Skadden

2022: What You Need To Know …

Contents

This year, we expect to see new disclosure requirements; rule changes at the Securities and Exchange Commission that will affect directors; activists adopting new tactics; changes to shareholder voting processes; tax and antitrust developments that could alter the way companies execute deals; and revised trade rules that will have an impact on many businesses.

Below is a quick guide to critical developments that may affect your decisions as a director, drawing on the insights of Skadden lawyers across practices and offices. We flag key issues that directors will want to be alert to this year.

Regulation, Enforcement and Disclosures

The SEC Plans a Slew of New Disclosure Requirements

Boards will need to monitor actions at the Securities and Exchange Commission (SEC), whose ambitious agenda includes a wide array of new and amended regulations it hopes to put in place by the end of 2022.

ESG. The SEC increasingly is focused on disclosures related to environmental, social and governance (ESG) issues, including climate change, board diversity, human capital management and cybersecurity risk governance. Currently, disclosure of ESG matters is required only if they are considered material, and the commission has not issued guidance on climate-related disclosures since 2010.

Climate change will be a particular priority, as evidenced by detailed comment letters from the staff on climate-related disclosures in SEC filings. The commission is expected to propose mandatory ESG-related disclosure rules in 2022, but even without specific requirements, any ESG-related material impacts should be disclosed under existing SEC rules.

Executive compensation clawbacks. The SEC revived discussion of a long-delayed proposal that would require companies to implement policies to recoup incentive compensation from current and former executives if the company is forced to restate financials. The commission has indicated it is contemplating rules broader than those originally floated in 2015. For instance, the rules could apply to additional types of restatements, even correcting errors that were not material to the prior financial statements. Companies could also be required to reveal not only how much they have recovered from executives, but how they calculated the amount.

Disclosures by 5% shareholders. On February 10, 2022, the SEC proposed changes to the rules requiring disclosure of equity stakes of more than 5%, which would give companies fuller, prompter information about shifts in their shareholder bases, including attempts to achieve a change of control.

First, the changes would mandate more timely disclosures. When an investor passes the 5% threshold, it would have to disclose its stake and intentions within five calendar days instead the current 10 days. And, once over 5%, whenever its position changes, the investor would be required to update its filing within one business day.

Second, the disclosure requirements would now extend to some cash-settled equity derivatives that can give the holder voting power. Under the current rules, only conventional shareholdings count toward the threshold, although derivatives are frequently used where the investor's goal is a change of control.

(Listen to Skadden partner Brian Breheny discuss the proposed amendments: "Interview: SEC Changes Would Let You Know More About Your Shareholders.")

Finally, in defining investor "groups" that are working together, and whose holdings must therefore be aggregated for purposes of disclosure, the proposed rule would drop the requirement that there be "an agreement" among the investors. In some circumstances, this could force activists to reveal their holdings and intentions sooner than under the current rules.

Share repurchase plans. Additionally, the commission has proposed amendments to modernize share repurchase rules, including a requirement that repurchases by the company be disclosed by the end of the first business day after they are executed.

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Some Rules and Enforcement Policies Could Affect Directors Personally

Several of the SEC's initiatives will apply directly to board members.

Predetermined stock sale plans. In response to concern that executives and directors are possibly gaming the system, the SEC proposed several amendments to the rules governing predetermined trading plans (so-called 10b5-1 plans). The proposed changes would include mandatory cooling-off periods after adoption of a plan before trades are permitted, director and officer certifications, limits on multiple/overlapping plans, and new public disclosure and reporting obligations regarding adoption of plans. Legislation that would require further amendments to the rules has passed in the House and is pending in the Senate.

Executive perks. The SEC's Enforcement Division is using risk-based analytics to uncover potential violations of various rules, including undisclosed perks for company officials. Alleged violations cited in recent enforcement actions involved benefits such as the personal use of corporate aircraft, automobiles and credit cards; car, club and concierge services; and covered housing and travel costs.

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Pressure Grows for More Disclosures About Political Spending

Corporations need to prepare for increased pressure from shareholders and other stakeholders to disclose and justify their contributions to candidates and political action committees, as well as dues payments to trade associations. The recipients' positions on ESG issues, such as diversity and climate change, are a particular focus. But the events at the Capitol on January 6, 2021, also led many companies to reevaluate their political spending, and now companies are being asked about their positions on changes to state voting laws.

Shareholders press for transparency. During the 2021 proxy season, a record 40% of shareholder proposals requesting disclosure of corporate political spending were adopted, according to *Bloomberg Law*, double the already significant 20% rate in 2020. Many of these proposals called for disclosure not only of the amounts and recipients, but also of the policies for making contributions and the identities of the decision-makers. (SEC officials have signaled that some aspects of political giving could be encompassed by new ESG disclosure rules.)

Some proposals would restrict activities. An increasing number of proposals have also included substantive restrictions, such as prohibitions on contributing to candidates who voted for certain anti-ESG bills, or asking the company to provide metrics on how it weighs ESG issues when making contributions or working with trade associations.

Wider disclosure and oversight. The impact of the political disclosure movement extends beyond companies that have faced shareholder proposals. According to a recent study by the Center for Political Accountability, 370 S&P 500 companies disclosed some or all of their political spending, or banned at least one type of it, in 2021, up from 332 in 2020. Along with that, there is a trend toward increased board oversight of political activity and memorializing guidelines for corporate political spending.

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Prosecutors Are Taking a Harder Line in Corporate Plea Negotiations

As the Department of Justice (DOJ) adopts a tougher stance toward criminal enforcement involving corporations, companies need to review their compliance programs to ensure they are well positioned to detect and prevent misconduct, particularly if the company has entered into nonprosecution or deferred prosecution agreements (NPAs or DPAs) with the DOJ in the past.

Overseas bribery/kickbacks. To build cases under the Foreign Corrupt Practices Act, a senior DOJ official said in 2021 that the department is now relying more on innovative data mining, the use of law enforcement sources and close partnerships with foreign governments, and less on self-reporting by companies.

Evidence of individual wrongdoing. Newly enacted DOJ policy requires that, to obtain cooperation credit, companies must disclose all nonprivileged information about individual wrongdoing. That is a more burdensome than previous DOJ policies, which only called for information concerning individuals the company viewed as "substantially involved" in the misconduct. The change shifts to the DOJ the responsibility to assess the level of involvement and culpability of corporate employees.

Past misconduct. Since 2008, in deciding whether to bring criminal charges against a company, prosecutors have been told to consider the company's history of conduct similar to that under investigation. Now, prosecutors are directed to factor in not only similar misconduct, but the entire domestic or foreign criminal, civil and regulatory record of a company, when shaping a resolution.

Recidivism, NPAs and DPAs. The resolution of a recent investigation and comments by Deputy Attorney General Lisa Monaco make clear that the department is actively considering how to deal with corporate recidivists, raising the question of whether they should be eligible for NPAs or DPAs, and how to ensure that companies subject to such agreements comply with their obligations.

In a case involving allegedly manipulative trading practices at NatWest Markets, the government stressed the fact that the company had settled two earlier cases involving similar behavior with NPAs. The DOJ claimed trading at issue in the recent investigation violated those agreements. To resolve the latest charges, NatWest pled guilty to mail and securities fraud in December 2021 and agreed to the appointment of an independent compliance monitor.

While the DOJ has not issued new policies concerning corporate recidivists, this case suggests that the department may insist on guilty pleas in such cases, as opposed to NPAs or DPAs.

Monitors. The department's guidance to prosecutors has been revised to eliminate sections that indicated monitorships were disfavored or reserved only for exceptional circumstances.

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New Disclosures May Give Rise to More Securities Litigation

If the SEC adopts new rules mandating more detailed disclosures regarding climate-related risks and opportunities, a new wave of federal securities suits stemming from climate change disclosures may follow. Such lawsuits by private investors could be either event-driven (*e.g.*, a drop in the stock price triggered by an adverse climate-connected event affecting the company) or part of campaigns to bring about corporate change through litigation.

Any new reporting rules will likely require more specificity as to the effects of climate change on business operations and results, which could make it more difficult for companies to argue in litigation that such statements are merely aspirational or inactionable "puffery." When characterizing climate-related information positively, companies will need to consider disclosing contrary facts as well.

Based on court rulings to date in securities cases involving corporations' statements about their climate-related policies, even general statements regarding a company's commitment to net-zero emissions or other climate goals may be deemed "material" to shareholders — at least at the pleading stage of litigation. Statements that could be used in a complaint might be found in sustainability reports, brochures, websites and other materials issued by companies, not just SEC filings. Hence, companies need to ensure the accuracy of all their statements about climate matters, regardless of where they appear.

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Activists and Shareholder Voting

Activists Are Morphing Into ESG Advocates and Buyers, and Could Target SPACs

ESG and Exxon Mobil. The activist campaign against ExxonMobil during the 2021 proxy season demonstrated the growing importance of ESG issues for large investors. The activist fund Engine No. 1 secured three board seats at Exxon Mobil, arguing that the company was not doing enough to address climate change. Though Engine No. 1 held only a 0.02% stake in the company, it prevailed with the support of passive institutional investors as well as major proxy advisory firms.

One lesson: In the coming proxy season, companies should be wary of so-called "Trojan horse" campaigns, where activists combine ESG initiatives with traditional activism campaigns, such as proposing a breakup or sale of a company, or the nomination of a slate of directors. By pressing both sets of issues, an activist can appeal to the growing focus on ESG factors by institutional investors while also garnering support with more traditional, non-ESG proposals.

"SPACtivism": Nearly 200 "de-SPACs" — mergers of operating companies into special purpose acquisition companies (SPACs) — were completed in 2021, according to Deal Point Data. Many are likely to see a dramatic turnover in their shareholder bases as lockups for sponsors expire (typically after 12 months) and insiders sell off a portion or all of their shares. Some of that stock may be acquired by activists. Given the number of de-SPACed companies in the market, inevitably some will underperform, potentially becoming activist targets.

"SPACtivism" is not limited to de-SPACs. As of December 31, 2021, over 500 SPACs were collectively holding in trust more than $138 billion in initial public offering (IPO) proceeds — "dry powder" — and were seeking M&A targets. In addition, as of September 2021, over 90% of active SPACs were trading below their IPO price, according to Goldman Sachs. With deadlines looming to arrange business combinations, there is an opening for activist investors to buy SPAC shares below their IPO price and exercise redemption rights, forcing a return of the IPO proceeds held in trust at the original IPO price.

Activists pivot to buyouts. Activists continue to blur the lines of traditional M&A-related campaigns, sometimes launching full-fledged hostile takeovers after pursuing more conventional strategies. For example, Carl Icahn's campaign against Southwest Gas' proposed acquisition of Questar Pipeline evolved into a contentious proxy contest to replace Southwest's entire board, coupled with a tender offer for all shares of the company. More recently, Acacia Research, an entity controlled by the activist fund Starboard Value, submitted an unsolicited bid for Kohl's, which was followed by another activist fund, Macellum Capital Management, nominating 10 new directors to facilitate a sale of the company.

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Voting Changes Could Strengthen the Hand of Large Investors and Dissidents

Index fund voting policies. BlackRock announced that it will soon give its largest investors (*e.g.*, pension funds and endowments) the ability to cast votes tied to their fund investments on matters including board seats, ESG proposals and "say on pay." If other large index fund managers follow suit, the result would be a shift in voting power from index fund managers to their larger investors, likely making it harder to forecast the outcome of votes on shareholder proposals and in contested elections. It also could become more difficult for companies to influence the voting decision-makers.

Universal proxy cards. Traditionally, in contested elections, shareholders not voting in person had to choose between the company's and the challenger's proxy cards, with their competing slates of directors. But new SEC rules for contested elections require most public companies to include all board nominees — both company and dissident nominees — on a single universal proxy card for shareholder meetings after August 31, 2022. This new "a la carte" procedure may make it easier for dissident shareholders to obtain board representation by allowing shareholders to support some dissident nominees without having to reject all company nominees. Together with the possibility of "split decisions" by proxy advisers, that could make election outcomes more difficult to predict.

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New Factors Affecting Dealmaking

US Merger Reviews Are Likely To Take Longer and Be Less Predictable

Wide-ranging procedural changes at the Federal Trade Commission (FTC) have been implemented in an attempt to expand its review powers — changes that can complicate and slow down merger clearances. The commission shares jurisdiction over mergers with the DOJ, which also has a new leader who is talking tough about ramping up merger enforcement.

Mergers. In support of its more aggressive stance on vertical deals, the FTC abandoned the Vertical Merger Guidelines, which for years were based on the principle that most vertical tie-ups are pro-competitive and should not be challenged. The FTC and DOJ have announced that they are launching an effort to revise the Horizontal Merger Guidelines, as well as potentially the Vertical Merger Guidelines, later this year. These revisions will undoubtedly aim to lower the bar in challenging all types of mergers.

Labor markets. Under the Biden administration, a great deal of attention is being paid to competition in the labor market. During merger reviews, questions about the impact on labor markets are now common at both the FTC and DOJ.

Prior approval required. In an increasing number of merger consent orders, the FTC now includes a provision requiring firms to obtain approval before consummating future deals.

Second requests. The FTC's Bureau of Competition has modified requirements for second requests (in-depth reviews), making the process lengthier. This gives the FTC more time and leverage to challenge deals.

Other changes. The early termination option, which allowed deals to close before the end of the statutory waiting period if the FTC consents, has been eliminated, and the FTC now commonly sends letters to merging parties warning them that it will continue to investigate and reserves the right to challenge a deal after it closes.

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Merger Clearance Thresholds Are No Longer Clear-Cut Around the World

It has become less clear when a merger will require a regulatory review in jurisdictions around the world.

"Killer acquisitions" are altering standards. In many countries, concerns have been raised that traditional revenue thresholds for merger reviews do not bring all anti-competitive mergers to the attention of regulators — particularly acquisitions by incumbents of nascent competitors that could provide significant competition in the future. Termed "killer acquisitions," these are of particular concern in dynamic sectors such as technology and pharmaceuticals. In many cases, the target may have a promising technology but little or no revenue, so the deals do not meet traditional notification thresholds.

Since early 2021, the European Commission (EC) has invited national competition regulators to refer possible "killer" transactions to it, even where they do not meet either national or European Union value thresholds for investigation. Similarly, in the U.K., the Competition and Markets Authority is increasingly construing the criteria for review more broadly, taking jurisdiction over deals where targets appear to have limited (if any) revenue or direct activity in the U.K.

Other jurisdictions, including Austria, Germany and South Korea, have adopted alternative transaction-value thresholds, requiring notification of acquisitions where the target has significant activities in those countries, even if a target generates no revenue there.

Discretionary jurisdiction is spreading. More than 50 countries now have the discretion to conduct competition reviews of mergers below mandatory notification thresholds, and more are likely to follow. As a consequence, companies whose merger might not have been subject to a review in the past now must prepare for the possibility that their deal may draw the attention of regulators. In drafting merger agreements, the parties should address the risk of an unexpected review and delays, and the drop-dead (long-stop) termination dates in merger agreements may need to be extended.

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CFIUS-Like National Security Reviews Spread Globally

Companies investing or making acquisitions — or divesting assets — abroad in sectors deemed "strategic" face new hurdles. In 2021, more than a dozen countries enacted or significantly changed their foreign direct investment (FDI) review processes.

Some countries with relatively mature screening regimes — including Australia, Canada, China, France, Germany and Japan — strengthened or expanded them, while others implemented review schemes for the first time. In the U.K., a new FDI review law took full effect in January 2022.

The CFIUS review process (short for Committee on Foreign Investment in the United States) remains the most challenging FDI hurdle, but companies investing outside their home country now need to factor in the possibility that their transactions may be rigorously vetted in countries where that was not true in the past.

Strategic technologies. Many of the new regimes reflect a desire to maintain control over domestically developed technology. More governments now recognize the significant role emerging technologies play in national security and defense. With recent supply chain disruptions in the semiconductor and other industries, technological sovereignty is seen as a particularly important issue.

Virtually all the major FDI review mechanisms focus on the defense and security sector, critical infrastructure, raw materials and inputs (energy products, minerals, food security), advanced technologies, mass media and sensitive personal data. Cross-border investments in these categories are the most likely to trigger FDI reviews.

Government-backed acquirers. Concerns about the intentions of state-backed investors from nonmarket economies is another key factor driving the new regulations. A November 2021 European Commission report noted a "clear change in investor profiles and investment patterns, *i.e.*, increasingly non-OECD investors, occasionally with government backing or direction, whose motivation for a particular investment might not always be exclusively commercial."

Investors' identities. Investor-related due diligence is essential. A number of FDI regimes require filings for transactions involving state-backed investors, sometimes even where those entities are passive investors through funds. Therefore, private equity and other investment partnerships must be prepared to disclose information about their limited partners and partnership agreements during FDI reviews.

Reviews will take more time. Parties also need to plan for lengthier reviews, and the possibility that they will have to modify their agreement to mitigate regulators' concerns.

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Revamped Tax Rules Could Complicate Spin-Offs

Tax law changes included in the Biden administration's Build Back Better Act (BBBA) would make it harder for companies to extract value through a tax-free spin-off. While the full BBBA bill failed to gain Senate support, the administration hopes to win approval for much of its substance in smaller pieces, and the tax changes are likely to survive in those bills because they would generate revenue to offset proposed expenditures.

The current rules on spin-offs are well understood and applied routinely to allow parent companies to extract value from the assets they relinquish without being taxed. Subject to certain caps, the rules allow parents to transfer debt to the new entity

(Spinco) that will hold the assets and/or to receive cash from the Spinco without any tax liability.

The BBBA would amend the rules to eliminate the use of debt-for-debt exchanges between Spinco and the parent, which historically have been one of the main ways the parent can extract value in excess of the tax basis of the Spinco assets without paying tax.

There appear to be work-arounds that may allow parents to monetize value without tax to nearly the degree possible under current rules, but the amendments will force companies to engage in more complex, multi-stage transactions in order to avoid paying higher taxes. Some steps may need to be completed ahead of the spin-off itself and, in some cases, the transaction may have to be structured as a reverse spin-off, where the assets in question remain in the existing parent and the bulk of the business is transferred to a Spinco.

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Supply Chains and Cross-Border Commerce

Biden Administration Plans Broad Protections for Critical US Supply Chains

Concerns about the supply chain are giving rise to new policies that could provide opportunities to some companies while complicating business for others.

In June 2021, the Biden administration published reports identifying supply chain vulnerabilities and recommending policies to ensure long-term availability of economically essential product categories such as semiconductors, electric vehicle and other high-capacity batteries, critical minerals and other strategic materials, and pharmaceuticals and active pharmaceutical ingredients. Similar reports are to be finalized in early 2022 for broader economic sectors: defense, public health and biological preparedness, information and communications technology, energy, transportation, and agricultural commodities and food products.

A number of agencies have solicited industry and public input to strengthen supply chains and have been charged with devising policy recommendations, both "positive" (*e.g.*, workforce development, financing opportunities, stockpile creation) and "negative" (*e.g.*, addressing surveillance and cyber risks).

Several legislative and regulatory actions and proposals to address the challenges identified in these reports are likely in 2022. In the immediate term, Congress likely will pass a compromise version of the America COMPETES Act, which among other things would allocate more than $50 billion to support domestic semiconductor production and research. We expect to see targeted use of new and existing incentive programs in other areas, as well as use of trade remedies that could result in higher tariffs for certain imports.

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US May Renew Exemptions From Tariffs on Chinese Imports

U.S. importers are lobbying for relief from Section 301 tariffs imposed on products from China beginning in 2018 to address findings of intellectual property theft and other unfair trade practices. The Biden administration has maintained that the tariffs, which apply to most goods from China, remain necessary, and it has been slow to restart the Section 301 tariff exclusion process established by the Trump administration that expired in 2020. In October 2021, the U.S. trade representative (USTR) invited public comment on whether to reinstate certain tariff exclusions.

A number of lawmakers are urging the administration to make it easier to seek exclusions, claiming that certain tariffs have increased supply chain difficulties. The USTR likely will reinstate many of the tariff exclusions on which it invited comments and initiate a process for applying for additional exclusions in 2022. Absent improvement in U.S.-China trade relations, however, broader action to reduce or eliminate Section 301 tariffs remains unlikely.

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Restrictions on Imports From Xinjiang Could Have a Large Impact on Some Products

The import of some Chinese products has been complicated by U.S. government findings that goods made in the Xinjiang Uyghur Autonomous Region of China have been produced by forced labor, which has resulted in restrictions on their import. U.S. Customs and Border Protection has already issued orders blocking entry of products from China because of forced labor, including 10 directed specifically at activity in Xinjiang.

Legislation that effectively prohibits imports of goods made in whole or in part in Xinjiang was signed into law on December 23, 2021, and will go into effect in June 2022. The legislation could have a significant impact on the U.S. solar industry, because Xinjiang is a major center for polysilicon production. The legislation also could adversely affect imports of apparel, agricultural products such as tomatoes, and certain electronics.

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Multinationals Need To Comply With New Chinese Data Protection Laws

Two new Chinese laws came into force in late 2021 that are likely to have an impact on many multinational companies with operations in or touching the country.

The Data Security Law applies to all data activities in China as well as extraterritorially if they are deemed to impair the country's national security and public interest. It sets up a framework to classify data collected and stored in China based on its potential impact on Chinese national security and regulates its storage and transfer. The law clarifies and expands data localization and transfer requirements, and expands the scope of regulation to cover both the initial collectors and downstream intermediaries.

The Personal Information Protection Law generally applies to all types of data activities involving the personal information of subjects in China, as well as activities outside the country aimed at providing products or services to individuals in China or analyzing their behavior. It imposes a range of obligations on data handlers, including obtaining consents localizing and deleting data, and conducting regular self-audits to assess information security risks.

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Tax and Cryptocurrency

Authorities Try To Come to Grips With Cryptocurrency Tax Conundrums

As digital assets proliferate, so do questions about their taxation. Many tax rules designed over the last century to deal with financial and commercial assets — from derivatives to intellectual property — are ill-suited to digital assets. Companies that hold, trade or are otherwise involved with cryptocurrencies or other digital assets need to be alert as tax authorities come to grips with these new forms of property.

The technical architecture of digital assets makes it difficult to bring them within existing tax rules, even those designed to deal more generally with the digital marketplace. Questions that businesses, crypto traders and tax authorities are wrestling with today include:

- whether cryptocurrency is legal tender or some other form of asset;
- whether stablecoins, tied to a fiat currency, should be treated differently than other cryptocurrencies for tax purposes;
- when income is recognized (*e.g.*, when the cryptocurrency is mined, when it is received in payment for another asset);

- which cryptocurrency transactions qualify for capital gains treatment;
- where a cryptocurrency transaction takes place; and
- which country will be the primary taxing authority.

The U.S., U.K. and Australia have started to offer guidance on some of these topics, but there is no international consensus on many issues.

Financial regulators and tax authorities are seeking to tighten cryptocurrency regulation and require more reporting from crypto exchanges and other financial institutions. The Internal Revenue Service, for example, is currently drafting regulations to implement the cryptocurrency reporting framework recently enacted by the U.S. Congress and has also subpoenaed records of crypto exchanges to obtain information about their customers' trading income. That could cause some crypto activity to migrate to different jurisdictions, posing new challenges for tax authorities.

Corporate participants in the digital asset market need to manage tax risk by ensuring their internal teams comply with any new tax or reporting requirements, and closely tracking new legal developments as tax agencies attempt to reach cryptocurrency transactions that have thus far remained outside established tax schemes.

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