Expanded Definition of a Qualified Individual

Under Section 2202(a)(4)(ii) of the CARES Act, a "qualified individual" includes an individual:

- who is diagnosed with the SARS-CoV-2 virus or with coronavirus disease 2019 (COVID-19) by a test approved by the Centers for Disease Control and Prevention (CDC);
- whose spouse or dependent (as defined in section 152 of the Internal Revenue Code of 1986, as amended [the "Code"]) is diagnosed with COVID-19 by a test approved by the CDC; or
- who experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced, being unable to work due to lack of child care, or having to close or reduce the hours of their owned or operated personal business due to COVID-19, or other factors as determined by the Secretary of the Treasury (or the Secretary's delegate).

The Notice expanded the definition of qualified individual to include those individuals who are diagnosed with COVID-19 by a test authorized under the Federal Food, Drug, and Cosmetic Act. In addition, the Notice expanded the list of "adverse financial consequences" experienced as a result of COVID-19 (i.e., the third bullet point above) to include the following:

- an individual having a reduction in pay (or self-employment income) due to COVID-19 or having a job offer rescinded or start date for a job delayed due to COVID-19;
- an individual's spouse or a member of the individual's household (defined as someone who shares the individual's principal residence) being quarantined, being furloughed or laid off, or having work hours

reduced due to COVID-19, being unable to work due to lack of childcare due to COVID-19, having a reduction in pay (or self-employment income) due to COVID-19, or having a job offer rescinded or start date for a job delayed due to COVID-19; or

- the closing or reducing hours of a business owned or operated by the individual's spouse or a member of the individual's household due to COVID-19.

These additions to the definition of a qualified individual greatly expand the availability of CRDs and the plan loan relief for individuals financially harmed by COVID-19.

Clarification of Payments Satisfying the Definition of a CRD

The Notice clarified that a distribution which satisfies the requirements of a CRD may be considered a CRD even if it was not initially designated as a CRD. In addition, the Notice specified that the following distributions would be considered a CRD:

- Payments that would have been RMDs but for the waiver of the 2020 RMD requirement
- Distribution of death benefits to a beneficiary
- Offset of a qualified individual's account balance to repay a plan loan
- Hardship distributions

The Notice also clarified the following distributions would not be eligible to be treated as a CRD:

- Corrective distributions of contributions in excess of the Code Section 415 limits
- Corrective distributions of excess elective deferrals under Code Section 402(g)
- Corrective distributions of excess contributions and excess aggregate contributions
- Defaulted loans treated as deemed distributions under Code Section 72(p)
- Dividends paid on applicable employer securities under Code Section 404(k)
- The costs of current life insurance protection
- Prohibited allocations treated as deemed distributions pursuant to Code Section 409(p)
- Distributions that are permissible withdrawals from an eligible automatic contribution arrangement within the meaning of Code Section 414(w)
- Distributions of premiums for accident or health insurance under Treasury § 1.402(a)-1(e)(1)(i)

The Notice also clarified that a CRD does not need to be limited to the amount necessary to meet the need arising from COVID-19 (unlike hardship withdrawals).

Administrative Guidance for Plans Providing CARES Act Relief

The Notice answers common questions employers have had about how to administer CRDs.

Employer Discretion

The Notice clarified that the employer has discretion to decide whether or not a plan offers any CARES Act relief. However, as noted above, the Notice confirmed that even if an employer does not offer CRDs, a qualified individual may treat a distribution as a CRD on his or her tax return if the applicable requirements are met.

Rollover Issues

The Notice stated that for a distribution treated as a CRD, the plan is not required to offer a qualified individual a direct rollover with respect to the distribution, and thus the plan is not required to issue a 402(f) notice. The Notice also stated that CRDs are not subject to the mandatory 20% withholding rule. However, a CRD is subject to the voluntary withholding requirements of Code Section 3405(b) and Temporary Treasury Regulations Section 35.3405-1T.

Plan Aggregation

The maximum amount of distributions that an employer may treat as a CRD for a qualified individual under all of its retirement plans may not exceed $100,000. The Notice clarifies that for purposes of this limitation, the employer must take into consideration all plans maintained by the employer determined on a controlled group basis. The Notice further clarifies that an employer is not required to consider distributions from IRAs or distributions from plans maintained by unrelated employers.

Reliance on Self-Certification

The Notice clarified that a plan administrator may rely on an individual's certification that the individual satisfies the requirements to be considered a qualified individual, unless the plan administrator has actual knowledge to the contrary. In addition, the Notice stated that the plan administrator is under no obligation to inquire into whether the individual actually satisfies the requirements to be considered a qualified individual. The Notice further clarified that "knowledge" is limited to situations where the administrator "already possesses sufficiently accurate information to determine the veracity of a certification." Given that the definition of qualified individual has been expanded to cover events that impact the participant's spouse or household member, a plan administrator is unlikely to have actual knowledge to the contrary.

The Notice provides a sample of an acceptable individual certification, which may be used by participants who are seeking a CRD or plan loan relief. Notably, the sample certification did not require the individual to designate which specific condition he or she satisfied to be considered a qualified individual.

Tax and Reporting Guidance for Individuals Receiving Coronavirus-related Distributions

The Notice provides guidance on the tax and reporting requirements applicable to qualified individuals who receive CRDs.

Income Inclusion

A qualified individual who receives a CRD may choose to (i) include the CRD in income ratably over a three-year period that begins in the year of the distribution (i.e., the 2020, 2021, and the 2022 tax years); or (ii) elect out of the three-year income inclusion period and include the entire amount of the taxable portion of the CRD in income in the year of the distribution (i.e., the 2020 tax year). The Notice confirmed that this election cannot be changed after the timely filing of the qualified individual's tax returns (including extensions) for the year of the distribution and that all income attributable to CRDs must be treated consistently (either all portions of the CRDs spread ratably over three years, or alternatively, included in income in the year of distribution). The Notice also provides that if the qualified individual dies before the full amount of the CRD has been included in his or her taxable income, then the remainder must be included in the tax year of the qualified individual's death. A qualified individual must use the Form 8915-E to designate a distribution as a CRD and to elect out of three-year ratable income inclusion.

Taxation of Recontributions

The Notice provides that CRDs that are eligible for tax-free rollover treatment may be recontributed to an eligible retirement plan, and such recontributions will be treated as a trustee-to-trustee transfer to such plan. The Notice makes it clear, however, that certain CRDs are not available for recontribution (e.g., a distribution made to a qualified individual as beneficiary).

If a CRD is eligible for tax-free rollover treatment, a qualified individual is permitted at any time in the three-year period beginning with the year of the distribution, to recontribute any portion not in excess of the CRD. Recontribution of all or a portion of the CRD lowers the qualified individual's taxable income for the year of the recontribution. The qualified individual must report the amount of the recontribution on the Form 8915-E.

The Notice also clarifies the reporting obligations for a qualified individual who recontributes more than the amount that is otherwise includible in income for a particular tax year by providing that such excess amounts may be carried forward to subsequent tax years, or carried back to previous tax years. If a qualified individual carries back income attributable to a CRD, he or she will be required to file an amended tax return for the prior year or years to report the amount of the recontribution on Form 8915-E. The following examples illustrate how a qualified individual may report recontributions of CRDs:

Example 1: David, who is a qualified individual, receives $75,000 from a 401(k) plan on December 1, 2020 and treats such distribution as a CRD. He elects to use the three-year ratable income inclusion method for the distribution. David makes one recontribution of $25,000 to the 401(k) plan on April 10, 2022. He files his income tax return for the 2021 tax year on April 15, 2022. If he had made no recontributions, David would need to include $25,000 in each of his tax returns for the 2020, 2021 and the 2022 tax years. However, because he included the $25,000 recontribution for the 2021 tax year, he should include $25,000 for the 2020 and the 2022 tax years, and $0 in 2021.

Example 2: Emily, who is a qualified individual, receives a distribution of $90,000 from her 401(k) plan on November 15, 2020 and treats such distribution as a CRD. Emily elects to use the three-year ratable income inclusion method for the distribution. Without any recontribution, Emily will include $30,000 in income for the 2020, 2021, and 2022 tax years. Emily then recontributes $40,000 to her 401(k) plan on November 10, 2021. Emily is permitted to do either of the following:

Option 1: Emily includes $0 in income for the 2021 tax year. She then chooses to carry forward the remaining $10,000 of the recontribution to the 2022 tax year. For tax year 2022 she will include $20,000 in income. Her tax return for the 2020 tax year will remain unchanged (i.e., $30,000 is included in income).

Option 2: Emily includes $0 in income for the 2021 tax year. Emily chooses to carry back the excess $10,000 in recontributions to the 2020 tax year, which results in Emily including $20,000 in income for the 2020 tax year (and requires Emily to amend her 2020 tax return). Emily will include $30,000 in income for the 2022 tax year.

Guidance on CARES Act Plan Loan Relief

In addition to the guidance described above regarding CRDs, the Notice also provides guidance on the CARES Act loan relief. Under the CARES Act, qualified individuals may obtain a plan loan in amounts up to the lesser of (i) $100,000 (increased from normal maximum amount of $50,000) or (ii) 100% (increased from normal maximum amount of 50%) of their plan account balance for loans initiated during March 27, 2020 through September 23, 2020. In addition, qualified individuals who take out a loan or who had an existing loan with a repayment date occurring during March 27, 2020 and December 31, 2020 (the "suspension period"), may have their loan repayment period extended for an additional year.

The Notice clarifies how the loan suspension period is intended to work and provides a safe harbor method deemed to satisfy the rules. In order for a plan to qualify for the safe harbor, (i) loan repayments must resume on January 1, 2021, and (ii) the repayments suspended during the suspension period must be reamortized and added to the principal to be repaid over the remaining period of the loan (i.e., five years from the date of the loan plus an additional year).

In the Notice, the IRS acknowledges that there may be other methods to administer the loan suspension and repayment provisions, which are reasonable (although potentially more complicated). In the example provided by the IRS, loan repayments due during the suspension period are suspended until the one year anniversary of the beginning of the suspension period. For example, in a plan with a suspension period beginning April 1, 2020, each repayment that becomes due during the suspension period may be delayed to April 1, 2021 (the 1-year anniversary of the beginning of the suspension period). After originally scheduled repayments for January through March of 2021 are made, the outstanding balance of the loan as of April 1, 2021, including the delayed repayments with interest, may be reamortized over a period that is up to 1 year longer than the original term of the loan.

Plan Amendments

The Notice confirmed that non-governmental plans must be amended by the last day of the first plan year beginning on or after January 1, 2022 (December 31, 2022 for calendar-year plans), and that governmental plans as described under Section 414(d) of the Code must be amended by the last day of the first plan year beginning on or after January 1, 2024 (December 31, 2024 for calendar year plans). However, the Notice indicated that the deadline may also be extended by the Secretary of Treasury in future guidance.

If you have any questions regarding Notice 2020-50 or any other matter, please contact us. We are continuing to monitor all benefits-related developments relating to the COVID-19 pandemic.

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[1] The utility of CRDs for pension plans (including money purchase pension plans) is limited because pension plans continue to be subject to their distribution rules that prohibit in-service distributions prior to age 59 ½. However, qualified individuals may treat a distribution from a pension plan as a CRD for tax purposes if the requirements are met.

Update to 402(f) Notices (Notice 2020-62)

The Internal Revenue Service (IRS) has issued Notice 2020-62 which updates its safe harbor explanations for eligible rollover distributions from qualified retirement plans (commonly referred to as the "402(f) notice"). Section 402(f) of the Internal Revenue Code ("Code") requires plan administrators to provide recipients of eligible rollover distributions with a written explanation of their rollover options and the tax consequences of their distributions. To satisfy this requirement, the IRS has provided two safe harbor rollover explanations which were last updated in 2018. The safe harbor rollover explanations include one for distributions that are not from a designated Roth account and one for distributions that are from a designated Roth account. Notice 2020-62 updates those explanations to reflect the legislative changes made by the SECURE Act and the CARES Act. The safe harbor explanations are included in an appendix to Notice 2020-62. Plan administrators are advised that they may customize the safe harbor explanations to remove provisions inapplicable to their plans, such as those relating to after-tax contributions or employer stock; and that the safe harbor explanations will not satisfy Code Section 402(f) to the extent that they are no longer accurate because of changes in the relevant law occurring after August 6, 2020.

FIRM NEWS

For 2020–2021, **Tiffany N. Santos** will serve as Chairperson of the Joint Committee on Employee Benefits (JCEB), the American Bar Association's central and dedicated provider and coordinator of employee benefits in-person CLE programs and webinars, as well as annual meetings with the federal agencies that issue regulations and enforce the laws that govern employee benefit plans and deferred compensation arrangements. She will also be a panelist on the JCEB's September 22, 2020 webinar, *Turbulent Times for Health and Welfare Benefits — COVID-19, Mental Health Parity, State Laws and More*.

This month, **T. Katuri Kaye** was installed as the Newsletter Chair for the Black Women Lawyers Association, Inc. of Los Angeles for 2020–2021 board year.

On August 20, **Clarissa A. Kang** was a co-presenter at an online webinar, *ERISA Litigation and Attorneys' Fees*, sponsored by the Tort Trial & Insurance Practice Section of the ABA. The webinar focused on the recovery of attorneys' fees in ERISA litigation.

Trucker Huss was pleased to have participated as a virtual exhibitor at the 2020 NIPA Annual Forum & Expo's expanded event, NAFE Amplified, held August 10–12 and 17–18, 2020. The event, sponsored by both Western Pension & Benefits Council (WP&BC) and NIPA, was designed exclusively for retirement plan professionals and offered enriching, relevant, world-class education to attendees.

- **Kevin Nolt** was on the planning committee for NAFE Amplified and serves as President of the Governing Board for the WP&BC. He moderated the following Breakout Sessions: *ERISA Litigation Update*; *A Deep Dive into 415*; *Critical Conversations and Mentorship*; *An Internal Approach to Projects — Planning and Getting Buy-in from Staff*; and *Navigating DB/CB Required Minimum Distributions*.
- **Robert Gower** introduced the *Mergers and Acquisitions* Breakout Session sponsored by Trucker Huss.

The Trucker ✦ Huss *Benefits Report* is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

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