

DEPARTMENT OF THE TREASURY**Internal Revenue Service****26 CFR Part 1**

[REG–122855–15]

RIN 1545–BM83

Liabilities Recognized as Recourse Partnership Liabilities Under Section 752**AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Partial withdrawal of notice of proposed rulemaking and notice of proposed rulemaking, including by cross reference to temporary regulations.

SUMMARY: This document contains proposed regulations that incorporate the text of related temporary regulations and withdraws a portion of a notice of proposed rulemaking (REG–119305–11) to the extent not adopted by final regulations. This document also contains new proposed regulations addressing when certain obligations to restore a deficit balance in a partner's capital account are disregarded under section 704 of the Internal Revenue Code (Code) and when partnership liabilities are treated as recourse liabilities under section 752. These regulations would affect partnerships and their partners.

DATES: The notice of proposed rulemaking under sections 707 and 752 that was published in the **Federal Register** on January 30, 2014 (REG–119305–11, 79 FR 4826), is partially withdrawn as of October 5, 2016. Written or electronic comments and requests for a public hearing must be received by January 3, 2017.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–122855–15), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–122855–15), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically, via the Federal eRulemaking Portal site at <http://www.regulations.gov> (indicate IRS and REG–122855–15).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Caroline E. Hay or Deane M. Burke, (202) 317–5279; concerning submissions of comments and requests for a public hearing, Regina L. Johnson, (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION: In addition to these proposed regulations,

the Treasury Department and the IRS are publishing in the Rules and Regulations section in this issue of the **Federal Register**: (1) Final regulations under section 707 concerning disguised sales and under section 752 regarding the allocation of excess nonrecourse liabilities and (2) temporary regulations concerning a partner's share of partnership liabilities for purposes of section 707 and the treatment of certain payment obligations under section 752.

Paperwork Reduction Act

The collection of information related to these proposed regulations under section 752 is reported on Form 8275, Disclosure Statement, and has been reviewed in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) and approved by the Office of Management and Budget under control number 1545–0889. Comments concerning the collection of information and the accuracy of estimated average annual burden and suggestions for reducing this burden should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the burden associated with this collection of information should be received by December 5, 2016.

The collection of information in these proposed regulations is in proposed § 1.752–2(b)(3)(ii)(D) (which cross references the requirement in § 1.752–2T(b)(3)(ii)(D)). This information is required by the IRS to ensure that section 752 of the Code and applicable regulations are properly applied for allocations of partnership liabilities. The respondents will be partners and partnerships.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103.

Background*1. Overview*

This document contains proposed amendments to the Income Tax

Regulations (26 CFR part 1) under sections 704, 707, and 752 of the Code. On January 30, 2014, the Treasury Department and the IRS published a notice of proposed rulemaking in the **Federal Register** (REG–119305–11, 79 FR 4826) to amend the then existing regulations under section 707 relating to disguised sales of property to or by a partnership and under section 752 concerning the treatment of partnership liabilities (the 2014 Proposed Regulations). The 2014 Proposed Regulations provided certain technical rules intended to clarify the application of the disguised sale rules under section 707. The 2014 Proposed Regulations also contained rules regarding the sharing of partnership recourse and nonrecourse liabilities under section 752.

A public hearing on the 2014 Proposed Regulations was not requested or held, but the Treasury Department and the IRS received written comments. After consideration of, and in response to, the comments on the 2014 Proposed Regulations, the Treasury Department and the IRS are withdrawing the 2014 Proposed Regulations under § 1.752–2 and publishing new proposed regulations under § 1.752–2, as well as proposed regulations under section 704. Concurrently in this issue of the **Federal Register**, the Treasury Department and the IRS are also publishing final regulations that adopt, as modified, the 2014 Proposed Regulations under section 707 and § 1.752–3, and temporary regulations under sections 707 and 752.

2. Summary of Applicable Law

Section 752 separates partnership liabilities into two categories: recourse liabilities and nonrecourse liabilities. Section 1.752–1(a)(1) provides that a partnership liability is a recourse liability to the extent that any partner or related person bears the economic risk of loss (EROL) for that liability under § 1.752–2. Section 1.752–1(a)(2) provides that a partnership liability is a nonrecourse liability to the extent that no partner or related person bears the EROL for that liability under § 1.752–2.

A partner generally bears the EROL for a partnership liability if the partner or related person has an obligation to make a payment to any person within the meaning of § 1.752–2(b). For purposes of determining the extent to which a partner or related person has an obligation to make a payment, an obligation to restore a deficit capital account upon liquidation of the partnership under the section 704(b) regulations is taken into account. Further, for this purpose, § 1.752–2(b)(6)

of the existing regulations presumes that partners and related persons who have payment obligations actually perform those obligations, irrespective of their net worth, unless the facts and circumstances indicate a plan to circumvent or avoid the obligation (the satisfaction presumption). However, the satisfaction presumption is subject to an anti-abuse rule in § 1.752-2(j) pursuant to which a payment obligation of a partner or related person may be disregarded or treated as an obligation of another person if facts and circumstances indicate that a principal purpose of the arrangement is to eliminate the partner's EROL with respect to that obligation or create the appearance of the partner or related person bearing the EROL when the substance is otherwise. Under the existing rules, the satisfaction presumption is also subject to a disregarded entity net value requirement under § 1.752-2(k) pursuant to which, for purposes of determining the extent to which a partner bears the EROL for a partnership liability, a payment obligation of a disregarded entity is taken into account only to the extent of the net value of the disregarded entity as of the allocation date that is allocated to the partnership liability.

3. 2014 Proposed Regulations

As discussed in greater detail in the Summary of Comments and Explanation of Provisions section of this preamble, § 1.752-2 of the 2014 Proposed Regulations generally, among other things, (1) provided that a partner's or related person's obligation to make a payment with respect to a partnership liability (excluding those imposed by state law) would not be recognized for purposes of section 752 unless each recognition factor was satisfied; (2) applied the list of recognition factors to all payment obligations under § 1.752-2(b), including a partner's obligation to restore a deficit capital account upon liquidation of a partnership (deficit restoration obligations, or DROs) as provided under the section 704(b) regulations; and (3) provided generally that a payment obligation would be recognized to the extent of the net value of a partner or related person as of the allocation date.

After consideration of the comments received on the 2014 Proposed Regulations, the Treasury Department and the IRS are reconsidering the rules under section 752 regarding payment obligations that are recognized under § 1.752-2(b)(3), the satisfaction presumption under § 1.752-2(b)(6), the anti-abuse rule provided in § 1.752-2(j),

and the net value requirement as provided in § 1.752-2(k). Accordingly, the Treasury Department and the IRS are withdrawing § 1.752-2 of the 2014 Proposed Regulations and publishing these new proposed regulations that would amend existing regulations under sections 704 and 752. These new provisions, and comments received on the 2014 Proposed Regulations that are pertinent to these new provisions, are discussed in the Summary of Comments and Explanation of Provisions section of the preamble that follows.

4. Final and Temporary Regulations Under Section 707 and Requests for Comments

As previously mentioned, the Treasury Department and the IRS are concurrently publishing temporary regulations under section 707 (concerning disguised sales) (the 707 Temporary Regulations) and section 752 (concerning recourse liabilities, in particular bottom dollar payment obligations) (the 752 Temporary Regulations), and final regulations under section 707 and § 1.752-3. The temporary regulations are incorporated by cross reference in these proposed regulations. Notably, the 707 Temporary Regulations provide that, for disguised sale purposes, partners determine their share of any partnership liability in the manner in which excess nonrecourse liabilities are allocated under § 1.752-3(a)(3) (with certain limitations). Generally, a partner's share of the excess nonrecourse liability is determined in accordance with the partner's share of partnership profits taking into account all the facts and circumstances relating to the economic arrangement of the partners. The Treasury Department and the IRS recognize that taxpayers may require further guidance regarding reasonable methods for determining a partner's share of partnership profits under § 1.752-3(a)(3) for disguised sale purposes, especially given that a partner's share may change from year to year or differ with respect to different partnership assets and believe it may be appropriate to issue administrative guidance for this purpose. Accordingly, comments are requested regarding possible safe harbors and reasonable methods for determining a partner's share of profits, taking into account all of the relevant facts and circumstances relating to the economic arrangement of the partners. The preamble to the temporary regulations describes the provisions in greater detail. In addition, the final regulations under section 707 also include a request for comments concerning the exception for reimbursements of preformation capital

expenditures under § 1.707-4(d), which is described in greater detail in the preamble to the final regulations.

Summary of Comments and Explanation of Provisions

1. Rights of Reimbursement

Section 1.752-2(b)(1) provides that, except as otherwise provided in § 1.752-2, a partner bears the EROL for a partnership liability to the extent that, if the partnership constructively liquidated, the partner or related person would be obligated to make a payment to any person (or a contribution to the partnership) because that liability becomes due and payable and the partner or related person would not be entitled to reimbursement from another partner or a person that is a related person to another partner. Section 1.752-2(b)(1) presumes that, in the constructive liquidation, the partnership has a value of zero with which to pay its liabilities. Under the 2014 Proposed Regulations, a partner would not bear the EROL under § 1.752-2(b)(1) if the partner or related person is entitled to a reimbursement from "any person." Commenters noted that a reimbursement from "any person" would include a reimbursement from the partnership, which is contrary to the intent of the regulations under section 752. A right to be reimbursed by the partnership should be disregarded, as § 1.752-2(b)(1) presumes that the partnership would not be able to pay the liability or reimburse the partner. The Treasury Department and the IRS agree with the concerns expressed in the comments; therefore, these proposed regulations do not include the changes to § 1.752-2(b)(1) that were in the 2014 Proposed Regulations.

2. Arrangements Part of a Plan To Circumvent or Avoid an Obligation

The 2014 Proposed Regulations provided that a partner's or related person's obligation to make a payment with respect to a partnership liability (excluding those imposed by state law) will not be recognized for purposes of section 752 unless: (1) The partner or related person is (A) required to maintain a commercially reasonable net worth throughout the term of the payment obligation or (B) subject to commercially reasonable contractual restrictions on transfers of assets for inadequate consideration; (2) the partner or related person is required periodically to provide commercially reasonable documentation regarding the partner's or related person's financial condition; (3) the term of the payment obligation does not end prior to the term

of the partnership liability; (4) the payment obligation does not require that the primary obligor or any other obligor with respect to the partnership liability directly or indirectly hold money or other liquid assets in an amount that exceeds the reasonable needs of such obligor; (5) the partner or related person received arm's length consideration for assuming the payment obligation; and (6) the obligation is not a bottom dollar guarantee or indemnity (recognition factors).

Commenters expressed concerns with the all-or-nothing approach in the 2014 Proposed Regulations. One commenter noted that a partner could cause an obligation to deliberately fail one of the recognition factors so as to cause a liability to be treated as nonrecourse if such characterization potentially would be beneficial to such partner, even if that partner did, in fact, bear the EROL. This commenter also noted that commercial arrangements rarely satisfy each and every one of the recognition factors and commercial practices tend to change over time, thereby rendering the recognition factors out of date. This commenter recommended that regulations instead provide a nonexclusive list of facts and circumstances containing as factors many of the items identified in the 2014 Proposed Regulations.

The Treasury Department and the IRS believe that the concerns expressed by the commenters are valid and thus propose to move the list of factors to an anti-abuse rule in § 1.752-2(j), other than the recognition factors concerning bottom dollar guarantees and indemnities, which are addressed in the 752 Temporary Regulations. Under the anti-abuse rule, factors are weighed to determine whether a payment obligation should be respected. The list of factors in the anti-abuse rule in these proposed regulations is nonexclusive, and the weight to be given to any particular factor depends on the particular case. Furthermore, the presence or absence of any particular factor, in itself, is not necessarily indicative of whether or not a payment obligation is recognized under § 1.752-2(b).

In addition to comments addressing the recognition factor approach in the 2014 Proposed Regulations, the Treasury Department and the IRS received specific comments regarding the individual recognition factors. With respect to the first recognition factor regarding commercially reasonable net worth or restrictions on transfers, one commenter agreed that an obligor should have the wherewithal to make a payment to the extent required for the entire duration of its obligation, but

believed that this concern is alleviated by the anti-abuse rule in the current regulations under § 1.752-2(j). This commenter suggested that the anti-abuse rule in § 1.752-2(j) contain additional examples to illustrate abusive or problematic situations. Another commenter noted that the 2014 Proposed Regulations did not address the consequences if a partner or related person breaches its payment obligation under an agreement regarding net worth or restrictions on transfers and suggested that the regulations address such consequences in an anti-abuse rule (for example, a partner's or related person's payment obligation may be disregarded if it is determined that the creditor lacked the intent to enforce its rights under the agreement).

With respect to the first two recognition factors, commenters expressed concerns with the use of the terms "commercially reasonable" and "commercially reasonable documentation." One commenter believed that these terms are vague and subjective and would require partnerships to make difficult judgments as to whether these recognition factors have been met prior to allocating any partnership liability. Another commenter noted that the "commercially reasonable documentation" recognition factor did not specify who should receive the documentation and that such documentation should be provided to the lender.

Moving the list of factors to an anti-abuse rule should alleviate some of the concerns expressed regarding both whether a payment obligor has the wherewithal to pay and the use of the term "commercially reasonable." The proposed regulations also revise the first two factors to provide clarity by limiting the first factor to examine solely whether the partner or related person is subject to commercially reasonable contractual restrictions that protect the likelihood of payment, such as restrictions on transfers for inadequate consideration or equity distributions. In addition, the proposed regulations do not retain the subjective commercially reasonable net worth factor, but instead include a new factor that examines whether the payment obligation restricts the creditor from promptly pursuing payment following a default on the partnership liability or whether there are other arrangements that indicate a plan to delay collection.

The proposed regulations retain the use of the "commercially reasonable" standard, however, because different facts may require a different standard of whether contractual restrictions and

documentation are "commercially reasonable" with respect to a particular industry, and the flexible nature of the term is helpful in informing partnerships and their partners that obligations should be consistent with what is customary in the marketplace. With respect to the second recognition factor regarding documentation, these proposed regulations also clarify that the factor examines whether commercially reasonable documentation was provided to the party that benefits from the payment obligation (for example, the creditor in the case of a guarantee or the indemnified party in the case of an indemnification arrangement).

Commenters also noted that certain recognition factors do not take into account industry specific practices. One commenter pointed out that the requirement that a payment obligation last throughout the full term of the partnership's loan is contrary to commercial practice in some cases. In particular, the commenter noted that, in the real estate industry context, it is common for a construction loan to be guaranteed until the property reaches a required level of stabilization. This commenter did believe, however, that a payment obligation should be disregarded if the guarantor or other obligor has an unrestricted unilateral right to terminate the obligation at will, including immediately before the obligation becomes due and payable. Commenters also noted that the recognition factor that would require arm's length consideration is not commercial, as a partner is often willing to enter into a guarantee or other payment obligation with respect to a partnership liability because the partner will benefit from the liability in the obligor's capacity as a partner. The Treasury Department and the IRS agree with these recommendations; thus, these proposed regulations take into account industry practice with respect to terminations of payment obligations and do not include the arm's length consideration factor.

A commenter also expressed concerns regarding the recognition factor that examines whether a primary obligor or any other obligor with respect to the partnership liability is required to hold assets in an amount that exceeds the reasonable needs of the obligor. The commenter noted that partnership agreements often include restrictions on distributions before certain hurdles are satisfied for a variety of reasons, such as to protect the interests of preferred partners or for prudent business management. Another commenter agreed with the legal theory

underpinning the recognition factor (to address fact patterns in which the taxpayer intended and acted to ensure the partnership maintained sufficient collateral to repay the creditor without exposing the obligor to meaningful liability) but suggested that commercially required or prudent reserves not be considered. Both commenters suggested that an example illustrating the restrictions that violate this factor would be helpful.

The commenters' concerns should be largely addressed by making this recognition factor one of many examined under the anti-abuse rule that looks to whether there is a plan to circumvent or avoid the obligation. Under the anti-abuse rule, an obligor's retention of assets for its reasonable foreseeable needs (such as for commercial or prudent business reasons) generally would not, on its own, indicate that there is a plan to circumvent or avoid the obligation.

Finally, the proposed regulations provide two additional factors that indicate when a plan to circumvent or avoid an obligation exists. The first provides that, in the case of a guarantee or similar arrangement, the terms of the liability would be substantially the same had the partner or related person not agreed to provide the guarantee. This factor indicates that the guarantee was not required by the lender, presumably because the partnership had sufficient assets to satisfy its obligation. The second additional factor examines whether the creditor or other party benefiting from the obligation received executed documents with respect to the payment obligation from the partner or related person before, or within a commercially reasonable time after, the creation of the obligation.

3. Deficit Restoration Obligations

The 2014 Proposed Regulations applied the list of recognition factors discussed in Section 2 of this Summary of Comments and Explanation of Provisions to all payment obligations under § 1.752-2(b), including a DRO, as provided under the section 704(b) regulations. Commenters explained that not all of the recognition factors could be satisfied with respect to a DRO. In addition, commenters suggested that the regulations under section 704(b) be amended to clarify that if a DRO is not given effect under section 752, it should not be given effect under section 704(b).

A DRO is an obligation to the partnership that is imposed by the partnership agreement. In contrast, a guarantee or indemnity is a contractual obligation outside the partnership agreement. As a result of this difference

and based on the comments on the 2014 Proposed Regulations, the proposed regulations refine the list of factors applicable to DROs and clarify the interaction of section 752 with section 704 regarding DROs. Under § 1.704-1(b)(2)(ii)(c)(2) of the existing regulations, a partner's DRO is not respected if the facts and circumstances indicate a plan to circumvent or avoid the partner's DRO. These proposed regulations add a list of factors to § 1.704-1(b)(2)(ii)(c) that are similar to the factors in the proposed anti-abuse rule under § 1.752-2(j), but specific to DROs, to indicate when a plan to circumvent or avoid an obligation exists. Under the proposed regulations, the following factors indicate a plan to circumvent or avoid an obligation: (1) The partner is not subject to commercially reasonable provisions for enforcement and collection of the obligation; (2) the partner is not required to provide (either at the time the obligation is made or periodically) commercially reasonable documentation regarding the partner's financial condition to the partnership; (3) the obligation ends or could, by its terms, be terminated before the liquidation of the partner's interest in the partnership or when the partner's capital account as provided in § 1.704-1(b)(2)(iv) is negative; and (4) the terms of the obligation are not provided to all the partners in the partnership in a timely manner.

Notwithstanding the proposed factors, the Treasury Department and the IRS have concerns with whether and to what extent it is appropriate to recognize DROs (and certain partner notes treated as DROs) as meaningful payment obligations. Many DROs are triggered only on the liquidation of a partnership. However, some partnerships are intended to have perpetual life and other partnerships can effectively cease operations but not actually liquidate; therefore, a partner's DRO may never be required to be satisfied. In addition, some DROs can be terminated or significantly reduced in a manner that may not be appropriate, and therefore, the DRO similarly may never be triggered. The Treasury Department and the IRS request comments on the extent to which such DROs should be recognized. In addition, certain partner notes are treated as DROs under § 1.704-1(b)(2)(ii)(c)(1) and (3) of these proposed regulations. The Treasury Department and the IRS also request comments concerning whether these obligations should continue to be treated as DROs.

4. Exculpatory Liabilities

One commenter suggested that the 2014 Proposed Regulations would result in more liabilities being characterized as nonrecourse liabilities, in particular, so-called, "exculpatory liabilities," and urged the Treasury Department and the IRS to provide guidance with respect to such liabilities. An exculpatory liability is a liability that is recourse to an entity under state law and section 1001, but no partner bears the EROL within the meaning of section 752. Thus, the liability is treated as nonrecourse for section 752 purposes. The Treasury Department and the IRS are studying the treatment of exculpatory liabilities under sections 704 and 752 and agree that guidance is warranted in this area. However, the treatment of exculpatory liabilities is beyond the scope of these proposed regulations. The Treasury Department and the IRS seek additional comments regarding the proper treatment of an exculpatory liability under regulations under section 704(b) and the effect of such a liability's classification under section 1001. Further, the Treasury Department and the IRS request additional comments addressing the allocation of an exculpatory liability among multiple assets and possible methods for calculating minimum gain with respect to such liability, such as the so-called "floating lien" approach (whereby all the assets in the entity, including cash, are considered to be subject to the exculpatory liability) or a specific allocation approach.

5. Net Value

Section 1.752-2(b)(6) of the existing regulations provides that, for purposes of determining the extent to which a partner or related person has a payment obligation and the EROL, it is assumed that all partners and related persons who have obligations to make payments actually perform those obligations, irrespective of their actual net worth, unless the facts and circumstances indicate a plan to circumvent or avoid the obligation. See § 1.752-2(b)(6), cross referencing § 1.752-2(j) and (k). Under the anti-abuse rule in § 1.752-2(j), a payment obligation is disregarded if there is a plan to circumvent or avoid such obligation. Section 1.752-2(k)(1) provides that, when determining the extent to which a partner bears the EROL for a partnership liability, a payment obligation of a business entity that is disregarded as an entity separate from its owner under section 856(i), section 1361(b)(3), or §§ 301.7701-1 through 301.7701-3 of the Procedure and Administration Regulations (a

disregarded entity) is taken into account only to the extent of the net value of the disregarded entity as of the allocation date that is allocated to the partnership liability. Section 1.752-2(k)(2)(i) provides, in part, that net value is the fair market value of all assets owned by the disregarded entity that may be subject to creditors' claims under local law less all obligations of the disregarded entity that do not constitute § 1.752-2(b)(1) payment obligations of the disregarded entity.

The 2014 Proposed Regulations provided that, in determining the extent to which a partner or related person other than an individual or a decedent's estate bears the EROL for a partnership liability other than a trade payable, a payment obligation is recognized only to the extent of the net value of the partner or related person that, as of the allocation date, is allocated to the liability, as determined under § 1.752-2(k). The 2014 Proposed Regulations also provided that the partner must provide a statement concerning the net value of the payment obligor to the partnership. The preamble to the 2014 Proposed Regulations requested comments concerning whether the net value rule should also apply to individuals and estates and whether the regulations should consolidate these rules under § 1.752-2(k).

Commenters expressed concerns that an expansion of the net value rule would add considerable burden and expense to taxpayers and would likely lead to time consuming and costly disputes regarding valuations. Another commenter explained that taxpayers have often avoided the net value regulations (by not using disregarded entities) or have applied the regulations only when the disregarded entity has minimal or no assets.

Commenters suggested that if the net value rule is retained, § 1.752-2(k) should be extended to all partners and related persons other than individuals. One commenter expressed concerns that a partner who may be treated as bearing the EROL with respect to a partnership liability would have to provide information regarding the net value of the payment obligor, which is unnecessarily intrusive. Another commenter believed that if the rules requiring net value were extended to all partners in partnerships, the attempt to achieve more realistic substance would be accompanied by a corresponding increase in the potential for manipulation.

The Treasury Department and the IRS remain concerned with ensuring that a partner or related person only be presumed to satisfy its payment

obligation to the extent that such partner or related person would be able to pay on the obligation. After consideration of the comments, however, the Treasury Department and the IRS agree that expanding the application of the net value rules under § 1.752-2(k) may lead to more litigation and may unduly burden taxpayers. Furthermore, net value as provided in § 1.752-2(k) may not accurately take into account the future earnings of a business entity, which normally factor into lending decisions. Therefore, the Treasury Department and the IRS propose to remove § 1.752-2(k) and instead create a new presumption under the anti-abuse rule in § 1.752-2(j). Under the presumption in the proposed regulations, evidence of a plan to circumvent or avoid an obligation is deemed to exist if the facts and circumstances indicate that there is not a reasonable expectation that the payment obligor will have the ability to make the required payments if the payment obligation becomes due and payable. A payment obligor includes disregarded entities (including grantor trusts). These proposed regulations also add an example to illustrate the application of the anti-abuse rule when the payment obligor is an underfunded entity. Under these proposed regulations, § 1.752-2(b)(6) continues to presume that payment obligations with respect to a partnership liability will be satisfied unless evidence of a plan to circumvent or avoid the obligation exists as determined under § 1.752-2(j). If evidence of a plan to circumvent or avoid the obligation exists or is deemed to exist, the obligation is not recognized under § 1.752-2(b) and therefore the partnership liability is treated as a nonrecourse liability under § 1.752-1(a)(2).

Proposed Applicability Dates

The amendments to § 1.704-1 are proposed to apply on or after the date these regulations are published as final regulations in the **Federal Register**. The amendments to § 1.752-2 are proposed to apply to liabilities incurred or assumed by a partnership and to payment obligations imposed or undertaken with respect to a partnership liability on or after the date these regulations are published as final regulations in the **Federal Register**. Partnerships and their partners may rely on these proposed regulations prior to the date they are published as final regulations in the **Federal Register**. However, the rules in § 1.752-2(k) still apply to disregarded entities until the proposed regulations are published as final regulations in the **Federal Register**.

Some commenters were concerned that the 2014 Proposed Regulations "delinked" the regulations under sections 704 and 752 concerning DROs, that is, that a DRO may somehow still be recognized under section 704 despite not meeting the requirements to be recognized as a payment obligation under section 752. DROs are subject to the bottom dollar payment obligation rules in the 752 Temporary Regulations, but the rules in these proposed regulations concerning DROs will not be effective prior to the date they are published as final regulations in the **Federal Register**. However, these proposed regulations allow partnerships and their partners to rely on the proposed regulations, which should address this concern.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the amount of time necessary to report the required information will be minimal in that it requires partnerships (including partnerships that may be small entities) to provide information they already maintain or can easily obtain to the IRS. Moreover, it should take a partnership no more than 2 hours to satisfy the information requirement in these regulations. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. All comments will be available for public inspection

and copying at www.regulations.gov or upon request. A public hearing will be scheduled if requested in writing by a person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these regulations are Caroline E. Hay and Deane M. Burke of the Office of the Associate Chief Counsel (Passthroughs & Special Industries), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

Withdrawal of Proposed Regulations

Accordingly, under the authority of 26 U.S.C. 7805, § 1.752-2 of the notice of proposed rulemaking (REG-119305-11) that was published in the **Federal Register** on January 30, 2014 (79 FR 4826) is withdrawn.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

Sections 1.707-2 through 1.707-9 also issued under 26 U.S.C. 707(a)(2)(B).

■ **Par. 2.** Section 1.704-1 is amended by:

- 1. Adding two sentences to the end of paragraph (b)(1)(ii)(a).
- 2. Adding a sentence to the end of paragraph (b)(2)(ii)(b)(3) introductory text.
- 3. Removing the undesignated paragraph following paragraph (b)(2)(ii)(b)(3).
- 4. Adding paragraphs (b)(2)(ii)(b)(4) through (7).
- 5. Revising paragraph (b)(2)(ii)(c).

The additions and revisions read as follows:

§ 1.704-1 Partner's distributive share.

* * * * *

- (b) * * *
- (1) * * *
- (ii) * * *

(a) * * * Furthermore, the last sentence of paragraph (b)(2)(ii)(b)(3) of this section and paragraphs (b)(2)(ii)(b)(4) through (7) and

(b)(2)(ii)(c) of this section apply on or after the date these regulations are published as final regulations in the **Federal Register**. However, taxpayers may rely on the last sentence of paragraph (b)(2)(ii)(b)(3) of this section and paragraphs (b)(2)(ii)(b)(4) through (7) and (b)(2)(ii)(c) of this section on or after October 5, 2016 and before the date these regulations are published as final regulations in the **Federal Register**.

* * * * *

- (2) * * *
- (ii) * * *
- (b) * * *

(3) * * * Notwithstanding the partnership agreement, an obligation to restore a deficit balance in a partner's capital account, including an obligation described in paragraph (b)(2)(ii)(c)(1) of this section, will not be respected for purposes of this section to the extent the obligation is disregarded under paragraph (b)(2)(ii)(c)(4) of this section.

(4) For purposes of paragraphs (b)(2)(ii)(b)(1) through (3) of this section, a partnership taxable year shall be determined without regard to section 706(c)(2)(A).

(5) The requirements in paragraphs (b)(2)(ii)(b)(2) and (3) of this section are not violated if all or part of the partnership interest of one or more partners is purchased (other than in connection with the liquidation of the partnership) by the partnership or by one or more partners (or one or more persons related, within the meaning of section 267(b) (without modification by section 267(e)(1)) or section 707(b)(1), to a partner) pursuant to an agreement negotiated at arm's length by persons who at the time such agreement is entered into have materially adverse interests and if a principal purpose of such purchase and sale is not to avoid the principles of the second sentence of paragraph (b)(2)(ii)(a) of this section.

(6) The requirement in paragraph (b)(2)(ii)(b)(2) of this section is not violated if, upon the liquidation of the partnership, the capital accounts of the partners are increased or decreased pursuant to paragraph (b)(2)(iv)(f) of this section as of the date of such liquidation and the partnership makes liquidating distributions within the time set out in the requirement in paragraph (b)(2)(ii)(b)(2) of this section in the ratios of the partners' positive capital accounts, except that it does not distribute reserves reasonably required to provide for liabilities (contingent or otherwise) of the partnership and installment obligations owed to the partnership, so long as such withheld amounts are distributed as soon as practicable and in the ratios of the

partners' positive capital account balances.

(7) See examples (1)(i) and (ii), (4)(i), (8)(i), and (16)(i) of paragraph (b)(5) of this section for issues concerning paragraph (b)(2)(ii)(b) of this section.

(c) *Obligation to restore deficit—(1)*

Other arrangements treated as obligations to restore deficits. If a partner is not expressly obligated to restore the deficit balance in such partner's capital account, such partner nevertheless will be treated as obligated to restore the deficit balance in his capital account (in accordance with the requirement in paragraph (b)(2)(ii)(b)(3) of this section and subject to paragraph (b)(2)(ii)(c)(2) of this section) to the extent of—

(A) The outstanding principal balance of any promissory note (of which such partner is the maker) contributed to the partnership by such partner (other than a promissory note that is readily tradable on an established securities market), and

(B) The amount of any unconditional obligation of such partner (whether imposed by the partnership agreement or by state or local law) to make subsequent contributions to the partnership (other than pursuant to a promissory note of which such partner is the maker).

(2) *Satisfaction requirement.* For purposes of paragraph (b)(2)(ii)(c)(1) of this section, a promissory note or unconditional obligation is taken into account only if it is required to be satisfied at a time no later than the end of the partnership taxable year in which such partner's interest is liquidated (or, if later, within 90 days after the date of such liquidation). If a promissory note referred to in paragraph (b)(2)(ii)(c)(1) of this section is negotiable, a partner will be considered required to satisfy such note within the time period specified in this paragraph (b)(2)(ii)(c)(2) if the partnership agreement provides that, in lieu of actual satisfaction, the partnership will retain such note and such partner will contribute to the partnership the excess, if any, of the outstanding principal balance of such note over its fair market value at the time of liquidation. See paragraph (b)(2)(iv)(d)(2) of this section. See examples (1)(ix) and (x) of paragraph (b)(5) of this section.

(3) *Related party notes.* For purposes of paragraph (b)(2) of this section, if a partner contributes a promissory note to the partnership during a partnership taxable year beginning after December 29, 1988, and the maker of such note is a person related to such partner (within the meaning of § 1.752-4(b)(1)), then such promissory note shall be treated as

a promissory note of which such partner is the maker.

(4) *Obligations disregarded*—(A) *General rule.* A partner in no event will be considered obligated to restore the deficit balance in his capital account to the partnership (in accordance with the requirement in paragraph (b)(2)(ii)(b)(3) of this section) to the extent such partner's obligation is a bottom dollar payment obligation that is not recognized under § 1.752-2(b)(3) or is not legally enforceable, or the facts and circumstances otherwise indicate a plan to circumvent or avoid such obligation. See paragraphs (b)(2)(ii)(f), (b)(2)(ii)(h), and (b)(4)(vi) of this section for other rules regarding such obligation. To the extent a partner is not considered obligated to restore the deficit balance in the partner's capital account to the partnership (in accordance with the requirement in paragraph (b)(2)(ii)(b)(3) of this section), the obligation is disregarded and paragraph (b)(2) of this section and § 1.752-2 are applied as if the obligation did not exist.

(B) *Factors indicating plan to circumvent or avoid obligation.* In the case of an obligation to restore a deficit balance in a partner's capital account upon liquidation of a partnership, paragraphs (b)(2)(ii)(c)(4)(B)(i) through (iv) of this section provide a non-exclusive list of factors that may indicate a plan to circumvent or avoid the obligation. For purposes of making determinations under this paragraph (b)(2)(ii)(c)(4), the weight to be given to any particular factor depends on the particular case and the presence or absence of any particular factor is not, in itself, necessarily indicative of whether or not the obligation is respected. The following factors are taken into consideration for purposes of this paragraph (b)(2):

(i) The partner is not subject to commercially reasonable provisions for enforcement and collection of the obligation.

(ii) The partner is not required to provide (either at the time the obligation is made or periodically) commercially reasonable documentation regarding the partner's financial condition to the partnership.

(iii) The obligation ends or could, by its terms, be terminated before the liquidation of the partner's interest in the partnership or when the partner's capital account as provided in § 1.704-1(b)(2)(iv) is negative.

(iv) The terms of the obligation are not provided to all the partners in the partnership in a timely manner.

■ **Par. 3.** Section 1.707-0 is amended by revising the entries for § 1.707-5(a)(2)(i) and (ii) to read as follows:

§ 1.707-0 Table of contents.

* * * * *

§ 1.707-5 Disguised sales of property to partnership; special rules relating to liabilities.

- (a) * * *
(2) * * *
(i) In general.
(ii) Partner's share of § 1.752-7 liability.

* * * * *

■ **Par. 4.** Section 1.707-5 is amended by revising paragraph (a)(2) and *Examples 2, 3, 7, and 8* of paragraph (f) to read as follows:

§ 1.707-5 Disguised sales of property to partnership; special rules relating to liabilities.

- (a) * * *
(2) [The text of proposed § 1.707-5(a)(2) is the same as the text of § 1.707-5T(a)(2) published elsewhere in this issue of the **Federal Register**.]

* * * * *

Example 2. [The text of proposed § 1.707-5(f) *Example 2* is the same as the text of § 1.707-5T(f) *Example 2* published elsewhere in this issue of the **Federal Register**.]

Example 3. [The text of proposed § 1.707-5(f) *Example 3* is the same as the text of § 1.707-5T(f) *Example 3* published elsewhere in this issue of the **Federal Register**.]

* * * * *

Example 7. [The text of proposed § 1.707-5(f) *Example 7* is the same as the text of § 1.707-5T(f) *Example 7* published elsewhere in this issue of the **Federal Register**.]

Example 8. [The text of proposed § 1.707-5(f) *Example 8* is the same as the text of § 1.707-5T(f) *Example 8* published elsewhere in this issue of the **Federal Register**.]

* * * * *

■ **Par. 5.** Section 1.707-9 is amended by adding paragraph (a)(5) to read as follows:

§ 1.707-9 Effective dates and transitional rules.

- (a) * * *
(5) [The text of proposed § 1.707-9(a)(5) is the same as the text of § 1.707-9T(a)(5) published elsewhere in this issue of the **Federal Register**.]

* * * * *

■ **Par. 6.** Section 1.752-0 is amended by:

- 1. Adding entries for § 1.752-2(b)(3)(i) and (ii), (b)(3)(ii)(A) and (B), (b)(3)(ii)(C), (b)(3)(ii)(C)(1) through (3), (b)(3)(ii)(D), and (b)(3)(iii).
■ 2. Adding entries for § 1.752-2(j)(2)(i) and (ii).

■ 3. Adding entries for § 1.752-2(j)(3)(i) through (iii).

■ 4. Revising the entries for § 1.752-2(j)(3) and (4).

■ 5. Adding an entry for § 1.752-2(k).
The revisions and additions read as follows:

§ 1.752-0 Table of contents.

* * * * *

§ 1.752-2 Partner's share of recourse liabilities.

* * * * *

- (b) * * *
(3) * * *
(i) In general.
(ii) Special rules for bottom dollar payment obligations.
(A) In general.
(B) Exception.
(C) Definition of bottom dollar payment obligation.
(1) In general.
(2) Exceptions.
(3) Benefited party defined.
(D) Disclosure of bottom dollar payment obligations.
(iii) Special rule for indemnities and reimbursement agreements.

* * * * *

- (j) * * *
(2) * * *
(i) In general.
(ii) Economic risk of loss.
(3) Plan to circumvent or avoid an obligation.
(i) General rule.
(ii) Factors indicating plan to circumvent or avoid an obligation.
(iii) Deemed plan to circumvent or avoid an obligation.
(4) Examples.
(k) Effective/applicability dates.

* * * * *

■ **Par. 7.** Section 1.752-2 is amended by:

- 1. Revising the last sentence of paragraph (a).
■ 2. Revising paragraph (b)(3) and the last sentence of paragraph (b)(6).
■ 3. Adding a sentence to the end of paragraph (f) introductory text and adding *Examples 10* and *11* to paragraph (f).
■ 4. Revising paragraphs (j)(2) and (3).
■ 5. Adding paragraph (j)(4).
■ 6. Removing paragraph (k).
■ 7. Redesignating paragraph (l) as paragraph (k) and revising it.

The revisions and additions read as follows:

§ 1.752-2 Partner's share of recourse liabilities.

- (a) * * * The determination of the extent to which a partner bears the economic risk of loss for a partnership liability is made under the rules in paragraphs (b) through (j) of this section.

* * * * *

(b) * * *

(3) [The text of proposed § 1.752–2(b)(3) is the same as the text of § 1.752–2T(b)(3) published elsewhere in this issue of the **Federal Register**].

* * * * *

(6) * * * See paragraph (j) of this section.

* * * * *

(f) *Examples.* * * * Unless otherwise provided, for purposes of the following examples, assume that any obligation of a partner or related person to make a payment is recognized under paragraph (b)(3) of this section.

* * * * *

Example 10. [The text of proposed § 1.752–2(f) *Example 10* is the same as the text of § 1.752–2T(f) *Example 10* published elsewhere in this issue of the **Federal Register**].

Example 11. [The text of proposed § 1.752–2(f) *Example 11* is the same as the text of § 1.752–2T(f) *Example 11* published elsewhere in this issue of the **Federal Register**].

* * * * *

(j) * * *

(2) [The text of proposed § 1.752–2(j)(2) is the same as the text of § 1.752–2T(j)(2) published elsewhere in this issue of the **Federal Register**].

(3) *Plan to circumvent or avoid an obligation—(i) General rule.* An obligation of a partner or related person to make a payment is not recognized under paragraph (b) of this section if the facts and circumstances evidence a plan to circumvent or avoid the obligation.

(ii) *Factors indicating plan to circumvent or avoid an obligation.* In the case of a payment obligation, other than an obligation to restore a deficit capital account upon liquidation of a partnership, paragraphs (j)(3)(ii)(A) through (G) of this section provide a non-exclusive list of factors that may indicate a plan to circumvent or avoid the payment obligation. The presence or absence of a factor is based on all of the facts and circumstances at the time the partner or related person makes the payment obligation or if the obligation is modified, at the time of the modification. For purposes of making determinations under this paragraph (j)(3), the weight to be given to any particular factor depends on the particular case and the presence or absence of a factor is not necessarily indicative of whether a payment obligation is or is not recognized under paragraph (b) of this section.

(A) The partner or related person is not subject to commercially reasonable contractual restrictions that protect the likelihood of payment, including, for example, restrictions on transfers for inadequate consideration or

distributions by the partner or related person to equity owners in the partner or related person.

(B) The partner or related person is not required to provide (either at the time the payment obligation is made or periodically) commercially reasonable documentation regarding the partner's or related person's financial condition to the benefited party.

(C) The term of the payment obligation ends prior to the term of the partnership liability, or the partner or related person has a right to terminate its payment obligation, if the purpose of limiting the duration of the payment obligation is to terminate such payment obligation prior to the occurrence of an event or events that increase the risk of economic loss to the guarantor or benefited party (for example, termination prior to the due date of a balloon payment or a right to terminate that can be exercised because the value of loan collateral decreases). This factor typically will not be present if the termination of the obligation occurs by reason of an event or events that decrease the risk of economic loss to the guarantor or benefited party (for example, the payment obligation terminates upon the completion of a building construction project, upon the leasing of a building, or when certain income and asset coverage ratios are satisfied for a specified number of quarters).

(D) There exists a plan or arrangement in which the primary obligor or any other obligor (or a person related to the obligor) with respect to the partnership liability directly or indirectly holds money or other liquid assets in an amount that exceeds the reasonable foreseeable needs of such obligor.

(E) The payment obligation does not permit the creditor to promptly pursue payment following a payment default on the partnership liability, or other arrangements with respect to the partnership liability or payment obligation otherwise indicate a plan to delay collection.

(F) In the case of a guarantee or similar arrangement, the terms of the partnership liability would be substantially the same had the partner or related person not agreed to provide the guarantee.

(G) The creditor or other party benefiting from the obligation did not receive executed documents with respect to the payment obligation from the partner or related person before, or within a commercially reasonable period of time after, the creation of the obligation.

(iii) *Deemed plan to circumvent or avoid an obligation.* Evidence of a plan

to circumvent or avoid an obligation is deemed to exist if the facts and circumstances indicate that there is not a reasonable expectation that the payment obligor will have the ability to make the required payments if the payment obligation becomes due and payable. For purposes of this section, a payment obligor includes an entity disregarded as an entity separate from its owner under section 856(i), section 1361(b)(3), or §§ 301.7701–1 through 301.7701–3 of this chapter (a disregarded entity), and a trust to which subpart E of part I of subchapter J of chapter 1 of the Code applies.

(4) *Examples.* The following examples illustrate the principles of paragraph (j) of this section.

Example 1. Gratuitous guarantee. (i) In 2016, A, B, and C form a domestic limited liability company (LLC) that is classified as a partnership for federal tax purposes. Also in 2016, LLC receives a loan from a bank. A, B, and C do not bear the economic risk of loss with respect to that partnership liability, and, as a result, the liability is treated as nonrecourse under § 1.752–1(a)(2) in 2016. In 2018, A guarantees the entire amount of the liability. The bank did not request the guarantee and the terms of the loan did not change as a result of the guarantee. A did not provide any executed documents with respect to A's guarantee to the bank. The bank also did not require any restrictions on asset transfers by A and no such restrictions exist.

(ii) Under paragraph (j)(3) of this section, A's 2018 guarantee (payment obligation) is not recognized under paragraph (b)(3) of this section if the facts and circumstances evidence a plan to circumvent or avoid the payment obligation. In this case, the following factors indicate a plan to circumvent or avoid A's payment obligation: (1) The partner is not subject to commercially reasonable contractual restrictions that protect the likelihood of payment, such as restrictions on transfers for inadequate consideration or equity distributions; (2) the partner is not required to provide (either at the time the payment obligation is made or periodically) commercially reasonable documentation regarding the partner's or related person's financial condition to the benefited party; (3) in the case of a guarantee or similar arrangement, the terms of the liability are the same as they would have been without the guarantee; and (4) the creditor did not receive executed documents with respect to the payment obligation from the partner or related person at the time the obligation was created. Absent the existence of other facts or circumstances that would weigh in favor of respecting A's guarantee, evidence of a plan to circumvent or avoid the obligation exists and, pursuant to paragraph (j)(3)(i) of this section, A's guarantee is not recognized under paragraph (b) of this section. As a result, LLC's liability continues to be treated as nonrecourse.

Example 2. Underfunded disregarded entity payment obligor. (i) In 2016, A forms a wholly owned domestic limited liability

company, LLC, with a contribution of \$100,000. A has no liability for LLC's debts, and LLC has no enforceable right to a contribution from A. Under § 301.7701-3(b)(1)(ii) of this chapter, LLC is treated for federal tax purposes as a disregarded entity. Also in 2016, LLC contributes \$100,000 to LP, a limited partnership with a calendar year taxable year, in exchange for a general partnership interest in LP, and B and C each contributes \$100,000 to LP in exchange for a limited partnership interest in LP. The partnership agreement provides that only LLC is required to restore any deficit in its capital account. On January 1, 2017, LP borrows \$300,000 from a bank and uses \$600,000 to purchase nondepreciable property. The \$300,000 is secured by the property and is also a general obligation of LP. LP makes payments of only interest on its \$300,000 debt during 2017. LP has a net taxable loss in 2017, and, under §§ 1.705-1(a) and 1.752-4(d), LP determines its partners' shares of the \$300,000 debt at the end of its taxable year, December 31, 2017. As of that date, LLC holds no assets other than its interest in LP.

(ii) Because LLC is a disregarded entity, A is treated as the partner in LP for federal income tax purposes. Only LLC has an obligation to make a payment on account of the \$300,000 debt if LP were to constructively liquidate as described in

paragraph (b)(1) of this section. Therefore, paragraph (j)(3)(iii) of this section is applied to the LLC and not to A. LLC has no assets with which to pay if the payment obligation becomes due and payable. As such, evidence of a plan to circumvent or avoid the obligation is deemed to exist and, pursuant to paragraph (j)(3)(i) of this section, LLC's obligation to restore its deficit capital account is not recognized under paragraph (b) of this section. As a result, LP's \$300,000 debt is characterized as nonrecourse under § 1.752-1(a)(2) and is allocated among A, B, and C under § 1.752-3.

(k) *Effective/applicability dates.* (1) Paragraph (h)(3) of this section applies to liabilities incurred or assumed by a partnership on or after October 11, 2006, other than liabilities incurred or assumed by a partnership pursuant to a written binding contract in effect prior to that date. The rules applicable to liabilities incurred or assumed (or pursuant to a written binding contract in effect) prior to October 11, 2006, are contained in § 1.752-2 in effect prior to October 11, 2006, (see 26 CFR part 1 revised as of April 1, 2006). The last sentence of paragraphs (a), (b)(6), and (f) of this section and paragraphs (j)(3) and (4) of this section apply to liabilities

incurred or assumed by a partnership and to payment obligations imposed or undertaken with respect to a partnership liability on or after the date these regulations are published as final regulations in the **Federal Register**, other than liabilities incurred or assumed by a partnership and payment obligations imposed or undertaken pursuant to a written binding contract in effect prior to that date. Taxpayers may rely on these regulations for the period between October 5, 2016 and the date these regulations are published as final regulations in the **Federal Register**.

(2) [The text of proposed § 1.752-2(k)(2) is the same as the text of § 1.752-2T(1)(2) published elsewhere in this issue of the **Federal Register**.]

(3) [The text of proposed § 1.752-2(k)(3) is the same as the text of § 1.752-2T(1)(3) published elsewhere in this issue of the **Federal Register**.]

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

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