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Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: 408(b)(2) Amendment
Room N-5655
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, D.C. 20210

Ladies and Gentlemen:

On behalf of the American Council of Life Insurers ("ACLI"), we are writing to comment on regulations proposed under Section 404(a)(1)(A) and (B) of the Employee Retirement Income Security Act ("ERISA"), which were published at 73 Fed. Reg. 43014 (July 23, 2008) ("Proposed Regulations"). The Proposed Regulations set forth new requirements for the disclosure of plan investment and fee information to participants and beneficiaries of individual account plans subject to ERISA. Failure to conform to the rules in the Proposed Regulations would result in a breach of the fiduciary's duty to the participants and beneficiaries.

The Proposed Regulations are of particular significance to the three hundred fifty-three (353) member companies of ACLI. ACLI member companies account for ninety-three (93) percent of the life insurance industry's total assets in the United States. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including both defined benefit pension and 401(k) arrangements. ACLI member companies also are employer sponsors of retirement plans for their own employees.

ACLI appreciates the Department's significant work in addressing issues related to plan services and fees. As noted in the preamble to the Proposed

Regulations, there has been a proliferation of participant-directed individual account plans. Unlike traditional defined benefit plans, the investment decisions made under individual account plans directly affect the benefits available to participants and beneficiaries. ACLI agrees that it is appropriate for the Department to consider regulatory requirements that ensure participants and beneficiaries have the information they need to make informed investment decisions. Both plan fiduciaries and plan investment providers need a clear and concise regulatory framework that sets forth principles for disclosure that are readily understood and applied in the context of today's employee benefit plan designs and those of the future. We welcome the opportunity to work with the Department in this effort.

In our comments below, we suggest a number of specific changes and clarifications to the Proposed Regulations. We would welcome the opportunity to speak with the Department and supplement our comments as the Department considers these questions and we gain a better understanding of the Department's intent.

1. Final Rules Should Be Effective No Earlier than January 1, 2010

The Proposed Regulations state that final rules will be effective for years beginning on or after January 1, 2009. We agree that these disclosure rules should be a significant priority for the Department and that issuing final regulations in due course should be the goal. Service providers and plan fiduciaries will be well served by having clear guidance as soon as practicable. However, as indicated in our comments below, we believe some parts of the Proposed Regulations require further clarifications.

Even if the Department works quickly, by the time final regulations are published, there will be very little time before January 1, 2009 for fiduciaries to review and implement them. Without sufficient lead time, there is material risk that the transition to the new rules will be disorderly and confusing for plan fiduciaries, participants and service providers. It is even possible that employers considering the establishment of new plans will delay implementation. It is critical that fiduciaries and other interested parties have time to digest the new rules and work through the interpretive issues that are inevitably associated with new regulations. Fiduciaries of plans with unique investment options or structures, such as 403(b) plans, will be particularly challenged if there is a limited opportunity to analyze the regulations. A meaningful period between publication and the effective date of the new regulations will also have the virtue of providing the Department with an opportunity to answer questions and ensure that the regulations are being interpreted appropriately.

Plan fiduciaries and plan investment providers also need time to ensure that information can be provided to participants and beneficiaries in the manner required under the final rules. Providers will need to make a number of significant systems changes to comply with the regulations. For example, in the case of the new quarterly disclosures, even if existing benefit statements are used to distribute the information, it will take time for the information system to be modified to add the new

information (e.g., descriptions for applicable individual expense). In the case of the comparative investment chart, even assuming that an investment provider can quickly gather all of the relevant information, it will have to build out a new system for the creation of the charts for each employer. While these tasks may not seem complicated, they require time to implement. As discussed in more detail below, the Proposed Regulations also require that a website be provided to allow participants to access supplemental information. Most mutual funds and funds subject to securities laws already have such websites. However, for funds that do not already have such a website, compliance with this requirement (whether this means creating a new website, modifying a current website to incorporate the supplemental information, or compiling paper copies of all of the supplemental information in the absence of a website) will take time. It will also raise challenges for funds that invest in other funds, sometimes called "funds of funds." Given that information systems will need to be built in order to reflect the regulations and given the time required to gather the data, engage systems professionals, commit budgetary resources and build the systems necessary to implement the requirements, more time is required.

Another factor to consider regarding the feasibility of the effective date is the competing priorities to which significant resources have already been dedicated. Our member companies are currently engaged in work to facilitate the presentation of information to comply with the Form 5500 Schedule C changes effective for the 2009 plan year reports. Having to complete all of the systems changes to comply with these regulations on such a tight deadline in addition to the Schedule C changes already consuming resources would create a hardship for our member companies. For all of these reasons, we believe that an effective date no earlier than January 1, 2010 is appropriate.

2. Clarify Disclosure Elements, Supplemental Website Information Requirements

The Proposed Regulations require, among other items, an Internet website for each designated investment alternative that is sufficiently specific to lead participants and beneficiaries to supplemental information regarding the investment alternative, including its principal strategies, risks, performance and costs. Our member companies report that customers and plan participants routinely use the internet as a means by which to obtain information about investment products and plan account information. The provision of a website to convey supplemental information is appealing for multiple reasons. It allows participants access to a great deal of information, while not overloading them with too much. It also allows participants to access different layers of information in a coordinated manner and to receive the level of information that they desire. For these reasons, we believe that website information may be a useful element of disclosure to participants and beneficiaries.

There are, however, several refinements to the supplemental information rule that should be included in the final regulations. First, the final regulations should provide a comprehensive list of the information that must be contained on the Internet website. The Proposed Regulations currently have an open-ended

requirement of "supplemental information" and specifically reference a number of examples. A comprehensive list of the required supplemental information is appropriate given that some websites will be created specifically for the purpose of facilitating compliance with the final regulations and it will be important to have a method of determining if a website is compliant.

Second, subject to certain clarifications discussed below, we believe that the illustrative list of supplemental information in section 2550.404a-5(d)(1)(i)(B) should be the comprehensive list in the final regulations. In this regard, the Proposed Regulations require disclosure of "the name of the investment's issuer or provider, the investment's principal strategies and attendant risks, the assets comprising the investment's portfolio, the investment's portfolio turnover, the investment's performance and related fees and expenses." These elements provide a meaningful additional layer of information that participants and beneficiaries may access above and beyond the information that would be affirmatively provided to participants and beneficiaries under the Proposed Regulations.

Third, although we recommend that the illustrative list in the Proposed Regulations be the exclusive list of supplemental website information, it is also important that the elements of the list be consistent with parallel elements required to be disclosed to investors under SEC rules. Symmetry with the SEC disclosure requirements will provide plan participants with consistent "apples to apples" information both for investments within the plan and any holdings they may have outside the plan. It will also have the added benefit of minimizing the economic impact of the regulations on the investment community as investment providers apply a single set of definitions when preparing SEC disclosures and providing information to plan fiduciaries so that they may fulfill their responsibilities under the Proposed Regulations (see the SEC definitions in Form N-1A (mutual funds), Form N-3 (managed separate accounts), or Form N-4 (unit investment trust separate accounts)). For example, the Proposed Regulations require website disclosure of "the investment's principal strategies and attendant risks, the assets comprising the investment's portfolio." The SEC, however, has specific disclosure requirements for a fund's "investment objectives and investment policies." The investment policy describes the class of assets in a portfolio, but not the actual assets. We urge the Department to define the disclosure requirements with reference to the applicable SEC disclosure rules.

Fourth, the final regulations should confirm that plan fiduciaries are not obligated to provide website based supplemental information to participants and beneficiaries in paper form. In the Preamble to the Proposed Regulations, the Department requests comments on whether the website requirement raises any issues under the Department's regulations on the use of electronic media "given that plan fiduciaries may, in some cases, have to provide paper copies of the supplemental information listed in this requirement (i.e., information that would otherwise be accessible through the Internet Web site address) to participants who fail to affirmatively consent to receiving such information electronically." ACLI, however, does not believe that providing paper copies of website pages to

participants and beneficiaries, even upon affirmative request, should be required. The information on the website is information that is available to participants and beneficiaries. There is no need for consent to making this information available electronically. The only question is whether there should be a duty to provide paper copies of the website's pages upon affirmative request. However, we see little reason to create a "paper upon request" requirement since a separate requirement exists under the regulations that serves a very similar purpose. The Proposed Regulations state that, upon request by a participant or beneficiary, plan fiduciaries must provide copies of prospectuses (or any short-form or summary prospectus) in the case of registered investment alternatives or similar documents in the case of non-registered investment alternatives. Prospectuses will contain all of the critical information that a participant or beneficiary would be able to access on the website for a designated investment alternative. In effect, participants and beneficiaries will have the right to request a paper copy of the required information through the prospectus rule.[1] More generally, it makes little sense to require fiduciaries to provide paper copies of all of the pages and links in an Internet website since website information is not formatted or designed for paper delivery.

3. Permit Electronic Means as the Default Disclosure Method

In light of the discussion above, we also urge the Department to move forward with its long-awaited update to the existing electronic delivery rules. Under the current rules, if a fiduciary decides to electronically distribute the plan and fee information required under the proposed regulation, the current DOL electronic delivery rules must be followed (the participant must consent to electronic delivery, unless access to the employer's information system is an integral part of the participant's duties, etc.). This standard is very difficult to satisfy and results in very significant costs. We urge the Department to consider rules to permit plans to use electronic means as the default method by which to convey plan information and required disclosures with paper delivery as an alternative that may be elected by plan participants and beneficiaries.

Pending new guidance on electronic delivery standards for all notices and disclosures required under Title I of ERISA, the Department should provide that the disclosure requirements under the final participant-level fee disclosure regulations may be satisfied using electronic means that satisfy the IRS's "effective ability to access" standard. We note that in recent guidance, including guidance regarding pension benefits statements and QDIA notices, the DOL has permitted the use of the IRS electronic media rules as an alternative to the DOL's rules. The DOL's current electronic media regulations require that the electronic delivery system be reasonably calculated to ensure that actual receipt of the document occurs (such as by use of return-receipt notices, or undeliverable email notices). The IRS's rules do

[1] It is conceivable that some website information will be more current than information in a prospectus. However, the SEC has clearly decided that prospectus information is sufficiently timely. Further, there is an independent duty to update any information upon a material change so that it seems highly unlikely that any disconnect between website and prospectus information would be material.

not contain this as a requirement, although such documentation may be required when implementing its "alternate method" under which consent is not required. It is particularly important for the Department to take a similar approach to electronic delivery in this context given the very significant disclosure obligations that would arise from the regulation and its related costs.

4. Electronic Disclosure, Websites Should Not Be Required

In the Preamble to the Proposed Regulations, the Department requests comments on whether compliance with the website requirement for supplemental information, i.e., principal strategies, risks, performance and costs, will be difficult for certain funds. Some investment funds, including in-house funds, collective investment funds, separate accounts, and professionally managed accounts, typically do not offer websites that contain all of the supplemental information that would be required under the proposed regulation. In this regard, it is apparent that much of the supplemental information that would be made available to participants is information that is required to be disclosed in the prospectus for a registered investment company, and some funds that are not registered do not necessarily track the same information. For this reason, it is important that the final regulations provide transition relief that allows for the development of recordkeeping systems to track and make available the requisite information. We also ask that the final regulations clarify that if an investment fund does not already have a dedicated website for commercial purposes, there is not a requirement for the investment fund provider or the plan's fiduciary to create one. Rather, for such fund, participants may request paper copies of the supplemental information (e.g., a prospectus or similar document) from the plan administrator or plan representative.

5. Term Not Applicable to Certain Fixed Rate Investment

ACLI greatly appreciates the distinction drawn in the Proposed Regulations between a designated investment alternative to which the investment return is fixed and those to which the investment return is not fixed. For designated investment alternatives to which the investment return is fixed, the proposal requires the disclosure of "the fixed rate of return and the term of the investment."

One very common type of insurance investment involves a contract that provides for a fixed rate of return but does not guarantee a particular rate of return other than that such rate will not be lower than the contract's minimum guaranteed rate, if any. These contracts are open ended. The fixed rate of return may change upon notice. For these contracts, there is not a "term of the investment." The Department should confirm that for a designated investment alternative to which the investment return is fixed, that is open-ended without a set term, disclosure of the investment's term is not required. The final regulations should clarify that the key information to be disclosed is the most recent rate of return on the investment, the minimum rate of return guaranteed under the product, if any, and that the insurer has the ability to change the rate of return prospectively.

6. Final Rules Should Permit Tailored Disclosure of Certain Insurance Products and Investments

ACLI is concerned that the simple dichotomy drawn in the Proposed Regulations between designated investment alternatives with fixed and non-fixed returns will not be appropriate for all investments. Under the proposal, for investment alternatives with respect to which the return is not fixed, the plan fiduciary must provide the average annual total return for certain periods, an investment benchmark, and the total annual operating expenses of the investment expressed as a percentage. In contrast, however, for investments with a fixed return, the fiduciary must disclose both the fixed rate of return and, as we have noted, the term of the investment. The Proposed Regulations do not require disclosure of a benchmark or the total operating expenses for a fixed investment. This distinction between investments with fixed and non-fixed is entirely rational and we strongly support the line drawn in the Proposed Regulations.

Many annuity contracts and other insurance products have features that do not fit cleanly into either the fixed or non-fixed categories and the final regulations should provide guidance to plan fiduciaries on how to satisfy their disclosure obligations with respect to such products. We believe the overarching theme of the final regulations with respect to these products should be flexibility. Plan fiduciaries should not be forced to fit every investment option or product into a rigid framework spelled out in regulations. We discuss below some of the insurance products that do not fit neatly into the structure of the Proposed Regulations. It is important to recognize, however, that the investment and annuity landscape is constantly evolving and that these are just some of the current products. In this regard, the final regulations should be flexible enough to accommodate innovation and not become a barrier to the evolution of the investment and retirement landscape.

There are insurance products which provide participants with an opportunity to purchase a deferred annuity. Plan participants purchase future annuity benefits based upon the participant's current age and the current interest rate environment. The annuity may or may not have a cash value. Each purchase provides the participant with a set annuity amount commencing at a later date, such as normal retirement age. The annuities do not have a rate of return in the sense that a mutual fund has a rate of return.

There are also insurance products, typically associated with variable annuity contracts, which provide guarantees that protect investors against financial risks that could adversely affect their preparedness for retirement. For example, annuity contracts may offer *guaranteed minimum death benefits* with a return of premium guarantee that provides the participant's beneficiary with no less than the participant's contributions invested under the contract. Other variable contracts offer *guaranteed minimum income benefits* that permit plan participants the ability to annuitize that portion of their plan benefit invested in the contract at a certain age with the annuity payments guaranteed to be no less than a minimum amount regardless of the actual value of the amounts invested on the annuitization date.

Some contracts offer *guaranteed minimum withdrawal benefits* allowing plan participants to withdraw amounts from the portion of their plan benefit invested in the contract for the remainder of their lives at a minimum level without annuitizing their benefit. These guarantees may be made available to any participant who invests contributions in the contact or to only those who elect the guarantee. Premiums for these insurance investments are typically paid on a percentage of assets each valuation day.

The Proposed Regulations raise a number of fundamental issues for products like these that do not fit cleanly into the fixed and non-fixed investment categories. The issues include whether each element of disclosure contemplated by the regulations is workable and whether comparative disclosure makes sense given the qualitative differences between these products and other plan investments, such as mutual funds. They also include basic questions about how to define the investment, for example, where a guarantee is attached to a non-fixed investment fund. Given the complexity of these issues, we believe that the final regulations should provide that there is more than one method of satisfying the final regulations' disclosure requirements. The disclosures that are subject to the Proposed Regulations are fundamentally communications pieces and it should be possible to tailor those communications to make them as effective as possible.

7. Final Rules Should Permit Narrative Disclosure of Insurance Features

For designated investment alternatives which are insurance features, the final regulations should make clear that these features are permitted to be disclosed through a narrative rather than within a comparative chart. For example, in considering disclosure for purchases of deferred annuity benefits, there is no "fixed rate of return." Instead, it should be acceptable to disclose this feature with a narrative that describes the amount of the annuity that is purchased with a stated premium. Also, in circumstances in which an element is not applicable to a particular investment, the final regulations should expressly provide that it is acceptable, for example, to indicate in the comparative chart that a particular element is "not applicable" and use footnotes and/or other narrative as a means of disclosure.

8. The Final Regulations Should Provide Flexibility to Define the Scope of an Investment

It is also important that the final regulations provide flexibility to define the scope of an investment. As discussed above, there are a number of insurance products that provide guarantees that interact with non-fixed investment funds, such as mutual funds and separate account investments. Disclosure for these products involves a fundamental question of whether to disclose the guarantee apart from the fund or whether to disclose the investment as an integrated whole.

Consider, for example, a guaranteed minimum income benefit investment that is tied to the investment made in a balanced fund. It should be permissible to disclose information on the balanced fund without regard to the additional

guaranteed investment. Disclosing information about the fund and the guarantee separately may make sense because the fund and the minimum income benefit may be separate investment options. That is, a participant might have the right to invest in the fund without the guarantee or with the guarantee. In addition, there may be a concern that adjusting the performance of the balanced fund to account for the cost of the guarantee would mislead participants about the performance of the underlying fund, particularly relative to a benchmark. Under this approach, it should be acceptable to separately note in a narrative on the comparative chart the attendant costs and benefits for a participant who invests a portion of their benefit in the guaranteed investment or to add a column or row to the chart setting out the cost and benefits associated with the guarantee.

In contrast, however, it should also be acceptable to disclose a minimum income benefit that is associated with a fund on an integrated basis. This may make sense where the guarantee is not an option but an inherent feature of the investment. In such a case, however, it is likely that a benchmark investment would not be available. We believe that both of these approaches to disclosure should be permitted. Simply put, it would be a mistake to prescribe a one-size-fits-all disclosure regime that does not recognize or accommodate the unique features of guarantees.

9. Final Rules Should Provide That All Investments Do Not Have to be in the Comparative Chart

We also have fundamental questions about whether comparative disclosures of the type contemplated by the Proposed Regulations – a comparative chart – are appropriate in all circumstances. We appreciate the value of the type of comparative chart contemplated by the Department but are concerned about the challenges of "apples to oranges" disclosures and the possibility that the comparative chart will create a bias in favor of certain categories of investments.

The elements of fee disclosure that form the basis for the comparative chart were clearly derived from the elements of fee disclosure contemplated by the SEC for registered investment funds. As a result, it seems likely that mutual funds and other similar types of investments will fit naturally into the chart. However, these elements of disclosure are not well-suited to many common types of investments, including, collective investment trusts, non-publicly traded securities and company stock funds. The challenges of fitting particular investments into the chart contemplated by the Proposed Regulations are particularly acute for insurance products. If forced to provide a single comparative chart that includes all of the plan's options, there is a very real possibility that many common insurance products will have numerous entries of "not applicable," asterisks, and extensive footnotes.

We are concerned that the comparative chart format would not provide participants with adequate information regarding these insurance investments. For this reason, we strongly recommend that the final regulations provide flexibility regarding the format of disclosure, including authority to omit investments from the comparative format and instead provide the required information entirely through a narrative "off chart" disclosure.

10. Security Rules Require Current Quarter Investment Return Information

The Proposed Regulations provide for an annual disclosure of each non-fixed designated investment alternative's average annual total return for the following periods, if available, 1-year, 5-year, and 10-year, "measured as of the end of the applicable calendar year." This information is to be provided annually to each participant and beneficiary. In addition, the most recent annual disclosure is to be furnished to a new participant on or before the date of plan eligibility. However, some providers may have the ability and the desire to provide more current performance information to participants, particularly if the disclosure occurs after the first calendar quarter of the year. The Department should clarify that performance reports made based on more recent information, such as measured as of the most recent calendar quarter, will satisfy the disclosure requirements of §2550.404a-5(d)(1)(ii) and (v) of the Proposed Regulations.

11. Permit Notice On or Before Plan Entry/Initial Investment

The Proposed Regulations require that the disclosures be made on or before the date the participant is first eligible to participate. This requirement is very difficult to meet for participants who are eligible as of their date of hire. To ensure that the fiduciary has sufficient time, the Department should allow fiduciaries until the later of the participant's actual plan entry date, enrollment date, or first investment in the plan to provide the required disclosure.

12. Requirement for Single Disclosure Document

The Proposed Regulations require that the investment-related information regarding the designated investment alternatives must be furnished in the form of a chart or similar comparative format. For 403(b) plans, it is common for a plan to be funded with multiple annuity contracts and custodial accounts. It would be helpful if the Department clarify that for 403(b) plans this requirement may be satisfied with a separate chart for the designated investment alternatives available under each annuity contract and/or custodial account.

A related issue is raised by the requirement in the Proposed Regulations that individual expenses must be disclosed quarterly on a dollar amount basis with a description of the services provided for the fee. Members have indicated that they currently provide participants with a confirmation statement following an individualized charge and that it would be burdensome to aggregate all individualized charges in a quarter and disclose these amounts on a single statement, which the

proposed regulation appears to require. We see little benefit to such an aggregated statement and believe that separate confirmation statements should be acceptable. For this reason, the final regulations should clarify that disclosure of individualized expenses on a single document is not required.

13. Timing for Quarterly Statements

The Proposed Regulations require a statement at least quarterly that describes the amounts actually charged to participant accounts. The Department should clarify that, similar to its guidance for pension benefit statements, the furnishing of the statement not later than 45 days following the end of the quarter will constitute compliance with this rules.

14. Reliance on Investment Provider Information

Footnote 7 to the Preamble to the Proposed Regulations indicates that plan fiduciaries will not be liable for their reasonable good faith reliance on information furnished by their service providers in connection with the proposed disclosure requirements. ACLI believes that a fiduciary safe harbor for reasonable good faith reliance by a fiduciary or its designee on information from third-parties is very important and we urge the Department to include this relief within the four corners of the final regulations.

15. General Disclosure of All Administrative Expenses

The Proposed Regulations require annual disclosure of an explanation of any fees and expenses for plan administrative services and the basis on which such charges will be allocated to or affect the balance of individual accounts. However, not all fees and expenses can be anticipated in advance. For example, a change in the law or regulations may result in a required amendment to the plan's governing document resulting in unanticipated legal expenses. We ask that the Department clarify that a general statement regarding additional plan expenses will satisfy the fee disclosure requirements (for example, "*The plan sponsor reserves the right to deduct additional administrative expenses from your account from time to time*").

16. Regulatory Impact Analysis

The Regulatory Impact Analysis prepared for the proposal describes two types of benefits that flow from the proposal: a reduction in fees paid and a reduction in time spent searching for information.

The proposed changes may lead to a reduction in time spent searching for information. Providing a new format for participants to easily compare both the fees and charges of each designated investment alternative as well as its performance, rate of return, and other information regarding the alternative may reduce participant search time.

Regarding a reduction in fees, it is improper to assume that participants will choose to pay lower fees or that a reduction in fees will result in a net benefit. Many participants choose investments with higher fees seeking better returns, diversification of investments or the advantage of life cycle investments. We do not believe that the authority cited adequately supports the statement that participants pay higher fees than necessary. Also, a consideration of fees without consideration of expected performance and the higher potential risk and return associated with some investments that have higher fees may ignore the value of the investment to participants. There are many investment funds such as international funds and life cycle funds that typically have higher overall fees. We are not convinced that it necessarily follows that a more convenient presentation of fee information and investment returns will lead participants to invest contributions in funds with lower overall fees.

ACLI supports the proposal's goal of ensuring that participants have access to meaningful and convenient investment information. However, we note that an informed decision to invest in one or more designated investment alternatives may or may not necessarily lead to a lower cost investment mix as a participant may determine, based upon his or her judgment, that it is necessary to pay a higher fee to execute a particular investment strategy. Reduced participant search time alone may very well justify the cost these regulations will impose on plan fiduciaries and service and investment providers.

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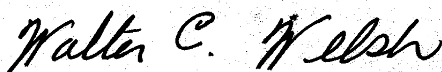
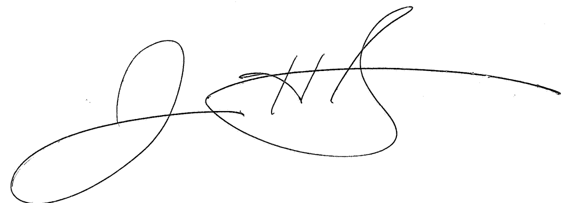
On behalf of the ACLI member companies, thank you for consideration of these comments. As stated above, we welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department on these important issues.

Sincerely yours,





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