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SEC/CORPORATE

SEC Releases Updated Schedule to Implement Certain Provisions of the Dodd-Frank Act

On January 6, the Securities and Exchange Commission again updated its planned schedule for adopting rules and taking other actions to implement the corporate governance and disclosure provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act). As reported in the April 15 and August 5 editions of the *Corporate and Financial Weekly Digest*, the SEC has on several occasions announced revised planned rulemaking schedules to implement provisions of the Dodd-Frank Act. Below are the updated time periods set forth in the SEC's current rulemaking schedule for governance and disclosure rules to be proposed and adopted during such time periods, as well as certain related actions. Section references are to the Dodd-Frank Act.

The following rules will be proposed in January-June 2012:

- Disclosure of pay-for-performance, pay ratios and hedging by employees and directors (Sections 953 and 955)
- Clawback of executive compensation (Section 954)

The following rules will be adopted in January-June 2012:

- Exchange listing standards regarding compensation committee independence and factors affecting compensation adviser independence; disclosure regarding compensation consultant conflicts (Section 952)
- Disclosure related to "conflict minerals" (Section 1502)
- Disclosure by resource extraction issuers (Section 1504)

The following rules will be adopted in July-December 2012:

- Disclosure of pay-for-performance, pay ratios, and hedging by employees and directors (Sections 953 and 955)
- Clawback of executive compensation (Section 954)

The following action will be taken in July-December 2012:

- Delivery of a report to Congress on study and review of the use of compensation consultants and the effects of such use (Section 952)

The pay-for-performance and pay ratio and the "conflict mineral" rules are of particular interest because each has been delayed several times. In its previous timeline released in late July 2011, the SEC expected to have pay-for-performance and pay ratio rules proposed between August-December 2011 and adopted between January-June, 2012. It also expected to have final "conflict mineral" rules adopted between August-December 2011. Both rules have been highly controversial, with commenters expressing concerns over the time and cost associated with compliance. The "conflict mineral" rules in particular have taken an odd path, with original rules proposed in December 2010, the original comment period extended, and the SEC then taking the unusual step of holding a roundtable to solicit outside views after the comment period expired. As to the "conflict mineral" rules, because issuers are required to begin complying with the rules for their first full fiscal year beginning after the date of the promulgation of the rules, the result of the delay into 2012 is that most issuers will not be required to file "conflict mineral" disclosure until 2014 at the earliest.

To view the planned schedule, click here.

SEC's Division of Corporation Finance Issues Guidance Regarding Disclosure Relating to Exposures to Certain European Countries

To view this entry, please see **Banking** below.

CFTC

Commodity Futures Trading Commission Adopts Additional Dodd-Frank Act Rules

At a public meeting held on January 11, the Commodity Futures Trading Commission adopted three final rules and agreed to publish for comment another rule implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act).

Final Rules on Protection of Cleared Swaps Customer Contracts and Collateral and Amendments to the Commodity Broker Bankruptcy Provisions

The Commodity Futures Trading Commission adopted final rules implementing section 724 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), which prescribes the manner in which cleared swaps and related collateral must be treated prior to and after bankruptcy. The final rule sets forth a model entitled "Complete Legal Segregation." The purpose of the rules is to protect swaps customers from so-called "fellow customer" risk, *i.e.*, the risk of loss resulting from the default of one or more customers. Similar to the rules governing funds segregated on behalf of customers trading on US futures exchanges, the rules permit futures commission merchants (FCMs) and derivatives clearing organizations (DCOs) to hold cleared swaps customer collateral in commingled customer omnibus accounts. However, the rules further require FCMs that are members of a DCO to provide the DCO at least once each day with information regarding: (1) the identity of the underlying customers whose positions are held in the omnibus account, (2) the portfolio of positions held by each customer, and (3) the margin associated with those positions. In the event a default by one or more of the clearing member FCM's cleared swaps customers results in the default of the clearing member to the DCO, the DCO would not have recourse to the collateral posted by non-defaulting cleared swaps customers to meet the FCM's obligations to the DCO. The rules contemplate that the positions and related margin of non-defaulting customers would either be transferred to another clearing member FCM or liquidated and returned to the Trustee in bankruptcy for distribution in accordance with the commodity broker liquidation provisions of the Bankruptcy Code (Chapter 7, Subchapter IV).

At the meeting, CFTC staff emphasized that the scope of the rules is limited. They are designed to protect non-defaulting customers from "fellow customer" risk. They will not protect customers from "operational risk" (*e.g.,* loss arising from negligence or malfeasance on the part of the FCM) or "investment risk".

The final rules also amend the CFTC's bankruptcy, Part 190 rules in order to implement changes required by the Dodd-Frank Act.

At the meeting, the staff also advised that the preamble to the rules set out in the Federal Register confirms that Financial and Segregation Interpretation No. 10-1, which since 2005 has prohibited third-party custodial accounts for almost all futures customers, does not apply to cleared swaps customers. Consequently, FCMs may agree to establish third-party custodial accounts for cleared swaps customers, provided all parties comply with the requirements of Financial and Segregation Interpretation No. 10, which was adopted in 1984.

The final rules will become effective 60 days after publication in the Federal Register. A copy of the fact sheet regarding the final rules is available here.

Final Rules Regarding Business Conduct Standards for SDs and MSPs

The Commodity Futures Trading Commission adopted final rules implementing business conduct standards rules for swap dealers (SDs) and major swap participants (MSPs) (collectively, SDs/MSPs), regulating their dealings with counterparties and additional requirements when they deal with "Special Entities," which the final rules define to include: (1) a Federal agency; (2) a State, State agency, city, county, municipality, or other political subdivision of a State, or any instrumentality, department, or a corporation of or established by a State or political subdivision of a State; (3) any employee benefit plan subject to Title I of the Employee Retirement Income Security Act of 1974 (ERISA); (4) any governmental plan, as defined in Section 3 of ERISA; (5) any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986; or (6) any employee benefit plan defined in Section 3 of ERISA, not otherwise defined as a Special Entity, that elects to be a Special Entity by notifying an SD/MSP of its election prior to entering into a swap with the particular SD/MSP.

Duties Owed

SDs /MSPs owe the following duties to all counterparties:

- Verifying that a counterparty is an eligible contract participant and whether a counterparty is a Special Entity;
- Disclosing material information in a manner sufficient to allow the counterparty to assess material risks, material characteristics, material incentives, and conflicts of interest;
- Providing the daily mid-market mark for uncleared swaps to the counterparty;
- Notifying a counterparty of its right to clear a swap that is not required to be cleared and to select the DCO; and
- Communicating with counterparties in a fair and balanced manner, based on principles of fair dealing and good faith.

SDs owe the following additional duties to all counterparties:

- Notifying its counterparty of its right to request and consult on a scenario analysis for the swap;
- Understanding risks and rewards of a recommended swap and to have a reasonable basis to believe that a recommended swap is suitable for the counterparty.

SDs acting as advisors to a Special Entities are required to comply with the above duties and to act in the best interests of the Special Entity. An SD acts as an advisor to a Special Entity when the SD recommends a swap or swap trading strategy tailored to the needs or characteristics of the Special Entity.

In addition, SDs/MSPs acting as counterparties to Special Entities are required to (1) disclose the capacity in which they are acting when entering into a swap and (2) have a reasonable basis to believe that the Special Entity (other than an ERISA plan) has a "representative" that:

- Is sufficiently knowledgeable to evaluate the transaction and risks;
- Is not subject to a statutory disqualification;
- Is independent of the SD/MSP;
- Acts in the best interest of the Special Entity;
- Makes appropriate and timely disclosures to the Special Entity;
- Evaluates, consistent with any guidelines provided by the Special Entity, fair pricing and appropriateness of the swap; and

- In the case of a governmental Special Entity, is subject to restrictions on certain political contributions to public officials of the governmental Special Entity.

When entering into a swap with a Special Entity, the SD/MSP must disclose to the Special Entity the capacity in which it is acting. Regarding ERISA plans, SDs/MSPs must have a reasonable basis to believe an ERISA plan's "representative" is an ERISA fiduciary.

Reliance on Counterparty Representations

SDs/MSPs may (as appropriate) (1) reasonably rely on representations of counterparties to meet due diligence obligations, (2) make disclosures by any reliable means agreed to by the counterparty, (3) make disclosures of material information to counterparties in a standard format, and (4) include representations and disclosures in counterparty relationship documentations, and deem them renewed with each subsequent swap.

Restrictions Because of Political Contributions

Under the final rules, SDs are subject to a two-year prohibition on entering swaps with a governmental Special Entity, if such SD makes certain political contributions to officials of the governmental Special Entity.

CTA Definition Exclusion

The final rules also add a new exclusion from the definition of a commodity trading advisor for SDs whose recommendations or advice are solely incidental to their business as SDs.

Exemptions from Certain Duties

If the swap is executed on a SEF or DCM and the SD/MSP does not know the identity of the counterparty prior to execution, the SD/MSP does not have to verify the eligibility of the counterparty or make disclosures of material information, other than the daily mark. Further, the requirements to disclose material information regarding a swap do not apply when the counterparty is another SD/MSP or a security-based swap dealer or major security-based swap participant.

A copy of the fact sheet regarding the final rules is available here.

Final Rules Regarding Registration of Swap Dealers and Major Swap Participants

The Commodity Futures Trading Commission adopted final rules establishing a registration process for SDs and MSPs. Registration requirements will not be mandatory until certain swap definitions are finalized and become effective. Persons who believe that they are SDs or MSPs will be able–but not required–to register before that time. As part of the registration requirements, SDs and MSPs are required to become and remain members of a registered futures association. Push-out affiliates will also be subject to the foregoing requirements. A push-out affiliate is a non-insured depository institution affiliate that is an SD or MSP.

Further, the final rules prohibit any SD or MSP from permitting any person associated with it who is subject to a statutory disqualification to effect or be involved in effecting swaps on its behalf if the SD or MSP knows, or in the exercise of reasonable care should know, of the statutory disqualification. The final rules also provide a limited exception to this prohibition for any person associated with a SD or MSP who has been duly listed as a principal or registered as an associated person of another registrant notwithstanding that such person is subject to a statutory disqualification.

In addition, the final rules provide that a statutory disqualification for purposes of this prohibition refers to a statutory disqualification under Section 8a(2) or 8a(3) of the CEA and clarifies that a "person associated with a SD or MSP" for purposes of this prohibition refers to an associated person defined by the final regulations to mean a natural person with respect to a SD or MSP.

The final rules regarding registration of SDs and MSPs will take effect 60 days after publication in the Federal Register. A copy of the final rules may be found here.

CFTC Order Authorizing NFA to Perform SD and MSP Registration

The Commodity Futures Trading Commission issued an order authorizing the National Futures Association to process and grant applications for registration and withdrawals of registration with respect to SDs and MSPs, to issue notices of provisional registration, to confirm initial compliance with requirements applicable to SDs and MSPs under Section 4s of the CEA, to conduct proceedings to deny, condition, suspend, restrict, or revoke the registration of any SD or MSP, to maintain records regarding SDs and MSPs, and to serve as the official custodian of those records.

The CFTC order will be effective upon publication in the Federal Register. A copy of the CFTC order may be found here.

Proposed Rules to Implement Volcker Rule

At a public meeting on January 11, the Commodity Futures Trading Commission, by a 3-2 vote (Commissioners O'Malia and Sommers, dissenting), voted to propose regulations to implement the provisions of Section 619 of the Dodd-Frank Act, commonly known as the "Volcker Rule." Among other things, the Volcker Rule generally prohibits federally insured depository institutions, bank holding companies, and their subsidiaries and affiliates (collectively, banking entities) from engaging in short-term proprietary trading and owning, sponsoring or having certain other relationships with hedge funds or private equity funds, in each case, subject to various exceptions.

The CFTC's proposed regulations are modeled after the joint rule proposal issued in October 2011 by the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Securities and Exchange Commission to implement the Volcker Rule. The proposal outlines several exemptions from the Volcker Rule's prohibition on proprietary trading, including certain government securities trading, market making and underwriting activities and risk-mitigating hedging. The proposal also includes exemptions that would permit a banking entity to organize and offer hedge funds and private equity funds (subject to certain conditions, including limitations on the amount invested by the banking entity in such funds) and make investments in certain non-U.S. funds. Under the proposal, banking entities would be required to establish internal compliance programs to monitor compliance with the Volcker Rule and associated regulations, which would be subject to oversight by the banking entity's board of directors and the appropriate federal supervisory agency.

The comment period for the CFTC proposed regulations will expire 60 days after their publication in the Federal Register. A copy of the proposed regulations may be found here.

LITIGATION

Adverse Domination Statute of Limitations Doctrine Limited

The U.S. Court of Appeals for the Seventh Circuit last week held that the Illinois doctrine of adverse domination for tolling the statute of limitations on an action does not apply where a defendant was not a co-conspirator of a wrong-doing officer or director.

Plaintiff Independent Trust Corporation (InTrust) was placed in receivership in 2000, after it was discovered that InTrust board members had used the corporation to engage in a Ponzi scheme. Defendants, Stewart Title Company and its related companies, received $27 million from InTrust as insurers of certain accounts related to the scheme. The Seventh Circuit affirmed dismissal of the InTrust receiver's action to recover the wrongly transferred money from Stewart as barred by the statute of limitations. In affirming, the court rejected InTrust's argument that the doctrine of adverse domination applied, which tolls the statute of limitations for claims by a corporation against its officers, directors, and their co-conspirators when the corporation is controlled by those wrongdoers. The court refused to expand the doctrine to cases where the defendant was not an alleged co-conspirator of the officers. Here, because Stewart was not a co-conspirator, the doctrine was inapplicable.

Independent Trust Corporation v. Stewart Information Services Corporation, No. 11-1208 (7th Cir. Jan. 6, 2012).

Indemnification Extended to Officer's Post-Employment Actions

The Delaware Chancery Court granted indemnification to an officer who defended claims against him arising from representations he allegedly made before a merger, and for related conduct that occurred after that merger.

Plaintiff Danenberg, former CEO of Fitracks, sued Fitracks (which was acquired by Aetrex in 2008) for advancements of attorneys' fees and expenses incurred in a suit by Aetrex against Danenberg. During and after acquisition negotiations, Aetrex and Danenberg negotiated the terms of a new company that would receive an exclusive license to facilitate orders of Aetrex goods. In the underlying case, Aetrex sued Danenberg personally for misrepresentations made in those negotiations. Danenberg argued that because he was Fitracks' CEO during the negotiations, he was entitled to indemnification. Fitracks and Aetrex then tried to limit their claims only to representations Danenberg made post-closing. The court nevertheless granted Danenberg indemnification for both pre- and post-merger conduct, finding that the post-closing continued negotiations of the license agreement "represent[ed] a continuation of the pre-merger negotiations."

Danenberg v. Fitracks, No. 6454-VCL (Del. Ch. Jan. 3, 2012).

BANKING

OCC Rescinds Supervisory Guidance Issued by OTS

On January 6, the Office of the Comptroller of the Currency (OCC), regulator of the nation's national banks and federal savings associations, issued a Bulletin 2012-2 (Bulletin), rescinding much of the guidance that the Office of Thrift Supervision (OTS) had issued in previous years with respect to its supervisory function over federal savings institutions. The purpose of the rescission was "to produce one common set of supervisory policies that will apply to both federal savings associations and national banks, while recognizing differences anchored in statute." The Bulletin rescinded 389 CEO Letters, and dozens of Regulatory and Thrift Bulletins as well as Trust Handbook guidance issued previously by the OTS. In many but by no means all cases, thrift institutions were informed that guidance issued by the OCC would now control. The OCC offered four explanations for each rescinded document:

- *Outdated* – The document is no longer needed. Any attachments to the document are rescinded only as they relate to national banks and federal savings associations.

- *Duplicative* – The document transmitted interagency guidance that was issued jointly with the OCC. The rescission applies to the transmitting document only and not the attached interagency guidance. Thrifts are directed to use the OCC-issued document.

- *Conveyance* – The document is a cover letter that merely conveyed another document. The rescission does not change the applicability of the conveyed document. To determine the applicability of the conveyed document, please refer to the original issuer of the document.

- *Replaced* – The document and any attachments are superseded by OCC guidance.

For more information, click here and here.

SEC's Division of Corporation Finance Issues Guidance Regarding Disclosure Relating to Exposures to Certain European Countries

On January 6, the Division of Corporation Finance (the Division) of the Securities and Exchange Commission issued disclosure guidance, stating that it is "concerned about the risks to financial institutions that are SEC registrants from direct and indirect exposures" to European sovereign debt holdings. "To date we note that disclosures about the nature and extent of these exposures that registrants, including foreign private issuers, have provided in reports filed or furnished with the Commission have been inconsistent in both substance and presentation. We believe this inconsistency may lead to disclosures that lack transparency and comparability for investors."

The Division also stated, "Therefore, we determined that investors would benefit from our providing additional guidance to assist registrants in their assessment of what information about exposures to European countries they should consider disclosing and how they should disclose this information with the goal of greater clarity and comparability."

The Division called attention generally to MD&A requirements, and specifically to Industry Guide 3 (Guide 3), which provides staff guidance regarding disclosure for bank holding companies. Thus, registrants must disclose known trends or known demands, commitments, events, or uncertainties that will result or that are reasonably likely to result in a material increase or decrease in liquidity and to describe any known trends or uncertainties that have had, or that a registrant reasonably expects may have, a material favorable or unfavorable impact on income. Further, pursuant to Guide 3, registrants must identify cross-border outstandings to borrowers in each foreign country where the exposures exceed 1% of total assets, and disclose current conditions in a foreign country that give rise to liquidity problems which are expected to have a material impact on the timely repayment of principal or interest on the country's private or public sector debt.

In determining which countries are covered by its guidance, the Division stated "[r]egistrants should focus on those experiencing significant economic, fiscal and/or political strains such that the likelihood of default would be higher than would be anticipated when such factors do not exist. We expect that the countries covered by this analysis would vary and thus the disclosures should be sufficiently flexible to capture those risks as they change over time. We encourage registrants to disclose the basis used for identifying the countries included in this disclosure. We believe that disclosures should be provided separately by country, segregated between sovereign and non-sovereign exposures, and by financial statement category, to arrive at gross funded exposure, as appropriate. Registrants should also consider separately providing disclosure of the gross unfunded commitments made. Lastly, we suggest that registrants provide information regarding hedges in order to present an amount of net funded exposure."

The Division also provided a list of factors for registrants to consider in crafting disclosure.

It has been reported that issuance of the guidance was precipitated by the recent failure of MF Global.

For more information, click here.

CFPB Release Mortgage Origination Examination Procedures

On January 11, the Consumer Financial Protection Bureau (CFPB) released a new examination manual entitled *Mortgage Origination Examination Procedures.* The manual is a field guide for CFPB examiners looking at mortgage originators in both the bank and nonbank sectors of the mortgage industry.

The release of the manual marks an initial step in regulating entities in the mortgage business that were not subject to federal regulation prior to passage of the Dodd-Frank Act. Such entities include independent lenders, brokers, servicers and others unaffiliated with banks and depository institutions.

The manual describes the types of information the agency's examiners will gather to evaluate mortgage originators' policies and procedures, assess whether originators are in compliance with applicable laws and identify risks to consumers throughout the mortgage origination process.

For more information, click here.

EXECUTIVE COMPENSATION AND ERISA

Retirement Plan Fee Disclosure Rules Expected to Be Effective April 1, 2012

Despite a delay in the issuance of the final rule, the Department of Labor (DOL) expects service provider fee disclosure obligations to go into effect April 1. The final rule, which is expected to be very similar to the interim final rule issued in July, 2010, will likely require retirement plan service provider to disclose to plan fiduciaries certain information about the fees they collect from the plan. While certain industry professionals have been requesting a delay in the effective date, the DOL has not yet indicated that such a delay will be forthcoming.

Compliance with the interim final rule's disclosure requirements will be required for contractual agreements between service providers and retirement plans in order to qualify for an exemption from the prohibited transaction rules under ERISA and the federal tax code. In other words, noncompliance with the interim final rule would mean the service provider is liable for taxes and penalties related to prohibited transactions if it is a party in interest with respect to the plan. Certain plan fiduciaries may also incur liability if a prohibited transaction occurs, but the interim final rule contains a special provision to help diligent plan fiduciaries avoid liability.

The interim final rule generally applies to service providers expected to receive $1,000 or more in compensation for providing any of the following services: (1) service as a fiduciary or a registered investment advisor; (2) certain recordkeeping or brokerage services; or (3) other services for indirect compensation (e.g., accounting, auditing, actuarial, appraisal, banking, consulting, custodial, investment advisory, etc.). Prior to entering into such agreements, or prior to any renewal or extension thereof, the service provider is required to provide plan fiduciaries with a description of:

- the services to be provided;
- all direct and indirect compensation to be received by the service provider and how it will be distributed among its affiliates;
- the manner in which compensation will be received; and
- certain investment disclosures.

In addition, during the term of the agreement and upon request by the plan fiduciary, the service provider must disclose all information about its compensation that is necessary for the plan to comply with its own disclosure obligations (e.g., disclosures required on the annual Form 5500).

Plan fiduciaries should work with their service providers to ensure that everything necessary is in place to ensure compliance with the interim final rule by April 1. In addition, plan fiduciaries should be on the lookout for issuance of the final rule in order to ensure timely compliance with any different requirements that the final rule might contain.

The interim final rule can be found here.

For more information, contact:

SEC/CORPORATE

Robert L. Kohl	212.940.6380	robert.kohl@kattenlaw.com
David A. Pentlow	212.940.6412	david.pentlow@kattenlaw.com
Robert J. Wild	312.902.5567	robert.wild@kattenlaw.com
David S. Kravitz	212.940.6354	david.kravitz@kattenlaw.com

FINANCIAL SERVICES

Janet M. Angstadt	312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	212.940.6615	henry.bregstein@kattenlaw.com
Wendy E. Cohen	212.940.3846	wendy.cohen@kattenlaw.com
Guy C. Dempsey, Jr.	212.940.8593	guy.dempsey@kattenlaw.com
Daren R. Domina	212.940.6517	daren.domina@kattenlaw.com
Kevin M. Foley	312.902.5372	kevin.foley@kattenlaw.com
Jack P. Governale	212.940.8525	jack.governale@kattenlaw.com
Maureen C. Guilfoile	312.902.5425	maureen.guilfoile@kattenlaw.com
Arthur W. Hahn	312.902.5241	arthur.hahn@kattenlaw.com
Joseph Iskowitz	212.940.6351	joseph.iskowitz@kattenlaw.com
Carolyn H. Jackson	44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Raymond Mouhadeb	212.940.6762	raymond.mouhadeb@kattenlaw.com
Marilyn Selby Okoshi	212.940.8512	marilyn.okoshi@kattenlaw.com
Ross Pazzol	312.902.5554	ross.pazzol@kattenlaw.com
Kenneth M. Rosenzweig	312.902.5381	kenneth.rosenzweig@kattenlaw.com
Fred M. Santo	212.940.8720	fred.santo@kattenlaw.com
Marybeth Sorady	202.625.3727	marybeth.sorady@kattenlaw.com

James Van De Graaff	312.902.5227	james.vandegraaff@kattenlaw.com
Meryl E. Wiener	212.940.8542	meryl.wiener@kattenlaw.com
Lance A. Zinman	312.902.5212	lance.zinman@kattenlaw.com
Krassimira Zourkova	312.902.5334	krassimira.zourkova@kattenlaw.com
LITIGATION		
Bruce M. Sabados	212.940.6369	bruce.sabados@kattenlaw.com
Dean N. Razavi	212.940.6743	dean.razavi@kattenlaw.com
BANKING		
Jeff Werthan	202.625.3569	jeff.werthan@kattenlaw.com
Christina J. Grigorian	202.625.3541	christina.grigorian@kattenlaw.com
EXECUTIVE COMPENSATION AND ERISA		
Daniel B. Lange	312.902.5624	daniel.lange@kattenlaw.com

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CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK OAKLAND WASHINGTON, DC

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