# CONSULTATION PAPER ON REVISION OF THE SINGAPORE CODE ON TAKE-OVERS AND MERGERS

**SECURITIES INDUSTRY COUNCIL**

Monday, 1 November 1999

The Singapore Code on Take-overs and Mergers (the "Singapore Code") was introduced in 1974, and was first revised in 1979 and again in 1985. In view of market innovations and fast-changing international practices over the years, there is a need to review and update the Singapore Code.

The Securities Industry Council ("Council") has discussed, in broad terms, with merchant bankers and lawyers active in merger and acquisition ("M&A") transactions how best to revise the Singapore Code. These discussions formed the basis of this consultation paper, which sets out major proposals to amend the Singapore Code.

Council invites the public to give their views and comments on the proposed changes to the Singapore Code.

Comments should be in writing and can be submitted as follows:-

electronic mail: sic@mas.gov.sg

hard copy: The Securities Industry Council<br>10 Shenton Way #22-00<br>MAS Building<br>Singapore 079117

All submissions should reach Council by Friday, 7 Jan 2000 and should include the name, address and phone number of the sender. Comments received will be carefully considered and, where appropriate, incorporated in the amended Singapore Code.

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# EXECUTIVE SUMMARY

The Singapore Code needs updating to keep pace with market innovations and international practices. This paper sets out, for public comments, proposed revisions to the Singapore Code.

The major proposals are as follows:-

Regulatory Framework

i) to retain the current UK model for regulating M&A activities i.e. shareholders (instead of directors under the US model) should have the right to decide whether to accept or reject an offer;

ii) to maintain take-over rules in their current non-statutory form;

iii) to rationalise the legal provisions on take-overs in the Singapore Companies Act such that they only empower Council to administer the Singapore Code and stipulate the penalties for non-compliance with the law. Other take-over provisions should be consolidated in the Singapore Code;

Changes to Specific Rules

iv) to include supplementary notes to rules in the Singapore Code to give guidance to market practitioners;

v) to widen the concert-party presumption to include a person's close relatives, related trusts and companies controlled by him, his close relatives or related trusts;

vi) to review whether the mandatory bid threshold should be raised from 25% now to a higher level;

vii) to consider revising the creeping provision from 3% in 12 months to 1% in 6 months if the mandatory bid threshold is increased beyond 25%;

viii) to shorten the reference period for the offeror's transactions in the offeree company's shares in a mandatory bid from 12 months to 6 months;

ix) to only require cash or a cash alternative for a voluntary offer where the offeror has bought in cash 10% (15% now) or more of the offeree company's voting rights during the offer period and 6 months (12 months now) prior to the start of the offer. Such cash offer to be made at the highest price paid for the offeree company's shares during the offer period and the 3 months (12 months now) prior to the start of the offer;

x) to require the offer document to be posted within 21 days (28 now) of the offer announcement, and the offer to be kept open for at least 28 days (21 now);

xi) to review whether the moratorium on further bids by a failed offeror should be shortened from 12 months to 8 months;

xii) to allow partial offers conditional on more than 50% acceptances subject to safeguards;

xiii) to remove the requirement that offer documents must be posted within 2 months of entering into conditional share acquisition agreements which would lead to mandatory offers;

xiv) to clarify that voluntary offers conditional on high level (e.g. 90%) of acceptances are permitted in specified circumstances;

Provisions in Companies Act and SES Listing Manual

xv) to introduce rules governing the conduct of schemes of arrangement, including guidelines on parties that should abstain from voting on such schemes; and

xvi) to allow potential offerors to conduct due diligence on price-sensitive material prior to making an offer.

# INTRODUCTION

1 The Singapore Code, last revised in November 1985, is in need of updating to keep pace with market innovations and evolving international practices as well as to ensure that the M&A market in Singapore is efficient.

2 In recent months Council has discussed, in broad terms, with more than 20 merchant bankers and lawyers (see list at annex) active in M&A transactions how best to revise the Singapore Code. This paper sets out these broad areas for public comments before we proceed to draft detailed rule changes.

3 This paper is divided into three parts. Part I reviews the regulatory framework for M&A activities in Singapore. Part II outlines the major proposed amendments to the Singapore Code. Part III deals with provisions in the Companies Act and SES Listing Manual relating to take-overs and mergers.

# *PART I*

# REGULATORY FRAMEWORK

**US or UK model of take-over regulation**

4 A fundamental issue that arises is whether Singapore should adopt the US model or retain the existing UK model (also known as the City model) for regulating M&A activities. In the US, directors of a target company have the discretion to put a proposed offer to shareholders for consideration or reject it outright. In comparison, the UK model requires the board to obtain competent independent advice on any bona fide offer received, whether welcome or not. In addition, directors are prohibited from engaging in actions that have the effect of frustrating the bona fide offer.

5 While there may be advantages in empowering directors to hold out for a better offer and/or negotiate for better terms under the US model, the flip-side is that shareholders could be deprived of an opportunity to consider and accept a take-over proposal which the directors have rejected. Furthermore, the US system is underpinned by (i) a litigious environment where directors are likely to be sued if they have acted improperly or not in the interests of shareholders; (ii) robust corporate governance practices; and (iii) extensive case law on the duties and responsibilities of directors in a take-over situation.

6 It should be noted, however, that the Singapore Code does not prohibit competing offers for the same offeree company. Interested parties are always free to make a rival bid if they so decide. In fact, the Singapore Code requires the offeree company to treat all offerors equally.

7 The general consensus among market practitioners is to retain the current UK system, i.e. the board should obtain advice on all bona fide offers received and not to reject any out of hand. This view is based on the fundamental principle that shareholders, as owners of the target company, should have the right to decide for themselves whether to accept or reject an offer for their shares. Although we do not adopt the US model, that should not preclude us from studying how the good features of the US system could be adapted for use in Singapore.

**Singapore Code: Statutory or non-statutory form**

8 Although the Singapore Code is promulgated as a subsidiary legislation and is given legal backing by the Singapore Companies Act, it is **non-statutory** in that a breach of the Code is not a transgression of the law. This is similar to take-over codes of other Commonwealth countries, with the exception of Australia (and perhaps the UK in the near future).

9 Australia has enacted a statute to regulate take-overs and mergers. The UK may soon have to turn its existing non-statutory take-over provisions into legislation too if required by the European Community Directive on Take-overs. The London Panel is concerned that legislating take-over rules will result in the loss of general flexibility in its day-to-day operations and increase the risk of its decisions being challenged in Court. This will result in parties to a take-over not being able to rely on consultations with the Executive and/or decisions made by the Panel.

10 Take-over rules in non-statutory form have important advantages: (i) prompt rulings as opposed to Court judgements which would take time; (ii) flexibility in administering/interpreting provisions according to specific circumstances as the non-statutory rules are not

rendered in legal language; and (iii) certainty as the Court is normally reluctant to review Council's rulings, particularly in the midst of a take-over offer. Parties thus cannot use the Court process to stall or frustrate a take-over offer. From our discussions with market practitioners, the consensus is that rules and practices governing M&A transactions should remain in non-statutory form in view of the inherent benefits of speed, flexibility and certainty.

**Consolidating take-over regulations in the Singapore Code**

11 Sections 213, 214 and the Tenth Schedule of the Singapore Companies Act lay down basic take-over procedures and disclosures for the offeror and the offeree company. The Singapore Code goes much further, prescribing comprehensive principles, rules and procedures that govern the conduct of take-overs.

12 Market practitioners have found it cumbersome to have to comply with 2 separate sets of legislation/regulation, especially when some of the provisions in the Companies Act and the Singapore Code overlap with each other. Furthermore, the requirement to serve a notice of take-over under section 213 of the Companies Act does not serve any useful purpose. There is thus a need to rationalise the requirements relating to take-over and merger transactions under the Companies Act and the Singapore Code.

13 The Corporate Finance Committee had recommended that all securities laws should be consolidated into a single piece of legislation. An inter-agency committee has started work to determine the legislative and administrative arrangements for transfer of the relevant provisions in the Companies Act to the Securities Industry Act. Simultaneous with that move, the legal provisions on take-overs and mergers should be rationalised such that they only empower Council to administer the

Singapore Code and stipulate the penalties for non-compliance with the law. Other take-over provisions currently found in the Companies Act should either be repealed (e.g. the requirement for take-over notice) or consolidated (e.g. certain disclosure requirements in the Tenth Schedule) in the Singapore Code. This will streamline the procedural and disclosure requirements governing take-over and merger transactions, thereby making regulatory compliance easier for parties to a take-over offer.

***PART II***

# PROPOSED CHANGES TO SPECIFIC RULES

**Incorporating guidance notes**

14 The current Singapore Code is not as user-friendly as its equivalent in the UK and Hong Kong, which have detailed guidance notes to certain of their rules. Although Council has adopted similar practices on areas not specifically covered in the Singapore Code, such practices are known only to the practitioners who have requested those rulings.

15 Going forward, we propose to improve regulatory transparency by including supplementary notes to the Rules in the revised Singapore Code so as to give guidance to market practitioners on how Council will deal with certain issues. Examples include the conditions for whitewash waiver, computation of "see-through" price for warrants, and the factors that may give rise to inference that parties are acting in concert. Besides reducing the need for consultation with Council, market practitioners will also be better able to advise their clients.

**Definition of concert-party**

16 Under the existing Singapore Code, the presumption of acting in concert does not extend to an individual and his close relatives. The only exception is where the individual is a director of a company viz. "a company is presumed to be acting in concert with any of its directors (together with their close relatives and related trusts)".

17 The Hong Kong Code provides for such presumed concert-party relationship: an individual is presumed to act in concert with his **close relatives**, related trusts and companies controlled by him, his

close relatives or related trusts. Although the term "close relatives" is not defined, the Hong Kong Practitioners Guide suggests that it would be extended widely to include parents, brothers, sisters, uncles, aunts and children.

18 Given similar shareholding structures and kinship ties in Hong Kong and Singapore, we propose to adopt the Hong Kong Code provision in the revised Singapore Code so that, unless rebutted, an individual is ***presumed*** to act in concert with his close relatives, related trusts and companies controlled by him, his close relatives or related trusts. The term "close relatives" will also not be defined so as to enable Council to presume close relatives, even if they fall outside the immediate family, to be acting in concert with each other when the facts of a case so warrant it.

**Mandatory bid threshold**

*25% threshold*

19 Currently, the Singapore Code requires a person who acquires shares which (taken together with shares held or acquired by persons acting in concert with him) carry 25% or more of the voting rights of a company to make a general offer for the company. The Companies Act also defines "acquiring effective control" as the acquiring of shares carrying 25% or more voting rights, which triggers a bid obligation. (The limit was increased from 20% to 25% in 1985.) The rationale is that shareholders of a public company should be given an exit opportunity upon a change of control.

20 Some market practitioners have submitted that the present 25% threshold for a mandatory bid is relatively low by international standards, and proposed that it should be raised. They argue that where public companies are tightly-controlled, as is the norm in Singapore, a

shareholding below 30% does not confer effective control. Consequently the current 25% threshold hinders some corporate alliances, in cases where the partner does not want voting control but only a substantial stake (larger than 25%) to have a strong voice.

21 In Hong Kong and Malaysia where shareholding patterns are similar to Singapore's, thresholds for a mandatory bid are higher at 35% and 33%, respectively. Even in the UK where shareholdings in public companies are generally more diffused, its threshold of 30% is higher than Singapore's. Australia has a lower threshold at 20%, but that is not a permanent barrier. A shareholder who holds at least 19% of an Australian company's voting rights in the preceding 6 months is permitted to acquire 3% of the company's voting rights in the following 6 months without incurring a bid obligation.

22 Increasing the control threshold beyond 25% could in some cases result in an acquiror gaining effective control of a company without being required to make a general offer, particularly in large companies with dispersed share ownership. Furthermore, a person with more than 25% shareholding is in a position to veto or block special resolutions which need 75% votes to be passed as required under the Companies Act.

23 We invite views on the merits of raising the 25% mandatory offer threshold, and will deliberate on this issue after studying all the responses to the consultation paper. [It is **not** proposed that the Companies Act requirement of 75% votes for special resolutions be revised, regardless of whether the definition of effective control (and thus the mandatory offer threshold) in the Companies Act and the Singapore Code is changed.]

*3% creeping threshold*

24 Under the Singapore Code, a person who, together with persons acting in concert with him, holds between 25% and 50% of the voting rights in a company and such person, or any person acting in concert with him, acquires in any 12-month period additional shares carrying more than 3% of voting rights (i.e. creeping provision) is obliged to make a general offer for the company.

25 The creeping provision should be tied to the initial threshold for a mandatory bid. This is because the higher the initial trigger point, the lower the percentage of shares a person has to acquire subsequently to gain statutory control (more than 50% voting rights) of the company. Feedback from market practitioners is that we should lower the creeping provision if we decide to raise the initial control threshold in order to maintain the existing time period (i.e. 8 years for a party to creep from 25.1% to 47%[1]) over which a person can "creep" to statutory control without having to make a general offer for the company. For example, if the initial threshold for a mandatory offer is increased to 30%, the creeping provision should be revised to 1% in a 6-month period (the shortening of the reference period to 6 months will be discussed in the next section).

**Reference period for transactions in offeree company shares**

26 The Singapore Code requires a mandatory offer to be made at the highest price the offeror and its concert parties have paid for shares in the offeree company within 12 months of the offer. The UK and Hong Kong have a similar reference period of 12 months. In 1998, Malaysia shortened the reference period for share transactions in the offeree

[1] A person holding 47% of the company's voting rights may acquire additional shares that increase his voting rights by more than 3% without triggering a bid obligation if he has not acquired any shares for 12 months.

company by the offeror and its concert parties from 12 months to 6 months. Australia looks at the offeror's share transactions in the offeree company in the 4 months preceding the offer.

27 With volatile share prices and fast-changing economic situations, the reference period of 12 months for the offeror's share transactions in the offeree company can reasonably be considered as too long. Such protracted reference period presents an impediment to the efficient functioning of the market for corporate control. It could also work against the shareholders of an offeree company by preventing an offer at a good premium to the prevailing market price (but below the highest price paid by the potential offeror in the last 12 months) from being made.

28 Taking into account the fast-changing market environment and practices elsewhere, we propose to reduce the reference period for share transactions from 12 months to 6 months. Moreover, a 6-month front-end reference period is consistent with the post-offer period of 6 months prohibiting the successful offeror from making a second offer or purchasing shares in the offeree company at a price higher than what was made available in the first offer.

**Cash offer if 15% bought in cash**

29 Rule 32 now requires that when an offeror has bought in **cash** 15% or more of the offeree company's voting rights during the offer period and the 12 months prior to the start of the offer ("the relevant period"), the offeror must (i) make an offer at not less than the highest price paid for shares during the relevant period; and (ii) the offer must be in cash or accompanied by a cash alternative. This applies even when it is not a mandatory offer under Rule 33. The requirement is another extension of the principle of equal treatment of shareholders.

30 UK and Hong Kong have similar rules: UK requires a cash offer or a cash alternative when the offeror has purchased 10% of voting rights of the offeree company in 12 months prior to the offer, while it is 10% in 6 months prior to the offer in the case of Hong Kong. The cash offer is pegged to the highest price paid in the previous 12 months for UK, and 6 months for Hong Kong.

31 Market practitioners consider the rule as stretching the equality principle too far. The effect is to subject a voluntary offer to the mandatory offer requirements, just because the offeror has bought 15% or more shares in cash in the preceding12 months.

*Reference period for price of Rule 32 cash offer*

32 As is the UK practice, we require a voluntary offer to be made at the highest price paid by the offeror and its concert parties for the offeree company's shares in the last 3 months. While we can understand the requirement for a cash offer under Rule 32, we do not see why the reference period for the offer price should be extended to 12 months just because the offeror (who is making a voluntary offer) has bought 15% or more of the offeree company's shares in cash in the last 12 months. We therefore propose to shorten the reference period for the price of Rule 32 cash offer from 12 months to 3 months.

*Reference period for requirement to make a cash offer*

33 To dovetail with the reduced reference period for transactions in the offeree company's shares for mandatory offers (para 28), the period for determining whether a cash offer is required for voluntary offers should also be shortened to 6 months (from the current 12 months). With the reduction, the threshold for requiring a cash offer

should correspondingly be lowered from 15% to 10%. This will be similar to Hong Kong's requirement.

**Timing of despatch of offer document and offeree circular**

34 The Singapore Code requires the offer document to be posted within 28 days of the offer announcement, as is the case in the UK (21 days in Hong Kong). Section 213 of the Companies Act requires the offeree circular, which contains the recommendation of the directors and advice of the independent financial adviser on the offer to the offeree company's shareholders, to be posted no later than 14 days after the despatch of the offer document. As the offer is not required to remain open for more than 21 days from the offer document, this in effect often gives shareholders only 7 days to consider the recommendation and advice and decide on the offer. This does not really give shareholders sufficient time to ponder and decide on the offer, particularly when nominee companies require their clients who wish to accept the offer to notify them a few days prior to the closing date.

35 To give shareholders more time to consider the recommendation and advice on the offer set out in the offeree circular, we propose that an offer must be kept open for at least 28 days (instead of 21 now) from the posting of the offer document. The offeree circular must be despatched as soon as practicable and not later than 14 days after posting of the offer document. To keep the overall offer time-table the same as it is now, we further propose to require the offer document to be posted within 21 days (instead of 28 now) of the offer announcement, as in Hong Kong.

**No further offer by the same offeror within 12 months**

36 The existing rule disallows an offeror which attempted a failed take-over offer to make another bid for 12 months. The UK, Hong Kong

and Malaysia impose the same 12-month moratorium. While practitioners accept the requirement for a pause as reasonable, they consider the 12-month moratorium as a little too long given the fast-changing market environment. They have proposed that the period be reduced to 8 months. We invite comments on their proposal.

**Partial offers**

37 The concern with partial offers is likely discrimination between shareholders of the offeree company. Shareholders who sold their shares to the offeror prior to the partial offer were able to dispose of their **entire** shareholdings while the same opportunity is not given to the remaining shareholders under the partial offer even when control of the company has changed hands as a result of the partial offer. In addition, small shareholders who accepted the partial offer could end up with odd lots. For these reasons, partial offers have long been viewed with suspicion by M&A regulators. Under the Singapore Code, partial offers are considered to be generally undesirable (except in circumstances where the partial offer results in the offeror holding shares carrying not more than 25% of a company's voting rights) and Council's approval must be obtained in advance.

38 Market practitioners hold the view that such blanket prohibition on partial offers could reduce efficiency in the market for corporate control while not serving the interests of shareholders. As a result, incompetent management in some cases are secure from take-overs, and shareholders do not have an opportunity to consider partial offers which could be pitched at attractive prices. Concerns about discrimination between shareholders can be addressed by specific conditions for partial offers.

39 Our assessment is that partial offers should be allowed subject to proper safeguards as follows:

(i) the partial offer is not a mandatory offer under Rule 33;

(ii) the partial offer cannot become unconditional until the offeror owns more than 50% of the voting rights of the company;

(iii) the offeror did not acquire any shares in the offeree company (i.e. no disqualifying transactions) in the last 6[2] months and cannot buy any shares during the offer period and for 6 months after the completion of the partial offer;

(iv) the offer consideration must include cash or a cash alternative;

(v) the offeror must arrange with the SES to provide a special trading counter to trade odd-lots in the offeree company's shares for a certain period after the close of the partial offer, so as to provide accepting shareholders with odd lots an avenue to either buy further shares to round up their shareholding or to sell their odd-lot shares; and

(vi) the rounding-up of the minimum size for the partial offer must be reasonable (i.e. rounding up to the nearest hundred shares).

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[2] In line with the proposed reduction of reference period to 6 months for the offeror's transactions in the offeree company's shares for a mandatory offer (para 28).

40 In the UK and Hong Kong, shareholders' approval is required before partial offers can be made. We are of the view that such a condition is unnecessary as shareholders are free to reject partial offers put to them.

**Conditional sale-and-purchase agreements**

41 Under the Singapore Code, an offeror is permitted to attach conditions to a share acquisition agreement, which on fulfilment of the conditions precedent would trigger a mandatory bid obligation, if the conditions are attached because of the requirements of any written law or those laid down by the SES Listing Manual. Practice Note No. 12 ("PN 12") states that an offeror who has entered into a **conditional** share acquisition agreement is given up to 2 months (instead of the normal 28 days) from the offer announcement to despatch the offer document. This differs from the London and Hong Kong Codes where the offer document need not be posted until all the pre-conditions in a conditional share acquisition agreement are met.

42 PN 12 (previously Practice Note 9) arose from Malayan United Industries' ("MUI") take-over bids for Ming Court Hotel and Malaysia Hotel in 1981. In that case, MUI's agreements to acquire shares that would trigger mandatory bids for Ming Court and Malaysia Hotel were subject to approvals from authorities outside Singapore. For 5 months, minority shareholders in the two offeree companies did not know whether a bid would materialise. PN 12 (then Practice Note 9) was consequently introduced to ensure that acquisitions of shares which would result in a mandatory offer, are not subject to conditions that would create prolonged uncertainty about whether an offer is forthcoming.

43 The market is of the opinion that the 2-month requirement in PN 12 to post the offer document is too short and has been rendered ineffectual in practice in any event. Practitioners have advised parties to acquire shares by way of put and call option agreements which are not subject to PN 12.

44 We agree that the requirement in PN 12 that the offer document must be posted within 2 months of entering into a conditional share acquisition agreement should be lifted. However, to prevent potential abuse, pre-conditional offers should be subject to the following:

(a) the pre-conditions should be stated clearly in the take-over announcement;

(b) the pre-conditions should be objective and reasonable; and

(c) the pre-conditional offer must specify a reasonable period for the fulfilment of the pre-conditions failing which the offer will lapse.

**Voluntary offers conditional on high-level acceptances**

45 Council has permitted persons making voluntary offers in some cases to specify that the offer is conditional on 90% acceptances. In such instances, the offeror's intent is to take the offeree company private. Not allowing the offeror to make the offer conditional on 90% acceptances in such cases would be rigid.

46 To make Council's practice transparent, the revised Singapore Code will make clear that offers conditional on high level (e.g. 90%) of acceptances would be allowed subject to:

(i) bids conditional on a high level of acceptances are strictly restricted to voluntary offers;

(ii) the offeror must state clearly in the offer document the level of acceptances upon which the offer is conditional; and

(iii) the offeror has to satisfy Council that it is acting in good faith in imposing such high level of acceptances.

## *PART III*

# PROVISIONS IN COMPANIES ACT AND SES LISTING MANUAL

### Schemes of arrangement

47 While the Singapore Code defines "offer" to include a scheme of arrangement, Council has been reluctant in the past to extend the Singapore Code provisions to schemes of arrangement as they are already subject to the approval of shareholders as well as the Court. However, questions have been raised in some cases as to whether such schemes of arrangement are in the interests of minority shareholders. This is especially so where a party, owning shares in both the companies under a proposed merger, is not barred under the Companies Act and the SES Listing Manual from voting on the scheme of arrangement if a new company is set up to own the shares in the two companies which are the subjects of the scheme of arrangement.

48 The Hong Kong Panel has introduced new rules[3] recently to curb "aggressive" schemes of arrangement to privatise listed companies. Council will be working with the SES to introduce rules, which may include clear guidelines on which parties should abstain from voting on schemes of arrangement.

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[3] Where a shareholder having control of a company seeks to use a scheme of arrangement to privatise the company, the scheme of arrangement must either be:-

(i) approved by a majority in number representing 90% in value of those shares that are voted either in person or by proxy at a general meeting. The person seeking to privatise the company and his concert parties must abstain; or

(ii) if not so approved by the requisite authority, not disapproved by shareholders voting in person or by proxy at such general meeting holding more than 2.5% of the total number of shares in issue.

These requirements are in addition to the requirements imposed by the law.

**Due diligence**

49 A frequent complaint of market practitioners has been the constraints placed on a potential offeror in conducting pre-offer due diligence on price-sensitive information relating to the offeree company. It has been argued that allowing the offeror to conduct such due diligence would benefit shareholders as the offeror might otherwise pitch the offer price low as a result of insufficient information on the offeree company.

50 Council sees no objection to allowing a potential offeror to conduct due diligence on price-sensitive material prior to making the offer as long as there are appropriate safeguards to ensure that the potential offeror does not divulge, improperly benefit from and/or trade on such confidential information. Council and the SES will study this issue with a view to clarifying Chapter 12 of the SES Listing Manual which requires that information should not be divulged outside the listed issuer and its advisers in such a way as to place any person in a privileged dealing position.

***ANNEX***

## MARKET PRACTITIONERS CONSULTED

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