DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR ASSOCIATE AREA COUNSEL (LMSB), PHILADELPHIA
ATTN: RICHARD H. GANNON, SLA
LM:MCT:PHI

FROM: Lon B. Smith
Acting Associate Chief Counsel (Financial Institutions and Products) CC:FIP

SUBJECT:
Deductibility of Loan Origination Costs

This Chief Counsel Advice responds to your memorandum dated January 31, 2001. In accordance with § 6110(k)(3) of the Internal Revenue Code, this Chief Counsel Advice should not be cited as precedent.

LEGEND

Taxpayer =
Trust =
Tax Year 1: =
Tax Year 2: =
Tax Year 3 =
Tax Year 4 =
Date 1 =
c =
d =
e =
f =
Series S =
Class X =
Class Y =
Class Z =
Agreement 1 =
Agreement 2 =

State 1 =
State 2 =
State 3 =

ISSUES

Whether certain costs incurred in connection with (a) the acquisition of credit card receivables, (b) the conversion of acquired account records to the Taxpayer's computer system, (c) the exchange of acquired credit card receivables for certificates in a trust, and (d) the subsequent sale of certificates to investors are required to be capitalized under § 263 of the Internal Revenue Code?

CONCLUSIONS

Costs incurred by Taxpayer in connection with the acquisition of credit card receivables are required to be capitalized under § 263 of the Code. Costs incurred by Taxpayer in connection with the conversion of acquired account records to the Taxpayer's computer system, the exchange of acquired credit card receivables for certificates in a trust, and the subsequent sale of certificates to investors may be required to be capitalized under § 263 of the Code, depending upon the development of needed additional facts.

FACTS

Taxpayer is a federally chartered banking institution engaged in the business of issuing credit cards to customers. Taxpayer also regularly purchases credit card receivables and/or credit card customer accounts from other financial institutions. Thereafter, Taxpayer may or may not extend additional credit to the customers on these accounts. In connection with its credit card business, Taxpayer derives interest income, fees, and interchange income. Taxpayer's main credit card operations are located in State 1.

As part of its business operations, Taxpayer purchases existing credit card accounts from other credit card issuers. These credit card accounts are each identified by customer name, and often contain an existing balance owed by the credit card customer. When Taxpayer acquires a portfolio of credit card accounts from another issuer, Taxpayer typically acquires the right to derive income from all future receivables generated by the customers on those accounts, including the right to all annual fees, interchange income on future transactions, and interest income on the accounts' outstanding balances. Taxpayer typically pays the seller an amount equal to at least the face amount of the outstanding balance for both open and closed credit card accounts (Taxpayer typically pays an additional premium on the outstanding balance for open accounts).

After acquiring these credit card accounts, Taxpayer generally must integrate any account information into its own computerized system for tracking account information. Taxpayer's integration process consists of c steps and affects more than d departments and offices, and spans locations from State 2 to State 3. The integration process generally takes e to f weeks to complete.

Taxpayer typically enters into securitization arrangements with respect to these acquired credit card accounts once it integrates those accounts into its computer systems. In accordance with Agreement 1, Taxpayer packages a portfolio of credit card receivables, which it then delivers to Trust in exchange for a seller's certificate representing all of the beneficial interests in that series of Trust. Taxpayer in turn sells investor certificates[1] to investors in Trust, who are issued the investor certificates by Trust at the request of Taxpayer. By definition, Taxpayer's seller's certificate retains all interests in Trust that are not held by owners of the investor certificates.

Trust operates in accordance with the terms and conditions contained in a master prospectus and any applicable prospectus supplements. Trust is comprised of various series (for example, Series S), each series being comprised of a portfolio of receivables. Each series within Trust is comprised of one or more classes (for example, Classes X and Y), each class being entitled to certain rights with respect to the portfolio of receivables in that series. Each class is governed by a separate prospectus supplement.[2]

Taxpayer transfers receivables to Trust without recourse and, with respect to any given receivable, Trust bears the risk of loss. Taxpayer, however, creates collateral interests and provides credit enhancements to protect primary certificate holders from loss. For example, Class Y certificates bear a higher rate of interest than Class X certificates, but holders of Class Y certificates are subordinated to Class X certificate-holders for repayment of principal. Series S also offers Class Z certificates. Holders of Class Z certificates receive a higher rate of interest than holders of Class Y certificates, but are subordinated to holders of both Class X and Class Y certificates for repayment of principal. When and if all investor interests in Classes X, Y, and Z are paid in full, Taxpayer can require Trust to convey any

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[1] Under Agreement 2 between Taxpayer and Trust, the investor certificates are designated as debt for all Federal income tax purposes. Pursuant to § 385(c) of the Code, this designation is binding on both Trust and the holders of the investor certificates issued by Trust.

[2] We understand that Series S's certificates and prospectus supplement were reviewed for purposes of this request for advice. We have assumed for purposes of this discussion that Series S is a typical arrangement between Taxpayer and Trust.

remaining trust assets to it. In addition, Taxpayer is required to maintain a minimum "participation interest" in the amount of total receivables owned by Trust. If the interest represented by Taxpayer's seller's certificate exceeds Taxpayer's minimum participation interest, Taxpayer has the right to remove receivables from Trust; conversely, if the interest represented by Taxpayer's seller's certificate falls below Taxpayer's minimum participation interest, Taxpayer is obligated to add receivables to the Trust.

Taxpayer and Trust treat Taxpayer as the owner of the receivables for Federal income tax purposes. Under Agreement 2, Trust is not required to file a federal income tax return, and Taxpayer is obligated to reimburse Trust for all expenditures incurred in connection with the administration of Trust.

Taxpayer claimed deductions for Tax Year 1 and Tax Year 2 for certain expenses incurred in connection with the acquisition and securitization of credit card receivables. The examining agent disallowed these deductions, and the case was closed on an agreed basis, with Taxpayer conceding the adjustments. On Date 1, Taxpayer filed claims for refund (Forms 1120X) with respect to these disallowed expenses for Tax Year 1 and Tax Year 2. Taxpayer's refund claims identified three groups of expenditures: (a) certain expenditures associated with respect to new account acquisitions ("Group A expenses"); (b) additional amounts associated with new account acquisitions that are not included in (a) ("Group B expenses"); and (c) salaries of employees involved in portfolio acquisitions and securitization of receivables ("Group C expenses").

Taxpayer capitalized Group A expenses for financial accounting purposes, and deducted such expenses for federal income tax purposes. Taxpayer deducted Group B and Group C expenses for both financial accounting and tax purposes. Taxpayer subsequently generally described all of the expenses at issue as: (a) costs incurred to acquire receivables (including making the decision to buy and how much to pay), (b) costs incurred to convert the receivables to Taxpayer's accounting system, and (c) costs incurred to assemble and sell receivables to Trust (which, in turn, sells certificates to investors).[3]

LAW AND ANALYSIS

Applicable law

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[3] We understand that Taxpayer is also under examination with respect to Tax Years 3 and 4, and that the examining agents are proposing similar adjustments for those years.

The primary consequence of characterizing a cost as an ordinary and necessary expense under § 162(a) or a capital expenditure under § 263(a) concerns the timing of the taxpayer's cost recovery. Section 162(a) allows a current deduction for an item that is (1) "ordinary," (2) "necessary," (3) an "expense," (4) "paid or incurred during the taxable year," and (5) made for "carrying on any trade or business."

Costs that are capital expenditures under § 263(a) are not currently deductible. Section 263(a)(1) provides the general rule that no deduction shall be allowed for any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate. Capital expenditures are generally amortized or depreciated over the life of the relevant asset, or, where no specific asset or useful life can be ascertained, deducted upon dissolution of the enterprise.

Section 1.263(a)-2(a) of the regulations provides as examples of capital expenditures [t]he cost of acquisition, construction, or erection of buildings, machinery, and equipment, furniture and fixtures, and similar property having a useful life substantially beyond the taxable year.

The facts and circumstances of each case must be examined to determine whether an item should be capitalized or may be currently deducted. See Deputy v. Du Pont, 308 U.S. 488, 496 (1940). However, § 263 has been interpreted and applied by the courts consistently over the years to require the capitalization of any cost that: (1) serves to create or enhance a separate and distinct asset, or (2) provides significant future benefits. Capitalization takes precedence over the allowance of deductions. See §§ 161, 261 and 263(a).

The Supreme Court cases Idaho Power, Lincoln Savings, and INDOPCO have helped to clarify when an expenditure is required to be capitalized under § 263. The Supreme Court in Idaho Power noted that an expenditure which otherwise might qualify as a currently deductible expense must nevertheless be capitalized if it is incurred in acquiring a capital asset. See Commissioner v. Idaho Power Co., 418 U.S. 1, 11 (1974); see, also, Helvering v. Winmill, 305 U.S. 79, 84 (1938) (regular and recurring expenses incurred in taxpayer's business of buying and selling securities were required to be capitalized because the expenses created a separate asset).

In Commissioner v. Lincoln Savings & Loan Assn., 403 U.S. 345 (1971), the Court concluded that payments made by Lincoln Savings and Loan Association into a "Secondary Reserve" fund at the Federal Savings and Loan Insurance Corporation were not currently deductible as ordinary business expenditures. Following an extensive analysis of the nature of the Secondary Reserve fund and

the premium payments made into it by Lincoln Savings and other similarly situated FSLIC-insured institutions, the Court stated:

> What is important and controlling, we feel, is that the [Secondary Reserve] payment serves to create or enhance for Lincoln what is essentially a separate and distinct additional asset and that, as an inevitable consequence, the payment is capital in nature and not an expense, let alone an ordinary expense, deductible under § 162(a) in the absence of other factors not established here.

403 U.S. at 354.

In INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 85 (1992), the Supreme Court cited the fundamental principle that deductions, as exceptions to the norm of capitalization, are strictly construed and allowed only "when there is a clear provision therefor." (quoting Deputy v. Du Pont, 308 U.S. 488, 493 (1940)). The Supreme Court, moreover, reaffirmed and expanded upon the separate and distinct asset test set forth in Lincoln Savings. The Court, although specifically addressing whether investment banking and legal fees incurred by a target corporation in support of a friendly takeover were currently deductible, held that the expenditures at issue were required to be capitalized even though the costs did not serve to create or enhance a separate and distinct asset. Thus, the Court clarified that the separate and distinct asset test enunciated in Lincoln Savings was not the only test that could be applied to determine whether an expenditure is required to be capitalized:

> Lincoln Savings stands for the simple proposition that a taxpayer's expenditure that "serves to create or enhance . . . a separate and distinct" asset should be capitalized under §263. It by no means follows, however, that only expenditures that create or enhance separate and distinct assets are to be capitalized under §263. We had no occasion in Lincoln Savings to consider the tax treatment of expenditures that, unlike the additional premiums at issue there, did not create or enhance a specific asset, and thus the case cannot be read to preclude capitalization in other circumstances. In short, Lincoln Savings holds that the creation of a separate and distinct asset well may be a sufficient but not a necessary condition to classification as a capital expenditure.

503 U.S. at 86-87.

The Court recognized that the Code, through provisions such as §§ 162(a) and 263, generally endeavors to match expenses with the revenues of the taxable period to which the expenses are properly attributable, thereby resulting in a more

accurate calculation of net income for federal income tax purposes. The Court stated that with respect to expenditures that produce benefits both in the current year and in future years, the determination of whether these expenditures must be capitalized requires a careful examination of all the facts. Although the mere presence of some future benefit may not warrant capitalization, a taxpayer's realization of future benefits is undeniably important in determining whether the appropriate tax treatment is immediate deduction or capitalization. 503 U.S. at 87.

Issue 1: Whether certain costs incurred in connection with the acquisition of credit card receivables are required to be capitalized under § 263?

Taxpayer's loan acquisition costs are comprised of allocated salaries and other expenses which, as identified by Taxpayer, are directly related to the acquisition of the credit card accounts and related receivables comprising the outstanding account balances (hereafter, the "loans"). The acquired loans are separate and distinct assets of Taxpayer, and provide Taxpayer with significant future benefits, including an interest income stream, which extend beyond the close of the taxable year in which the loan acquisition expenses were incurred.

Capitalization of Taxpayer's acquisition costs is supported by a long line of precedent holding that an expense either incurred in connection with the acquisition or creation of a separate and distinct capital asset, or that provides a taxpayer with a significant future benefit, is required to be capitalized under § 263(a). See, e.g., Commissioner v. Idaho Power Co., supra; Woodward v. Commissioner, 397 U.S. 572 (1970); United States v. Hilton Hotels Corp., 397 U.S. 580 (1970); Helvering v. Winmill, 305 U.S. 79 (1938); and INDOPCO, Inc. v. Commissioner, supra. Further, the acquisition costs are clearly required to be capitalized as part of the total cost of the asset acquired. See e.g., Woodward v. Commissioner, supra; Helvering v. Winmill, supra ; and Spangler v. Commissioner, 323 F.2d 913 (9th Cir. 1963).

The capitalization requirement for costs incurred in the creation and/or acquisition of assets is grounded upon the fundamental principle that expenses should be matched with the income of the taxable year to which they relate, thereby resulting in a more accurate reflection of taxable income. See INDOPCO, supra. Disallowance of a current deduction for the acquisition costs at issue is in keeping with this principle.

The Service has also long taken the position that costs incurred in connection with the acquisition of a capital asset must be capitalized. For example, Rev. Rul. 57-400, 1957-2 C.B. 520, holds that finders' fees paid in the form of buying commissions by a bank to brokers and other third parties for their introduction of acceptable applicants for mortgage loans must be capitalized because the commissions are a part of the acquisition cost of the loans. See also,

Rev. Rul. 69-331, 1969-1 C.B. 87 (bonuses and commissions paid by gas distributor to secure five-year leases for hot water heaters held to be capital expenditures amortizable over the five-year terms of the leases); and Rev. Rul. 73-580, 1973-2 C.B. 86 (portion of compensation paid by corporation to its employees that is attributable to services performed in connection with corporate mergers and acquisitions required to be capitalized).

Capitalization may be required of indirect, as well as direct, acquisition costs. While under particular facts and circumstances, a given "indirect" expense may be currently deductible, capitalization is required if that expense is specifically allocable to the acquisition or creation of a capital asset or provides significant future benefits. See, e.g., Mayer v. Commissioner, T.C. Memo 1994-209 (1994); Honodel v. Commissioner, 722 F.2d 1462 (9th Cir. 1984); and Estate of Milner v. Commissioner, 1 T.C.M. (CCH) 513 (1943). As noted above, the Court in Idaho Power Co., 418 U.S. at 11, required capitalization of an expenditure that otherwise might have qualified as a currently deductible expense because that expenditure was incurred in connection with the acquisition of a capital asset.

Based on the facts provided, Taxpayer acquires separate and distinct assets that are generally transferable (as clearly evidenced by Taxpayer's subsequent transfers of the loans to Trust) when it acquires credit card accounts from third parties.[4] Because the costs at issue were incurred by Taxpayer in connection with the acquisition of separate and distinct assets, such costs must be capitalized. See Idaho Power, supra; Lincoln Sav. & Loan Ass'n., supra. In addition, the loans reasonably can be expected to provide Taxpayer with benefits that extend beyond the taxable year in which the acquisition costs are expended. Accordingly, under the rationale of INDOPCO, supra, the costs incurred to acquire these assets are required to be capitalized under § 263(a).

Some, if not all, of the costs at issue have been characterized as expenses of determining whether to acquire certain loans, and which loans to acquire. This description of the expenses raises the question of whether the capitalization of such costs is consistent with the holding of Rev. Rul. 99-23, 1999-1 C.B. 998.

Rev. Rul. 99-23 provides guidance concerning which investigatory costs incurred in connection with the acquisition of a new trade or business are eligible for amortization as start-up expenditures under § 195. The ruling holds that

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[4] Taxpayer and Trust treat these transfers to Trust as sales for book purposes although for federal income tax purposes, such transfers are treated as financing arrangements. Assuming that the transfers are respected for federal income tax as a financing arrangements, Taxpayer would continue to be treated as the owner of the loans after they are transferred to Trust.

expenditures incurred in the course of a general search for, or investigation of, an active trade or business in order to determine whether to enter a new business and which new business to enter (other than costs incurred to acquire capital assets that are used in the search or investigation) qualify as investigatory costs that are eligible for amortization as start-up expenditures.

Congress expressed an intent, through § 195, to allow for the amortization of certain investigatory expenditures incurred in connection with the acquisition of a new trade or business. However, no expression of congressional intent, and neither § 195 nor its legislative history, suggest that costs of investigating the acquisition of a specific capital asset are currently deductible or eligible for amortization under that provision. As discussed above, where a taxpayer in an existing trade or business incurs costs in investigating the acquisition of a specific capital asset, the law is clear that those costs are required to be capitalized. Accordingly, the holdings in Rev. Rul. 99-23 are not inconsistent with the capitalization of the acquisition costs at issue here.

Issue 2: Whether certain costs, incurred in connection with converting the account records acquired by Taxpayer to Taxpayer's computer system, are required to be capitalized under § 263?

As noted above, § 263(a)(1) provides the general rule that no deduction shall be allowed for any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate. See also § 1.263(a)-1(a) of the regulations.

Section 1.263(a)-1(b) of the regulations provides that in general, the amounts required to be capitalized referred to in § 1.263(a)-1(a) include amounts paid or incurred (1) to add to the value of, or substantially prolong the useful life, of property owned by the taxpayer, such as plant or equipment, or (2) to adapt property to a new or different use.

The submitted facts indicate that after the loans were acquired, Taxpayer incurs certain "conversion" costs to integrate the loans into Taxpayer's pre-existing computerized tracking system. Further, the facts indicate that the integration process is complex. It is unclear whether these conversion costs add to the lives or value of the acquired loans, or if such costs adapt the acquired loans to a new or different use. Based on the facts submitted, the conversion costs appear to have been incurred after the loans were acquired to permit Taxpayer to access, track and monitor the acquired loans. Capitalizing such costs, incurred in connection with integrating an acquired asset into Taxpayer's pre-existing computerized tracking system, would be appropriate if the costs added to the life or value of the acquired asset, or if such costs adapted the asset to a new or different use. The facts concerning this issue are not yet sufficiently developed for us to reach a conclusion;

however, if you wish to pursue this issue, we recommend further developing the facts as outlined above.

> Issue 3: Whether costs incurred in connection with the exchange of the acquired loans for investor certificates in Trust are required to be capitalized under § 263?

Taxpayer securitizes certain of the acquired loans through Trust, and incurs expenses in this securitization process. These expenses include salaries of employees who are involved in the securitization process. However, it is unclear from the incoming request for field service advice what the nature and extent of such employees' involvement in the securitization process is, and whether other costs are incurred in this process. The request for field service advice provides that the role of Trust is to protect the holders of Trust's investor interests, who, in substance, loan money to Taxpayer through Trust.[5] Taxpayer apparently uses the funds obtained from these securitizations in its daily operations and for acquiring additional credit card loans.

Generally, a borrower's expenses incurred to obtain a loan are capital expenditures that must be amortized over the period of the loan. Enoch v. Commissioner, 57 T.C. 781, 794-95 (1972), acq. on this issue, 1974-1 C.B. 1. In reaching its holding in Enoch, the Tax Court relied on Lovejoy v. Commissioner, 18 B.T.A. 1179, 1182 (1930), in which the Board of Tax Appeals stated:

> In its essence such a disbursement [commissions, fees, and printing costs] is not unlike bond discount, prepaid rent, cost of acquiring or disposing of a leasehold or term contract and many other transactions. They should be spread over the definite period of the loan, lease, or contract.

Enoch, 57 T.C. at 794. See also, S. & L. Bldg. Corp. v. Commissioner, 19 B.T.A. 788 (1930), acq., X-1 C.B. 60 (1931), rev'd on other grounds, 60 F.2d 719 (2d Cir. 1932), rev'd. 288 U.S. 406 (1933); Metropolitan Properties Corp. v. Commissioner, 24 B.T.A. 220 (1931); Longview Hilton Hotel Co. v. Commissioner, 9 T.C. 180 (1947), acq., 1947-2 C.B. 3; Rev. Rul. 86-67, 1986-1 C.B. 238; Rev. Rul. 81-161, 1981-1 C.B. 313; Rev. Rul. 75-172, 1975-1 C.B. 145; Rev. Rul. 70-360, 1970-2 C.B. 103.

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[5] As previously indicated, it is assumed for purposes of this field service advice that Taxpayer's transfer of credit card receivables to Trust is properly characterized as a financing arrangement, rather than as a sale, for Federal income tax purposes.

In Anover Realty Corp. v. Commissioner, 33 T.C. 671 (1960), a transferee corporation that assumed a mortgage on transferred property argued that loan expenses that were incurred by the transferor for the sole purpose of acquiring a business asset (the mortgaged property) should follow the asset when it was transferred. The court stated that the loan expenses were made to obtain the use of the money and that:

> It is not the purpose for which the loan is made that is important. It is the purpose of the expenditure for loan discounts and expenses. That purpose is to obtain financing or the use of money over a fixed period extending beyond the year of borrowing. When we analyze the reason behind the rule of amortizing such debt expenses, the distinction between this case and S. & L. Building Corporation and Longview Hilton Hotel Co. vanishes. Here, as in the cited cases, the mortgage discounts and expenses represent the cost of money borrowed for a period extending beyond the year of borrowing. It matters not that the proceeds of the loans be used to build an income-producing warehouse as in [Lovejoy v. Commissioner, 18 B.T.A. 1179 (1930)], or "to purchase additional properties" as in S. & L. Building Corporation or to buy the mortgaged premises, as in the instant case. In all such cases the expenditure represents an expenditure for the cost of the use of money and not a capital expenditure for the cost of any asset obtained by the use of the proceeds of the money borrowed.
>
> Amortization of the loan expense is related to the life of the loan and not the life of any asset obtained by use of the loan proceeds. The transfer of the asset obtained by use of the loan proceeds does not mean the transferee succeeds to the unamortized balance of the loan discounts and expenses. If the debt is assumed by the transferee it merely marks an earlier end to the period for which the borrower had the use of the money, which means the borrower, who has been amortizing the debt discounts and expenses he incurred or paid, and not the transferee, can take the unamortized balance as a deduction in the year of transfer.

Id. at 675.

The facts as provided indicate that Taxpayer's securitization arrangement with Trust provides Taxpayer with available financing over periods extending substantially beyond the taxable year in which the securitization expenses are incurred. In general, costs associated with a borrowing should be capitalized to the extent they "represent the cost of money borrowed for a period extending beyond the period of the borrowing." Anover Realty, 33 T.C. at 675. In the present case, however, the facts provided do not detail the borrowing costs at issue or the nature

and extent of the Taxpayer's employees' involvement in the securitization process. We request that you provide additional facts regarding these costs if you wish to pursue this issue.

> Issue 4: Whether certain administration costs incurred by Taxpayer in connection with the subsequent sale of Trust certificates to investors are required to be capitalized under § 263?

Taxpayer reimburses Trust for certain "administration" costs that Trust incurs in selling Trust certificates to investors. According to the incoming request, these costs include all expenditures incurred in connection with the administration of Trust, presumably including the costs of preparing the prospectus and the costs associated with other actions necessary to create the investor interests marketed to the public. To the extent such costs represent additional costs of Taxpayer obtaining financing, capitalization of such costs may be required consistent with the discussion in Issue 3 above. We request that you provide additional facts regarding these costs if you wish to pursue this issue.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

[redacted][6]

[redacted]

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[6] [redacted]

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[7] [redacted]

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[8] [redacted]

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[10] [redacted]

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[redacted]

[redacted]

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[10](...continued)
[redacted]

[redacted]

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Please call if you have any further questions.

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