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Deadline Looms to Come Clean on Offshore Credit Card Tax Schemes

The IRS's revised disclosure policy offers a limited amnesty that ends on April 15

Although it is not illegal to own a credit card issued by an offshore bank, the Internal Revenue Service has suspected for some time that some U.S. citizens might be using offshore credit cards to evade payment of taxes. These individuals divert funds overseas by, for example, claiming false deductions for payments to foreign entities or by using other income diversion schemes. The credit cards then provide relatively easy—many believed untraceable—access to the diverted funds maintained in various “tax haven” countries.

In order to determine the scope of the problem, the IRS turned to a well-established tax enforcement tool, the John Doe summons, which allows the IRS to obtain information about individuals who may not be in compliance with the tax laws and whose identities are otherwise unknown to the IRS.¹ U.S. district courts in Miami and San Francisco have enforced the issuance of John Doe summonses to Mastercard International, American Express, and

Visa relating to accounts in approximately 30 foreign countries. The summonses seek information relating to the tax years 1998-2001.²

The IRS also has been authorized by other district courts in Florida and California as well as district courts in Arizona, Georgia, Illinois, Minnesota, Maryland, New Jersey, New York, Ohio, Texas, Virginia, and Washington, to serve John Doe summonses on more than 100 separate businesses, including airlines, hotels, rental car companies, and Internet providers who have accepted the use of offshore cards. Identification of the merchants confirmed IRS suspicions that use of offshore credit cards has “gone retail”—offshore transactions are no longer confined to the super wealthy but instead are conducted by a broad stratum of the population. Information gathered in this process is being used for both civil tax

examinations and criminal investigations. IRS fraud referral specialists will likely assist agents in identifying those cases having the greatest criminal investigation potential.

Early returns from these investigations suggest that large numbers

of U.S. taxpayers are, at the very least, not fulfilling the reporting requirements for maintaining a foreign bank account: filing Form TD F 90-22.1 (Report of Foreign Bank & Financial Accounts, or FBARs) and checking the appro-

appropriate box on Schedule B of their income tax returns. Information provided by Mastercard, which is estimated to have about 30 percent of the offshore credit card market, suggests that as many as one or two million U.S.-based customers may possess debit/credit cards issued by offshore banks. However, in 2000 only 170,000 FBARs, and in 1999 only 117,000 FBARs, were filed.

With the IRS's increased enforcement activities, taxpayers who have used offshore credit cards or other offshore accounts to evade U.S. taxes are faced with an increased prospect of detection, examination, investigation, and possible criminal prosecution. The stakes of offshore tax evasion schemes have increased, but so have the tools available to practitioners counseling clients in what is admittedly a very difficult matter. A series of recent pronouncements by the IRS have provided some avenues of poten-

tial relief. The IRS recently revised and updated its long-standing voluntary disclosure policy and, more recently, the IRS announced the Offshore Voluntary Compliance Initiative, a program designed to allow individuals to step forward and “clear up their tax liabilities.”³

Revised Voluntary Disclosure Policy

A “voluntary disclosure” is the process by which a taxpayer voluntarily reports previously undisclosed income (or false deductions) by filing an amended or delinquent return. Practitioners often are uncertain whether a taxpayer can avoid with certainty a criminal tax investigation by making such a disclosure. It is clear that a taxpayer's timely, voluntary disclosure of a significant unreported tax liability is an important factor when the IRS considers whether the matter should be referred to the Depart-

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ment of Justice for criminal prosecution. A voluntary disclosure is also a factor that the Department of Justice considers in deciding whether to prosecute a taxpayer.⁴

However, the IRS takes the position that the voluntary disclosure policy creates no substantive or procedural rights for taxpayers. Rather, it merely describes internal IRS practice, provided solely for guidance to IRS personnel.⁵ Most federal courts agree with this interpretation—although one district court found that the policy created substantive taxpayer rights.⁶ Nor may a criminally charged taxpayer rely on the fact that other similarly situated taxpayers may not have been recommended for criminal prosecution. The taxpayer's admission of wrongdoing, along with any other available evidence of repentance, is weighed along with all other factors in the investigation in determining whether to recommend criminal prosecution.⁷

Thus, a timely voluntary disclosure will not automatically guarantee immunity from criminal prosecution, but a true voluntary disclosure will normally result in the IRS not even recommending a criminal prosecution to the Department of Justice. In practice, a true voluntary disclosure is a strong deterrent to the IRS from initiating a criminal investigation. From a tax administration point of view, those who make a voluntary disclosure lack jury appeal, and there are more culpable taxpayers to investigate.

The recent publicity surrounding the IRS offshore credit card investigations has called into question whether a taxpayer's disclosure could now be called truly voluntary. In its recently revised and updated voluntary disclosure policy, the IRS answered that question: The general publicity regarding enforcement and compliance efforts, including the use of offshore credit cards, will not bar a taxpayer from making a voluntary disclosure.⁸ In addition, the disclosure policy has been modernized to reduce the uncertainty over what constitutes a timely voluntary disclosure.

A voluntary disclosure must be truthful, timely, and complete, and the taxpayer must demonstrate a willingness to cooperate—and must, in fact, cooperate—with the IRS in determining the correct tax liability.⁹ The taxpayer must make good-faith arrangements with the IRS to pay in full the tax, interest, and any penalties determined by the IRS to be applicable.¹⁰ Additionally, the policy only applies to income earned through a legal business—so-called legal source income. A modern-day Al Capone cannot take advantage of the policy.

The recent revisions to the policy clarify the timeliness requirement, an issue long troubling to practitioners. To be timely, the disclosure must now be received before:¹¹

- “The IRS has initiated a civil examination or criminal investigation of the taxpayer, or has notified the taxpayer that it intends to commence such an examination or investigation.”

- “The IRS has received information from a third party (e.g., informant, other governmental agency, or the media) alerting the IRS to the specific taxpayer's noncompliance.”

- “The IRS has initiated a civil examination or criminal investigation which is directly related to the specific liability of the taxpayer.”

- “The IRS has acquired information directly related to the specific liability of the taxpayer from a criminal enforcement action (e.g., search warrant, grand jury subpoena).”

Any taxpayer who contacts the IRS in person or through a representative regarding voluntary disclosure will now be directed to IRS Criminal Investigation for an evaluation of the disclosure. IRS Criminal Investigation special agents have been encouraged to consult IRS area counsel for criminal tax matters on issues relating to a voluntary disclosure.¹²

Examples of timely voluntary disclosures include:¹³

- A letter from an attorney enclosing amended returns from a client that are complete and accurate (reporting legal source income omitted from the original returns) and that offers to pay in full the tax, interest, and any penalties determined by the IRS to be applicable and that meets the timeliness standards.

- A disclosure made by a taxpayer of omitted income that was hidden or disguised through a widely promoted scheme, and, although the IRS has begun a civil compliance project involving the scheme and already obtained information that might eventually lead to an examination of the taxpayer, the IRS has not yet commenced an examination or investigation of the taxpayer or notified the taxpayer of its intent to do so. This still constitutes a voluntary disclosure because the civil compliance project involving the scheme has not yet identified the specific liability of the taxpayer.

- A disclosure made by an individual who has not filed tax returns even after the individual receives a notice stating that the IRS has no record of receiving a return for a particular year and inquiring whether the taxpayer filed a return for that year. The individual must file complete and accurate returns for the years in question and make arrangements with the IRS to pay the tax, interest, and any penalties determined by the IRS to be applicable. This is a voluntary disclosure because the IRS has not yet commenced an examination or investigation of the taxpayer or notified the taxpayer of its intent to do so.

Examples of what will not be considered a voluntary disclosure include:¹⁴

- “A letter from an attorney stating that a client, who wishes to remain anonymous, wants to resolve his or her tax liability. This is not a voluntary disclosure until the identity of the taxpayer is disclosed and all other required elements are satisfied.”

- “A disclosure made by a taxpayer who is under grand jury investigation. This is not a voluntary disclosure because the taxpayer is already under criminal investigation. The conclusion would be the same whether or not the taxpayer knew of the grand jury investigation.”

- “A disclosure made by a taxpayer, who is not currently under examination or investigation, of omitted gross receipts from a partnership, but whose partner is already under investigation for omitted income skimmed from the partnership. This is not a voluntary disclosure because the IRS has already initiated an investigation which is directly related to the specific liability of this taxpayer. The conclusion would be the same whether or not the taxpayer knew of the ongoing investigation.”

- “A disclosure made by a taxpayer, who is not currently under examination or investigation, of omitted constructive dividends received from a corporation which is currently under examination. This is not a voluntary disclosure because the IRS has already initiated an examination which is directly related to the specific liability of this taxpayer. The conclusion would be the same whether or not the taxpayer knew of the ongoing examination.”

- “A disclosure made by a taxpayer after an employee has contacted the IRS regarding the taxpayer's double set of books. This is not a voluntary disclosure even if no examination or investigation has yet commenced because the IRS has already been informed by the third party of the specific taxpayer's noncompliance. The conclusion would be the same whether or not the taxpayer knew of the informant's contact with the IRS.”

To determine whether the disclosure is truly voluntary, the IRS will review the status of any prior IRS interest in the taxpayer, the taxpayer's potential knowledge of this interest, and the taxpayer's fear of a potential trigger that could have alerted the IRS. A voluntary disclosure cannot be made anonymously. Any plan by a taxpayer, or his or her representative, to resolve a tax liability, file a correct return, or offer payment of taxes for an anonymous client will not be considered a voluntary disclosure.¹⁵

Under the revised policy, a voluntary disclosure does not occur until the IRS has actually been contacted. As such, it is imperative

that the disclosure occur as quickly as possible. Since returns filed pursuant to a timely voluntary disclosure face a relatively high likelihood of being audited, they should be bulletproof—correctly reflecting the taxpayer's income and expense items.

Due to various information sharing agreements among federal and state agencies, applicable state returns should be contemporaneously filed or amended with the federal returns. Returns for related entities should also be contemporaneously filed or amended. Questions or doubts should generally be resolved in favor of the government. Remember, if a return filed pursuant to a voluntary disclosure is less than accurate, the taxpayer is compounding, not diminishing, the problem.

For long-term tax avoiders, there is a question of how far back the disclosure should go. While there is no firmly established rule on how many returns to file when making a voluntary disclosure, the general consensus is about six tax years, the statute of limitations period for most tax-related crimes.¹⁶ That should eliminate any IRS concern that potential issues remain concerning tax years for which the statute of limitations for criminal prosecutions has not already expired. Returns looking back farther than six years could be

in order since the statute of limitations for a criminal prosecution is tolled during the period that a taxpayer is outside the United States or is a fugitive from justice.¹⁷

One tactical question is whether to contact the IRS before submitting a voluntary disclosure and actually filing the delinquent or amended tax returns. Some practitioners simply choose to file these returns, with payment, at the appropriate IRS service center (now referred to as a campus) by certified mail, return receipt requested. Filings are often sent separately for each tax year at issue, spaced out over a brief time period. Such filings occur during the typical tax return filing season (around April 15 and October 15 for individual returns).

Other practitioners prefer making the voluntary disclosure in a meeting with the special agent in charge at the local IRS Criminal Investigation office where the investigation would be conducted. At this meeting, counsel can outline the facts in a hypothetical form (probably in writing) and ask whether IRS CI would consider the filing to be a voluntary disclosure and thus avoid recommendation for criminal prosecution. Counsel may also attempt to secure an IRS waiver of all applicable penalties before revealing the taxpayer's identity. In the event that CI responds

affirmatively, counsel could then disclose the client's identity and taxpayer identification number.

The Offshore Voluntary Compliance Initiative

The revised voluntary disclosure policy plays an important role in the IRS's recently announced Offshore Voluntary Compliance Initiative. This initiative is designed to bring taxpayers who have used offshore credit cards or other offshore financial arrangements to hide their income and evade taxes into compliance with tax law. It is a bold initiative that offers taxpayers the opportunity to avoid criminal prosecution through application of the voluntary disclosure policy and to settle with finality the civil tax liabilities arising from their use of illegal offshore financial arrangements.

The IRS is attempting to achieve two important goals with the initiative. First, it is attempting to get at the root of the offshore tax evasion problem—the promoters and others who are selling these types of tax avoidance devices to taxpayers. Second, the IRS recognizes it has limited resources and cannot audit and prosecute everybody who was involved in these transactions. The initiative allows taxpayers themselves to correct prior underreporting and allows the IRS to focus on the promoters and taxpayers who do not want to come forward and “pay their fair share.” Taxpayers who want to take advantage of the initiative must, *on or before April 15, 2003*, send a written request to participate to the National Offshore Voluntary Compliance Initiative Coordinator.¹⁸

Before doing so, every practitioner must weigh the risks and benefits for taxpayers to come forward. By taking advantage of the initiative, taxpayers who qualify will gain a greater degree of certainty over how they will be treated by the IRS. For voluntarily disclosed unreported income or false deductions claimed in connection with an offshore financial arrangement, the IRS will waive the 75 percent civil fraud penalty, the 75 percent fraudulent failure-to-file penalty, and the penalties for failure to comply with various reporting requirements relating to foreign transactions. The Treasury Department's Financial Crimes Enforcement Network (known as FinCEN) also will agree not to impose civil penalties for failure to file FBARS in a timely manner.¹⁹

More importantly, taxpayers qualifying under the initiative receive a high degree of assurance that they will not be subject to criminal prosecution. While the revenue procedure covering the initiative discusses only civil liabilities and is silent about criminal prosecution, the IRS press release states,

Asset Protection Planning Now Can Insulate Your Clients' Assets From Future Judgments

Yes, it's true. By properly restructuring your clients' estate plan, their assets and the assets they leave to their family will be protected from judgment creditors. Here are some of the situations in which our plan can help protect your clients' assets:



- Judgments exceeding policy limits or exclusions from policy coverage.
- Judgments not covered by insurance.
- Children suing each other over your client's estate.
- A current spouse and children from a prior marriage suing each other over your client's estate.
- A child's inheritance or the income from that inheritance being awarded to the child's former spouse.

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Mr. Gleitman has practiced sophisticated estate planning for 24 years, specializing for more than 12 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Four. He has submitted 36 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 36 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.

"Eligible taxpayers who come forward will also avoid criminal prosecution based upon the revised voluntary disclosure practice." While this announcement is not a formal grant of immunity, the IRS is now on record as telling taxpayers that voluntary disclosure will not just be a consideration in determining whether it will recommend criminal prosecution, it has publicly stated that qualifying taxpayers will not be prosecuted. While the form of this public pronouncement may not create ironclad constitutional due process protections for a qualifying taxpayer,²⁰ the practical result is that the IRS will need to stand by what it says, and it is highly unlikely that qualifying taxpayers will be prosecuted. However, the devil is in the details, and each taxpayer who undertakes voluntary disclosure will still face the question of whether he or she qualifies.

Those who qualify still face substantial costs, even taking into account the waiver of fraud penalties. Taxpayers qualifying under the initiative will be required to pay all tax and interest plus the 20 percent accuracy-related penalty and the 25 percent delinquency penalty, or both if the circumstances warrant. While the initiative indicates penalties will be applied only in "appropriate circumstances," the implication of the IRS announcement is that these penalties will apply in most circumstances. What the taxpayer avoids is the larger, 75 percent civil fraud penalties and the possibility of criminal prosecution.²¹

Taxpayers may possibly gain another benefit because the initiative limits the number of years that the IRS requires a taxpayer to report the correct amount of income and pay the additional tax. As a general matter, the initiative applies to tax years ending after December 31, 1998—for most individuals, the 1999 and subsequent tax years.²² This could provide a substantial benefit for taxpayers who engaged in illegal offshore tax avoidance for many years. It is likely the IRS drew this administrative line in recognition of the three-year statute of limitations on tax avoidance unless fraud is proven (in which case there is no civil statute of limitations), the difficulty of proving fraud, and the recognition that taxpayers needed to be provided a significant financial inducement to come forward. On the other hand, sound tax administration requires that the inducement not be so great as to cause complying taxpayers to question whether tax avoidance pays off in the long run.

There is an important caveat regarding pre-1999 tax years not covered by the initiative. The IRS has reserved the right to investigate pre-1999 tax years if information comes to its attention that "substantial tax avoidance" occurred in those years, as long as the

statute of limitations remains open. Some taxpayers may thus place themselves at real risk if their tax avoidance is significant and evidence of fraud is present. The IRS seemed to recognize this dilemma by providing in the initiative that if a taxpayer wants to file amended returns for pre-1999 tax years, the IRS will accord those returns the same beneficial treatment as those of later years. The initiative, however, is silent on how the IRS will treat tax avoidance in pre-1999 tax years if it comes to the IRS "attention" without the taxpayer's disclosure.²³

Qualifying under the Initiative

There are four conditions a taxpayer must satisfy in order to be eligible for the initiative:²⁴

First, the taxpayer has to file the written request to participate before the IRS has 1) initiated a civil examination or criminal investigation of the taxpayer, or has notified the taxpayer of its intent to do so, or has received information from a third party alerting the IRS to the taxpayer's noncompliance, or 2) initiated a civil examination or criminal investigation that is directly related to the specific liability of the taxpayer, or 3) acquired information directly related to the specific liability of the taxpayer from a criminal enforcement action (e.g., search warrant, grand jury subpoena). This first requirement incorporates, in essence, the new timeliness criteria of the revised voluntary disclosure policy.

Second, the taxpayer must not have promoted, solicited, or in any way facilitated the participation of others (other than members of the taxpayer's immediate family or individuals from whom the taxpayer did not receive compensation of more than a nominal amount) in arrangements to avoid taxation by using offshore payment cards, offshore financial arrangements, or any other abusive transaction, domestic or offshore.

Third, during the years in which the taxpayer seeks to participate, the taxpayer must not have derived income from illegal sources, such as income from drug trafficking.

Fourth, during the years in which the taxpayer seeks to participate the taxpayer must not have used the offshore payment cards or offshore financial arrangements to support or in any way facilitate illegal activities not related to taxes.

The timeliness issue presents the greatest concern for practitioners, since the IRS may already have initiated a criminal or civil investigation of the taxpayer, and the practitioner or the client may not know about it. This is especially true for criminal grand jury investigations conducted in secrecy. Taxpayers who otherwise would qualify must try to determine whether the criminal investigation has begun, because if it has, the tax-

payer may be accelerating his or her criminal indictment rather than avoiding it by applying under the initiative.

After a taxpayer submits a written request to participate in the initiative, the IRS will, within 30 days of receipt, indicate to the taxpayer whether he or she has been "preliminarily" determined to be eligible. That indication, however, will not prevent the IRS from later determining that the taxpayer is not eligible to participate.²⁵ Within 150 days of receiving the preliminary determination, the taxpayer must provide the IRS with copies of all previously filed returns for tax years ending after December 31, 1998, a detailed description of the offshore payment cards and foreign accounts at issue, and information regarding all direct and indirect beneficial or legal interests in any foreign assets held at any time after December 31, 1998.²⁶

Further, the taxpayer must identify the sources of these foreign assets and provide all promotional and transactional materials related to them, complete and accurate amended or delinquent returns for all tax years ending after December 31, 1998, and an explanation of the previously unreported income or incorrectly claimed deductions (even if not related to the offshore financial arrangement). All relevant information must be provided. The taxpayer must also file complete and accurate amended or delinquent information returns and FBARs related to the offshore financial arrangement. The IRS may also request additional documentation and secure consent to extend the statute of limitations on the assessment of additional taxes.²⁷

Finally, the taxpayer must fully pay the tax liabilities, including applicable penalties and interest or make "other financial arrangements" acceptable to the IRS for all years covered by the initiative. The taxpayer will also be required to pay or make other financial arrangements for all other unpaid tax liabilities. For purposes of the initiative, the submission of complete financial statements to the IRS with the amended or delinquent returns will satisfy the "other financial arrangements" requirement.²⁸

It is unclear whether a taxpayer can make a voluntary disclosure under the initiative simply by filing correct tax returns with the IRS. Prior to the initiative, this was a common and accepted means of making a voluntary disclosure. The benefit is the possible avoidance of the accuracy-related penalties that will in most cases be imposed under the initiative. Under the initiative, this strategy appears risky, especially if done to avoid the 20 percent accuracy-related penalty. While the initiative is silent on the point, the IRS press release notes, "As part of the... Initiative,

the IRS will also be closely monitoring the filing of amended returns. If in order to circumvent this initiative, taxpayers simply file an amended return without complying with the other required provisions, they run the risk of having the civil fraud penalty and other information return penalties applied.”²⁹ A taxpayer’s exposure to criminal prosecution might also increase if he or she does not have the benefit of the initiative. Those taxpayers who do not make the April 15, 2003, deadline for applying for qualification under the initiative will, however, not be out of options. But they will then fall under the less generous provisions of the general voluntary disclosure policy, absent the benefits of the initiative.

The recently revised IRS voluntary disclosure policy and the Offshore Voluntary Compliance Initiative provide a greater level of certainty to taxpayers wishing to appropriately respond to their potential tax problems. While everyone qualifying under these avenues of relief will have to bear certain costs, in some cases these avenues could actually become prescriptions for disaster. Counsel must thoroughly review all potentially relevant information before determining whether a voluntary disclosure or an application under the initiative is right for a particular taxpayer.

The IRS is receiving volumes of electronic information about transactions that involve offshore credit cards and other offshore arrangements. Many civil examinations and criminal investigations have already begun or are in the pipeline. The initiative is a recognition that the IRS, on its own, cannot prosecute all the taxpayers who took a chance with an aggressive offshore financial strategy. With the initiative, many taxpayers will now come forward, and the information they provide will make many more promoters the focus of IRS investigations. That, in turn, may implicate more individual taxpayers who adopted the promoters’ schemes. Notwithstanding the fact that these developments will surely increase the odds in favor of detection and punishment, many taxpayers will continue to believe they can escape detection. For these taxpayers, one thing seems clear: Since the IRS has given them a second chance to get into compliance, a third chance is unlikely to be in the cards. ■

¹ The Supreme Court first sanctioned the use of the John Doe summons in *United States v. Bisceglia*, 420 U.S. 141 (1974), and Congress later codified the enforcement technique at I.R.C. §7609(f) (1976).

² In re Does, No. CV 00-3919 (S.D. Fla. filed Oct. 30, 2000); In re Does, No. 02-22404 (S.D. Fla. filed Aug. 21, 2002); In re John Does, No. CV 02-0049 Misc. (N.D. Cal. filed Mar. 27, 2002).

³ I.R.S. News Release No. IR-2003-5 (Jan. 14, 2003).

⁴ U.S. DEPARTMENT OF JUSTICE, CRIMINAL TAX MANUAL §§3.0 and 4.01 (7th ed. 1994).

⁵ INTERNAL REVENUE MANUAL (9.5).3.3.1.2.1 (Dec. 11, 2002).

⁶ See *United States v. Knottnerus*, 139 F. 3d 558 (7th Cir. 1998) (no rights created) and *Crystal v. United States*, 172 F. 3d 1141 (9th Cir. 1999) (questioning whether enforceable rights exist). But see *United States v. Tenzer*, 950 F. Supp. 554 (S.D. N.Y. 1996) (enforceable rights—indictment dismissed), *rev’d on other grounds*, 127 F. 3d 222 (2d Cir. 1999).

⁷ INTERNAL REVENUE MANUAL (9.5).3.3.1.2.1 (Dec. 11, 2002).

⁸ I.R.S. News Release No. IR-2002-135 (Dec. 11, 2002).

⁹ INTERNAL REVENUE MANUAL (9.5).3.3.1.2.1 (Dec. 11, 2002).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 26 U.S.C. §6531.

¹⁷ *Id.*

¹⁸ Rev. Proc. 2003-11, 2003-1 CB ___.

¹⁹ *Id.* at §2.

²⁰ See *supra* note 6.

²¹ I.R.S. News Release No. IR-2003-5 (Jan. 14, 2003).

²² Rev. Proc. 2003-11, 2003-1 CB ___ at §3.

²³ *Id.* at §8.

²⁴ *Id.* at §4.

²⁵ *Id.* at §5.

²⁶ *Id.* at §6.

²⁷ *Id.*

²⁸ *Id.*

²⁹ I.R.S. News Release No. IR-2003-5 (Jan. 14, 2003).

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