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Client Alert

A report for clients and friends of the firm

April 2003

New IRS Regulations Affecting Disclosure, List Maintenance and Confidential Corporate Tax Shelter Registration

The Internal Revenue Service (the "IRS") has released final regulations (the "Final Regulations") requiring a taxpayer to disclose a broad range of transactions on its federal income tax return if they have certain characteristics common to tax shelter transactions. The Final Regulations also require certain advisors to those transactions to maintain investor lists and retain certain other information relevant to the tax structure of the transaction. Finally, the Final Regulations require the registration with the IRS of confidential corporate tax shelter transactions.

The Final Regulations revise and finalize temporary and proposed regulations that the IRS had previously issued on October 22, 2002 (the "Temporary Regulations").[1] The Temporary Regulations were criticized as excessively broad in scope, requiring disclosure of many commonplace transactions that ordinarily would not be considered "tax shelters." In response to these concerns, the Final Regulations, along with two revenue procedures issued simultaneously, refine the scope of these rules and exempt certain categories of transactions from these requirements. Notwithstanding these clarifications, the Final Regulations continue to apply very broadly to a wide range of business transactions.

The Final Regulations are generally effective for transactions entered into on or after February 28, 2003. For transactions entered into on or after January 1, 2003 and before February 28, 2003, taxpayers may elect to rely on the Final Regulations to determine their reporting obligations. Otherwise, the Temporary Regulations will apply.

Taxpayer Disclosure of Reportable Transactions

General Disclosure Obligation for Reportable Transactions

Each taxpayer required to file a U.S. federal income tax return must submit a Form 8886[2] "Reportable Transaction Disclosure Statement" with the taxpayer's annual federal income tax return for each year for which the taxpayer participates in a "reportable transaction." The taxpayer also must submit Form 8886 to the Office of Tax Shelter Analysis when it first discloses the transaction to the IRS.

A "reportable transaction" includes any transaction described in any one of the six categories described below. However, the Final Regulations contain a general exemption from the definition of reportable transaction for transactions, other than listed transactions, entered into by a regulated investment company ("RIC") or an investment vehicle that is owned 95% or more by one or more RICs. In addition, certain customary leasing transactions are excluded from the definition of reportable transactions. Finally, the IRS has the authority to determine by published guidance or under individual letter rulings that a particular transaction is not subject to reporting under the Final Regulations.

In response to comments on the Temporary Regulations, the Final Regulations clarify the definition of participation as it applies to each category of reportable transactions. Generally, a taxpayer has partic-

1 The Temporary Regulations, which addressed taxpayer disclosure and list maintenance issues, are summarized in a Tax Department Client Alert dated December 2002, which is available on our website. The Final Regulations also revised and finalized rules relating to registration of confidential corporate tax shelters that were issued in their initial form in February 2000. See T.D. 8876 (March 2, 2000).

2 The IRS has just released this Form and its instructions, which generally track the language of the Final Regulations.

ipated in a category of transaction if the taxpayer's tax return reflects the elements described in that category. The Final Regulations also contain rules for determining whether a taxpayer is treated as participating in a transaction by reason of its ownership of an interest in a partnership, S corporation or trust (a "flow-through entity"). In certain circumstances, a disclosure obligation may be imposed on the flow-through entity itself, and also on the owners of the entity.

Categories of Reportable Transactions

The Final Regulations identify the following six categories of transactions as reportable transactions subject to disclosure.

Listed Transactions

A listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has determined to be a tax avoidance transaction and identified in published guidance as a listed transaction. The IRS intends for "substantially similar" to be broadly construed in favor of disclosure. Transactions that have been identified by the IRS to date as listed transactions are summarized in the Appendix to this bulletin.

A taxpayer is treated as participating in a listed transaction if (1) the taxpayer's tax return reflects tax consequences or a tax strategy described in the published guidance identifying the listed transaction or (2) the taxpayer knows or has reason to know that the taxpayer's tax benefits are derived directly or indirectly from tax consequences or a tax strategy described in the published guidance identifying a listed transaction. The Final Regulations also caution that published guidance may identify other types or classes of persons that will be treated as participants in a listed transaction.

The Final Regulations potentially have retroactive application in the case of listed transactions. If a transaction becomes a listed transaction after the filing of the taxpayer's final tax return reflecting the taxpayer's participation in the transaction, but before the expiration of the statute of limitations for that return, then a disclosure statement must be filed with the taxpayer's next filed federal income tax return.

Confidential Transactions

A transaction that is offered to a taxpayer under conditions of confidentiality must be disclosed to the IRS. A transaction is considered offered to a taxpayer under conditions of confidentiality if the taxpayer's disclosure of the tax structure or tax treatment[3] of the transaction is limited for the benefit of any person who makes a statement to the taxpayer regarding the potential tax consequences of the transaction. A transaction is also considered offered to a taxpayer under conditions of confidentiality if the taxpayer knows or has reason to know that the taxpayer's use or disclosure of information relating to the tax treatment or tax structure of the transaction is limited in any other manner, such as where the transaction is claimed to be proprietary or exclusive, for the benefit of any person who makes such a statement to the taxpayer. Thus, transactions subject to general confidentiality agreements will be considered to be reportable transactions, even if there is no tax avoidance potential. As described below, this result can be avoided if the confidentiality agreement permits disclosure of the transaction's tax implications.

A taxpayer participates in a confidential transaction if the taxpayer's tax return reflects a tax benefit from the transaction and the taxpayer's disclosure of the tax treatment or tax structure of the transaction was limited by a confidentiality provision. If disclosure by a flow-through entity is limited, but disclosure by a partner, shareholder or beneficiary of the flow-through entity is not limited, then only the flow-through entity (and not the owners of the entity) is treated as participating in the confidential transaction.

The Final Regulations contain two significant exceptions to this disclosure category. First, disclosure restrictions that are reasonably necessary to comply with applicable securities laws will not give rise to a confidentiality agreement requiring taxpayer disclosure. Second, in response to criticism of the scope of the Temporary Regulations, the Final Regulations contain an exception for confidentiality provisions in certain corporate merger and acquisition agreements. Specifically, disclosure restrictions will not be treated as a confidentiality provision in the case of (i) a proposed taxable or tax-free acquisition of historic assets of a corporation that constitute an active trade or business the acquirer intends to continue, or (ii) a proposed taxable or tax-free acquisition of more than fifty percent of the stock of a corporation that owns historic assets used in an active trade or business the acquirer intends to continue, if the taxpayer is permitted to disclose the tax treatment and tax structure of the transaction no later than the earlier of (1) the date of the public announcement of discussions relating to the transaction, (2) the date of the public announcement of the transaction, or (3) the date of the execution of an agreement (with or without conditions) to enter into the transaction. This exception for corporate merger and acquisition transactions does not apply to an investment company that is not publicly traded, or where the taxpayer's ability to consult any tax advisor regarding the tax treatment or structure of the transaction is limited in any way.

The regulations also provide a safe harbor with respect to the confidentiality category of reportable transactions. Generally, the safe harbor will be met if every person who makes a statement to the taxpayer as to the potential tax consequences that may result from the transaction provides express written authorization permitting the taxpayer to disclose the tax treatment and tax structure of the transaction. The Final Regulations specify that confidentiality waiver language should be in substan-

3 The tax treatment of a transaction is defined as the purported or claimed Federal income tax treatment of the transaction. The tax structure of a transaction is defined as any fact that may be relevant to understanding the purported or claimed Federal income tax treatment of the transaction.

tially the form provided in the regulations.[4] The party offering authorization must give it no later than thirty days following the date of its first statement made to the taxpayer regarding the transaction's consequences. We expect that standard confidentiality provisions in business transactions will be revised in many cases to include language intended to comply with the safe harbor.

Transactions with Contractual Protection

A transaction with contractual protection is a transaction for which the taxpayer (or a related party) has the right to a full or partial refund of fees paid in connection with the transaction if all or part of the intended tax consequences of the transaction are not sustained. A transaction also has contractual protection if the transaction fees are contingent on the taxpayer's realization of tax benefits from the transaction. However, contingent or refundable fees are not taken into account with respect to statements given after a return has been filed and the intended consequences have been reported, provided no fees were received before such time.

A taxpayer participates in a transaction with contractual protection if the taxpayer's tax return reflects a tax benefit from the transaction and the taxpayer has the right to a full or partial refund of the fees or the fees are contingent. If a flow-through entity has the right to a full or partial refund of fees or has a contingent fee arrangement, but the partner, shareholder or beneficiary of the flow-through entity does not individually have the right to the refund of fees or the contingent fee arrangement, then the flow-through entity, and not the partner, shareholder or beneficiary, has participated in the transaction with contractual protection.

The definition of contractual protection under the Temporary Regulations was much broader and would have applied to transactions with tax indemnities or tax insurance and to transactions with call rights or unwind provisions relating to a tax event. In response to comments, the contractual protection factor in the Final Regulations was narrowed to focus on whether fees are refundable or contingent. Thus, tax indemnities in merger and acquisition transactions, provisions in leveraged leases which provide for additional rent (or termination options) and other common tax protection arrangements between parties to a business transaction will not cause transactions to become reportable transactions. However, the preamble to the Final Regulations cautions taxpayers that changes to broaden the scope of the regulations will be considered if it comes to the attention of the IRS that types of contractual protection other than refundable or contingent fee arrangements are being used to facilitate abusive transactions.

Loss Transactions

In the view of many commentators, the loss transaction category in the Temporary Regulations was overly broad and would have required disclosure of a significant number of transactions occurring in the ordinary course of business. In response to comments, the Final Regulations clarify the circumstances under which a taxpayer will be treated as participating in a loss transaction. In addition, the IRS issued Revenue Procedure 2003-24 to provide for various exceptions to the loss transaction factor.

Generally, a loss transaction is a transaction that results in the taxpayer claiming a loss under Code section 165[5] that equals or exceeds a certain threshold. Code section 165 generally applies broadly to losses on sales or other dispositions of property but does not cover deductions attributable to depreciation or amortization. The applicable thresholds are:[6]

- for corporations and partnerships with only corporate partners, $10 million in any single year or $20 million in any combination of years;
- for other partnerships, and for S corporations, individuals or trusts, $2 million in any single year or $4 million in any combination of years; and
- for individuals or trusts with losses from foreign currency transactions, $50,000 in any year.

Taxpayers may not take offsetting gains into account when measuring their losses. Therefore, any Code section 165 loss that exceeds the applicable threshold will create a disclosure obligation without regard to any gains from the transaction. A Code section 165 loss also includes losses arising from other sections of the Code that treat transactions as sales or exchanges, or that otherwise result in a deduction under Code section 165.

A taxpayer is treated as participating in a loss transaction if the taxpayer's tax return reflects the Code section 165 loss and the amount of the loss equals or exceeds the applicable threshold. If a taxpayer owns an interest in a flow-through entity, and a Code section 165 loss flows through the entity to the taxpayer (disregarding netting at the entity level), then the taxpayer is treated as participating in the transaction if the taxpayer's tax return reflects a loss that equals or exceeds the threshold amount applicable to that taxpayer. As a result, the Final Regulations clarify that a loss transaction entered into by a flow-through entity may be reportable at the entity level but may also be reportable on the tax returns of the owners of the entity. While the Final Regulations do not specifically require disclosure of this information by the flow-through entity to its owners, this information will presumably need to be provided

4 The regulations state the authorization should contain substantially the following language: "The taxpayer (and each employee, representative, or other agent of the taxpayer) may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of the transaction and all materials of any kind (including opinions or other tax analyses) that are provided to the taxpayer relating to such tax treatment and tax structure."

5 All references to sections of the Code refer to sections of the Internal Revenue Code of 1986, as amended.

6 These amounts include losses whether or not they flow through to partners (or shareholders or beneficiaries, for S corporations and trusts).

to alert the partners, shareholders or beneficiaries, as the case may be, of their individual disclosure obligations.

Under rules designed to exempt loss transactions where a taxpayer acquired an asset for cash, Revenue Procedure 2003-24 provides that a loss is not treated as arising from a loss transaction if the following five requirements are satisfied:

1) the basis of the asset (less adjustments for any allowable depreciation, amortization, or casualty loss) is equal to the cash paid or is otherwise a "qualifying basis";
2) the asset is not an interest in a partnership, trust, regulated investment company, real estate investment trust or other passthrough entity;
3) the loss is not treated as ordinary under Code section 988 (certain foreign currency transactions);
4) the asset has not been separated from any portion of the income it generates; and
5) the asset has never been part of a straddle for tax purposes.

An asset has a "qualifying basis" if any one of the following is applicable:

1) the basis is equal to, and is determined solely by reference to, the amount of cash paid by the taxpayer for the asset including payments for any improvements;
2) the basis is determined by reason of a tax-free reorganization or spin-off transaction, and the basis of the property exchanged was a qualifying basis;
3) the basis is determined under Code section 1014 (basis of property acquired from a decedent);
4) the basis is determined under Code section 1015 (basis of property acquired by gifts and transfers in trust), and the donor's basis was a qualifying basis, or
5) the basis is determined by reason of a tax-free "like-kind" exchange under Code section 1031, and certain other requirements are satisfied.

Revenue Procedure 2003-24 also excludes certain other losses under Code section 165 from the determination of whether a loss transaction is reportable, including certain casualty losses, losses arising from mark-to-market treatment of an asset and losses arising from an identified hedging transaction.

Transactions with Significant Book-Tax Differences

A transaction results in a significant book-tax difference if the federal income tax and book accounting treatment of one or more items of income, gain, expense or loss differs by more than $10 million on a gross basis in any year. Taxpayers may not take offsetting items into account when calculating the amount of any book-tax disparity. The amount of an item for book purposes is generally determined by applying U.S. generally accepted accounting principles. A taxpayer participates in a transaction with a book-tax difference if the taxpayer's tax treatment of an item from the transaction differs from the book treatment of that item by more than the threshold amount.

This disclosure category does not apply to all taxpayers. Rather, this category applies only to (1) taxpayers (including foreign taxpayers) that are reporting companies under the Securities Exchange Act of 1934 and related business entities, or (2) business entities that have $250 million or more in gross assets for book purposes at the end of the applicable financial accounting period. Specific rules are provided on the application of these rules to taxpayers that file consolidated returns, foreign corporations and U.S. shareholders of "controlled foreign corporations" and similar foreign corporations. If a taxpayer is a partner of a partnership, items of income, gain, loss or expense that are allocable to the taxpayer for tax purposes, but that otherwise are considered items of the entity for book purposes, are treated as items of the taxpayer for purposes of determining whether the taxpayer itself is a participant in a transaction giving rise to a book-tax difference. That might be the case, for example, where one of the partners of the partnership is a corporation or other business entity to which the book-tax category may apply.

In separate guidance issued under Revenue Procedure 2003-25, the IRS provided numerous exceptions to this disclosure category, including book-tax differences arising from bad debts or cancellation of indebtedness income, employee compensation, tax-free reorganization transactions and like-kind exchanges of property under Code section 1031.

Transactions Involving Brief Asset Holding Period

A transaction resulting in a tax credit exceeding $250,000 must be disclosed to the IRS if the underlying asset giving rise to the credit is held by the taxpayer for 45 days or less. However, transactions resulting in a foreign tax credit for withholding taxes or other taxes imposed in respect of a dividend may be excluded from this category in certain circumstances. If a taxpayer owns an interest in a flow-through entity, the taxpayer is treated as participating in a transaction involving a brief asset holding period if the taxpayer's tax return reflects the tax credit and the amount of the tax credit claimed by the taxpayer exceeds $250,000.

Document Retention Requirement

The regulations require taxpayers subject to the reporting requirements to retain documents that are material to an understanding of the tax treatment or tax structure of the transaction subject to disclosure. Such documents may include marketing materials; correspondence and agreements between the taxpayer and any advisor or party to the transaction; documents discussing the intended tax benefits from the transaction; and documents referring to the business purposes for the transaction. In contrast to the Temporary Regulations, the Final Regulations clarify that a taxpayer is not required to retain earlier drafts of a document if the taxpayer retains a copy of the final document and the final document contains all the information in the earlier drafts of the document that is material to an understanding of the purported tax treatment or tax structure of the transaction. E-mail correspondence is likely covered by the regulations and should be retained. This record retention obligation exists until the expiration of the statute of limitations applicable to the final taxable year for which disclosure of the transaction is required.

Penalties for Non-Compliance

Under current law there are no specific sanctions for failing to comply with the disclosure regulations that apply to reportable transactions. However, the failure to disclose may nevertheless expose the taxpayer to penalties that might otherwise have been avoided. For example, the IRS believes that, depending on the facts and circumstances, the failure to file a disclosure statement may jeopardize a taxpayer's ability to rely on the reasonable cause exception to the substantial underpayment penalty.[7]

List Maintenance Obligation

The Final Regulations also require "material advisors" to maintain lists of persons who participate in certain tax-motivated transactions. The term "material advisor" generally includes attorneys, accountants, bankers, and other advisors who provide tax advice to the taxpayer in connection with a reportable transaction and who receive a certain amount of fees. The term also includes a person required to register a transaction under the tax shelter registration requirements of Code section 6111.[8]

The material advisor must list each person to whom or for whose benefit the material advisor makes or provides a tax statement with respect to certain tax-motivated transactions. If the transaction requires disclosure, then the material advisor must also list any subsequent participant if the material advisor knows the identity of the subsequent participant. If the material advisor is required to register the transaction under Code section 6111, such material advisor must also list each person who purchases or otherwise acquires an interest in the transaction.

The Final Regulations specify all the information that must be maintained, including, with respect to each potentially abusive tax shelter: identification of each person required to be on the list; the date and amount of each person's participation; a detailed description of the transaction, including its tax structure and expected tax treatment; a summary of the intended tax treatment; and certain written materials, including tax analyses and opinions, that are material to the tax treatment or tax structure of the transaction.

The regulations provide that the list must be maintained for seven years from the earlier of the date of the most recent statement as to the potential tax consequences of the transaction and the date the transaction was first entered into. The list must be furnished to the IRS within twenty days of a list request. When a list is requested by the IRS from an attorney, the attorney may assert a privilege claim if he or she also provides a statement that is signed under penalties of perjury, identifies each document for which the claim of privilege is made and makes certain specific representations regarding the applicability of the privilege claim.

Tax Shelter Registration Requirements

The Final Regulations generally require promoters to register "confidential corporate tax shelters" as tax shelters by filing Form 8264, "Application for Registration of a Tax Shelter." A confidential corporate tax shelter is any transaction (1) a significant purpose of the structure of which is the avoidance or evasion of Federal income tax for a direct or indirect corporate participant; (2) that is offered to any potential participant under conditions of confidentiality; and (3) for which tax shelter promoters may receive fees in excess of $100,000 in the aggregate.

A transaction is structured for the avoidance or evasion of Federal income tax if it is the same as or substantially similar to a listed transaction. In addition, if a transaction is structured to produce Federal income tax benefits that constitute an important part of the intended results of the transaction and the transaction is expected to be presented in the same or substantially similar form to more than one potential participant by the promoter, then the transaction is generally treated as structured for the avoidance or evasion of Federal income tax. However, such a transaction will not be subject to registration if (1) the potential participant is expected to participate in the transaction in the ordinary course of its business in a form consistent with customary commercial practice and (2) there is a generally accepted understanding that the expected Federal income tax benefits from the transaction are properly allowable. Alternatively, such a transaction is not subject to registration if the tax shelter promoter (or other person who would be responsible for registration) reasonably determines that there is no reasonable basis under Federal tax law for the denial of any significant portion of the expected Federal income tax benefits from the transaction. Finally, the IRS may determine by published guidance or individual ruling that registration is not required for a particular transaction.

Possible Future Developments

There are a number of pending legislative proposals that could affect the requirements set forth in the Final Regulations. For example, legislation has been proposed that, if enacted, will

7 *See* T.D. 8877 (March 2, 2000).

8 Code section 6111 generally requires promoters of tax shelter transactions to register them with the IRS. As discussed below, the Final Regulations affect the registration rules as they apply to confidential corporate tax shelters, but they do not affect the existing rules relating to registration of other tax shelter transactions, which are not addressed in this Client Alert.

impose stiff penalties for taxpayers who fail to comply with the disclosure requirements. In addition, due to differing definitions, transactions that require disclosure do not necessarily require registration under current law. Pending legislation would conform these requirements so that the IRS would generally be informed of all transactions that are reportable by taxpayers. The IRS and Treasury intend to revise the regulations under Code section 6111 if and when such legislation is enacted.[9] It is of course impossible to know whether any such legislation, or other legislation affecting tax shelter transactions, will be enacted.

Appendix

The IRS has identified the following transactions as "listed transactions" for tax shelter disclosure, registration and list maintenance purposes:

(1) Transactions in which taxpayers claim deductions for contributions to a qualified cash or deferred arrangement or matching contributions to a defined contribution plan where the contributions are attributable to compensation earned by plan participants after the end of the taxable year. *See* Rev. Rul. 90-105.

(2) Certain trust arrangements purported to qualify as multiple employer welfare benefit funds exempt from the limits of Code sections 419 and 419A. *See* Notice 95-34.

(3) Certain multiple-party transactions intended to allow one party to realize rental or other income from property or service contracts and to allow another party to report deductions related to that income (often referred to as "lease strips"). *See* Notice 95-53.

(4) Transactions in which the reasonably expected economic profit is insubstantial in comparison to the value of the expected foreign tax credits. *See* Notice 98-5, Part II.

(5) Transactions involving contingent installment sales of securities by partnerships in order to accelerate and allocate income to a tax-indifferent partner, such as a tax-exempt entity or foreign person, and to allocate later losses to another partner. *See ASA Investerings Partnership v. Commissioner* and *ACM Partnership v. Commissioner*.

(6) Transactions involving distributions described in Treas. Reg. Sec. 1.643(a)-8 from charitable remainder trusts. *See* Treas. Reg. Sec. 1.643(a)-8.

(7) Transactions in which a taxpayer purports to lease property and then purports to immediately sublease it back to the lessor (a LILO transaction). *See* Rev. Rul. 99-14.

(8) Transactions involving the distribution of encumbered property in which taxpayers claim tax losses for capital outlays that they have in fact recovered. *See* Notice 99-59.

(9) Transactions involving fast-pay arrangements as defined in Treas. Reg. Sec. 1.7701(l)-3(b).

(10) Certain transactions involving the acquisition of two debt instruments the values of which are expected to change significantly at about the same time in opposite directions. *See* Rev. Rul. 2000-12.

(11) Transactions generating losses resulting from artificially inflating the basis of partnership interests. *See* Notice 2000-44.

(12) Transactions involving the purchase of a parent corporation's stock by a subsidiary, a subsequent transfer of the purchased parent stock from the subsidiary to the parent's employees, and the eventual liquidation or sale of the subsidiary. *See* Notice 2000-60.

(13) Transactions purporting to apply Code section 935 to Guamanian trusts. *See* Notice 2000-61.

(14) Transactions involving the use of an intermediary to sell the assets of a corporation. *See* Notice 2001-16.

(15) Transactions involving a loss on the sale of stock acquired in a purported Code section 351 transfer of a high basis asset to a corporation and the corporation's assumption of a liability that the transferor has not yet taken into account for federal income tax purposes. *See* Notice 2001-17.

(16) Certain redemptions of stock in transactions not subject to U.S. tax in which the basis of the redeemed stock is purported to shift to a U.S. taxpayer. *See* Notice 2001-45.

(17) Transactions that use a loan assumption agreement to claim an inflated basis in assets acquired from another party. *See* Notice 2002-21.

(18) Transactions involving notional principal contracts to claim deductions for periodic payments made by a taxpayer while disregarding the accrual of a right to receive offsetting payments in the future. *See* Notice 2002-35.

(19) Transactions involving the creation of a tiered partnership that does not make an election under Code section 754 and that is used to duplicate straddle losses. *See* Notice 2002-50.

(20) Transactions involving the use of an S corporation or partnership and one or more transitory shareholders

9 *See* T.D. 9017 (October 22, 2002).

or partners to claim a loss while deferring an offsetting gain on a foreign currency straddle. *See* Notice 2002-65.

(21) Certain reinsurance arrangements used to shift income from U.S. taxpayers to related insurance companies that are subject to little or no U.S. federal income tax. *See* Notice 2002-70.

(22) Transactions using an employee stock ownership plan that holds employer securities in an S corporation to claim eligibility for the delayed effective date of Code section 409(p) under Code section 656(d)(2) of the Economic Growth and Tax Relief Reconciliation Act of 2001. *See* Rev. Rul. 2003-6.

(23) Certain offshore deferred compensation arrangements used to shift compensation from U.S. employees to foreign employee leasing companies. *See* Notice 2003–22.

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Client Alert

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