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Criminal Enforcement of the Consumer Product Safety Act:

Regulators Signal an Increasingly Aggressive Approach

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I. Introduction

On October 29, 2021, the Department of Justice (DOJ) announced the resolution of the first corporate criminal enforcement action brought under the Consumer Product Safety Act (CPSA) against Gree for knowingly and willfully failing to report to the Consumer Product Safety Commission (CPSC) as required under the Act.¹ This paper examines the facts of that case, the CPSC Commissioners' recent statements concerning CPSA enforcement, and DOJ officials' pronouncements that reflect a trend toward aggressive corporate enforcement. The confluence of these factors indicates that alleged CPSA reporting violations will likely lead to increased criminal enforcement. To help companies and lawyers navigate this new terrain, we also provide a legal analysis of the CPSA's criminal penalty provision.

II. CPSA Criminal Enforcement Developments

A. Gree: The CPSA's First Corporate Criminal Enforcement

In 2021, DOJ announced the resolution of the first corporate criminal enforcement action brought under the CPSA. DOJ charged Gree Electric Appliances, Inc. of Zhuhai (Gree Zhuhai), Hong Kong Gree Electric Appliances Sales Co., Ltd. (Gree Hong Kong), and Gree USA, Inc. (collectively, Gree) with knowingly and willfully failing to report product safety information to CPSC as required under Section 15(b) of the CPSA.²

The CPSA requires that manufacturers, importers, distributors, and retailers of consumer products “immediately” inform CPSC if they “obtain[] information which reasonably supports the conclusion that such a product...contains a defect which could create a substantial product hazard” or “creates an unreasonable risk of serious injury

¹ Press Release, U.S. Dep't of Just., Gree Appliance Companies Charged with Failure to Report Dangerous Dehumidifiers and Agree to \$91 Million Resolution (Oct. 29, 2021), <https://www.justice.gov/opa/pr/gree-appliance-companies-charged-failure-report-dangerous-dehumidifiers-and-agree-91-million>; see Kelsie Sicinski, Michelle F. Gillice, Jennifer A. Karmonick, & Murad Hussain, *A Historic First in Consumer Product Safety Act Enforcement: Corporate Criminal Penalties for Late Reporting Under Section 15*, ENFORCEMENT EDGE BLOG (Nov. 12, 2021), <https://www.arnoldporter.com/en/perspectives/blogs/enforcement-edge/2021/11/a-first-in-consumer-product-safety-enforcement>.

² U.S. Dep't of Just., *supra* note 1.

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or death.”³ Further, the Act authorizes imposition of criminal penalties for the “knowing and willful” commission of certain prohibited acts, as specified in 15 U.S.C. § 2068, including the failure to furnish information that is required to be reported to CPSC.⁴

Here, DOJ alleged that Gree obtained information in September 2012 that certain dehumidifiers it manufactured, distributed, and sold were defective and posed a risk to consumers, and that Gree “knowingly and willfully failed to inform” CPSC until March 2013.⁵

In July 2012, Gree USA’s CEO circulated a video of a burning Gree dehumidifier, calling it a “very serious issue with GREE product quality” and noting that the incident was the third reported fire in one month.⁶ In a recorded meeting in September 2012, a Gree Hong Kong manager informed several Gree USA officers, including the CEO and a Gree Zhuhai engineer, that testing revealed two product defects: “1) the dehumidifiers used plastics that did not meet UL standards for fire resistance; and 2) electrical arcing caused by the dehumidifiers’ compressors overheating could burn the non-UL standard plastic used in these dehumidifiers.”⁷

Despite these defects, the Gree Hong Kong manager said that their decision whether to report to CPSC “should be guided by the principle of minimizing the costs and loss of reputation to the Gree Companies.”⁸ The parties agreed not to report the issue immediately to CPSC and instead to delay a recall for six to nine months, reasoning that cooler winter temperatures could prevent dehumidifier units from catching fire.⁹ Gree continued to sell the dehumidifiers and represented to retailers that the dehumidifiers met all UL standards, ignoring advice from lawyers and its

³ 15 U.S.C. § 2064(b)(3)–(4).

⁴ 15 U.S.C. § 2070(a).

⁵ Plea Agreement for Def. Gree USA, Inc., ¶ 2, *United States v. Gree USA*, No. 2:21-cr-00498-MCS (C.D. Cal. Oct. 28, 2021).

⁶ Deferred Prosecution Agreement for Defs. Gree Electric Appliances, Inc. of Zhuhai, and Hong Kong Gree Electric Appliances Sales Co., Ltd., Ex. B ¶ 8, *United States v. Gree USA*, No. 2:21-cr-00498-MCS (C.D. Cal. Oct. 28, 2021) (“Deferred Prosecution Agreement”).

⁷ *Id.* at Ex. B ¶ 16.

⁸ *Id.* at Ex. B ¶ 17.

⁹ *Id.*

insurance company to report the dehumidifiers to CPSC.¹⁰ Gree ultimately submitted an Initial Report to CPSC on March 14, 2013 and recalled the dehumidifiers in September 2013, more than one year after watching the video of a dehumidifier on fire.¹¹

DOJ's enforcement action resulted in a guilty plea from Gree USA, Inc., a deferred prosecution agreement (DPA) from Gree Hong Kong, and \$91 million in monetary penalties and forfeitures.¹² Gree previously paid a \$15.5 million civil penalty in 2016 to resolve CPSC's allegations that the company failed to report timely as required under Section 15(b) arising out of the same facts.¹³ Under the DPA, the prior civil penalty was credited against the criminal penalties.¹⁴

As *Gree* is the first corporate criminal action for failure to report under Section 15(b), it remains unclear exactly where CPSC and DOJ will draw the line between seeking civil penalties for a knowing failure (i.e., under a "knew or should have known" standard) and seeking criminal penalties and asset forfeiture for a knowing and willful failure to report.¹⁵ DOJ Civil Division Acting Assistant Attorney General Brian M. Boynton warned in the wake of *Gree* that "[c]ompanies and executives that purposefully delay reporting to maintain profits will be prosecuted. The Department of Justice will continue to work closely with the CPSC to ensure consumers' safety."¹⁶

¹⁰ *Id.* at Ex. B ¶¶ 23, 28, 33.

¹¹ *See id.* at Ex. B ¶¶ 37, 46.

¹² U.S. Dep't of Just., *supra* note 1; *see* Sicinski et al., *supra* note 1.

¹³ *See* Press Release, U.S. Consumer Prod. Safety Comm'n, Gree Agrees to Pay Record \$15.45 Million Civil Penalty, Improve Internal Compliance for Failure to Report Defective Dehumidifiers (Mar. 25, 2016), <https://www.cpsc.gov/Newsroom/News-Releases/2016/Gree-Agrees-to-Pay-Record-1545-Million-Civil-Penalty-Improve-Internal-Compliance-for-Failure-to-Report-Defective-Dehumidifiers>.

¹⁴ Deferred Prosecution Agreement ¶ 28b.

¹⁵ *See* Sicinski et al., *supra* note 1.

¹⁶ U.S. Dep't of Just., *supra* note 1.

B. Statements by CPSC Commissioners

CPSC Commissioners have signaled that they will continue to enforce corporate violations of the CPSA and are comfortable seeking both civil and criminal penalties.¹⁷ Upon DOJ's announcement of the *Gree* resolution, CPSC Chairman Alexander Hoehn-Saric stated that “[t]his historic criminal enforcement action should serve notice that the CPSC will use its authority to the fullest to keep American families safe. . . . Failing to report dangerous products puts consumers at an unnecessary risk and will not be tolerated.”¹⁸

CPSC Commissioners made similar statements concerning a \$15.8 million civil penalty assessed against Generac Power Systems, Inc. (Generac). CPSC announced on May 5, 2023 that Generac agreed to settle charges that it failed to timely report that its portable generators allegedly contained a defect that could create a substantial product hazard.¹⁹ Commissioner Mary Boyle suggested raising the maximum

¹⁷ See Press Release, U.S. Consumer Prod. Safety Comm’n, Statement of Commissioner Peter A. Feldman on Peloton Settlement Agreement (Jan. 5, 2023), <https://www.cpsc.gov/s3fs-public/COPF-Peloton-Statement.pdf?VersionId=llORm2bwGjLjIBkqXflmulilGX6QYRMC>; Press Release, U.S. Consumer Prod. Safety Comm’n, Comm’r Rich Trumka Jr. Statement, CPSC Secures \$19.065 Million Penalty Against Peloton for Corporate Misconduct Surrounding Lethal Defect (Jan. 5, 2023), <https://www.cpsc.gov/About-CPSC/Commissioner/Richard-Trumka/Statement/CPSC-Secures-19065-Million-Penalty-Against-Peloton-for-Corporate-Misconduct-Surrounding-Lethal-Defect>; Press Release, U.S. Consumer Prod. Safety Comm’n, Commissioner Mary T. Boyle Statement on Peloton’s Agreement to Pay Major Civil Penalty (Jan. 5, 2023), <https://www.cpsc.gov/About-CPSC/Commissioner/Mary-T-Boyle/Statement/Commissioner-Mary-T-Boyle-Statement-on-Peloton%E2%80%99s-Agreement-to-Pay-Major-Civil-Penalty>.

¹⁸ See U.S. Dep’t of Just., *supra* note 1.

¹⁹ See Press Release, U.S. Consumer Prod. Safety Comm’n, Generac Agrees to Pay \$15.8 Million Civil Penalty for Failure to Immediately report Portable Generators Posing Finger Amputation and Crushing Hazards (May 5, 2023), <https://www.cpsc.gov/Newsroom/News-Releases/2023/Generac-Agrees-to-Pay-15-8-Million-Civil-Penalty-for-Failure-to-Immediately-Report-Portable-Generators-Posing-Finger-Amputation-and-Crushing-Hazards>.

allowable penalties, stating, “Egregious behavior of this kind should not be dismissed by companies as a mere cost of doing business. Civil – and potential criminal – penalties are essential to ensure that the interests of consumers are given their due. The Commission is committed to using all of our tools to enforce the law.”²⁰

Commissioners’ statements concerning a \$19 million civil penalty assessed against Peloton Interactive, Inc. (Peloton) to settle charged CPSC violations similarly exhibit the CPSC’s increased focus on ensuring corporate accountability for knowing failures to furnish information required by Section 15(b) of the CPSC. CPSC announced on January 5, 2023 that Peloton agreed to settle charges that it knowingly failed to report immediately that its Tread+ treadmill contained a defect that could create a substantial product hazard.²¹ Among other factors, Commissioner Peter Feldman highlighted reports of significant injuries and a child fatality as well as Peloton’s “failure to cooperate fully with CPSC and provide information in a timely and complete fashion.”²²

Commissioner Feldman also stressed that the imposition of civil penalties may not be sufficient, stating that “the Commission should always consider injunctive relief to deter future violations,” and that “all other tools must remain on the table as part of a coherent approach to enforcement.”²³ Commissioner Richard Trumka Jr. similarly welcomed the use of civil penalties and criminal referrals: “[T]his Commission is

²⁰ Press Release, U.S. Consumer Prod. Safety Comm’n, Commissioner Mary T. Boyle Statement on Generac Power Systems, Inc. Agreement to Pay \$15.8 Million Civil Penalty (May 5, 2023), <https://www.cpsc.gov/About-CPSC/Commissioner/Mary-T-Boyle/Statement/Commissioner-Mary-T-Boyle-Statement-on-Generac-Power-Systems-Inc-Agreement-to-Pay-158-Million-Civil-Penalty>.

²¹ See Press Release, U.S. Consumer Prod. Safety Comm’n, Peloton Agrees to Pay \$19 Million Civil Penalty for Failure to Immediately Report Tread+ Treadmill Entrapment Hazards and for Distributing Recalled Treadmills (Jan. 5, 2023), <https://www.cpsc.gov/Newsroom/News-Releases/2023/Peloton-Agrees-to-Pay-19-Million-Civil-Penalty-for-Failure-to-Immediately-Report-Tread-Treadmill-Entrapment-Hazards-and-for-Distributing-Recalled-Treadmills>.

²² See Statement of Commissioner Peter A. Feldman on Peloton Settlement Agreement, *supra* note 17.

²³ *Id.*

serious about deterring corporate misconduct using every tool at our disposal, including the appropriate use of civil penalties and, where warranted, criminal referrals.”²⁴ CPSC will continue to prioritize civil penalty assessments—and provide criminal referrals—for corporate violations of CPSA sections 2068 and 2070.

C. DOJ Trend Toward Aggressive Corporate Enforcement

On September 15, 2022, Deputy Attorney General Lisa Monaco provided remarks about broad changes that DOJ is making to strengthen how it prosecutes corporate crime.²⁵ Along with other priorities, Deputy AG Monaco emphasized that “the clearest path for a company to avoid a guilty plea or an indictment is voluntary self-disclosure. The Department is committed to providing incentives to companies that voluntarily self-disclose misconduct to the government.”²⁶

On January 17, 2023, Assistant Attorney General Ken Polite delivered remarks about the Criminal Division’s revisions to the Corporate Enforcement Policy (CEP).²⁷ After praising DOJ’s Criminal Division for its “considerable contributions to the fight against corporate criminality,” he recognized that the Division “could never completely identify and address this area of criminality without corporations . . . coming forward and reporting the conduct of these wrongdoers.”²⁸

Under the previous version of the CEP, there was a presumption that when a company voluntarily self-disclosed wrongdoing, cooperated with an investigation, and timely remediated its actions, the Criminal Division would decline to prosecute except

²⁴ *CPSC Secures \$19.065 Million Penalty Against Peloton for Corporate Misconduct Surrounding Lethal Defect*, *supra* note 17.

²⁵ Lisa O. Monaco, Deputy Att’y Gen., U.S. Dep’t of Just., Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement (Sept. 15, 2022), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement>.

²⁶ *Id.*

²⁷ Kenneth A. Polite, Jr., Assistant Att’y Gen., U.S. Dep’t of Just., Assistant Attorney General Kenneth A. Polite, Jr. Delivers Remarks on Revisions to the Criminal Division’s Corporate Enforcement Policy (Jan. 17, 2023), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law>.

²⁸ *Id.*

if there were aggravating circumstances.²⁹ Aggravating circumstances included “involvement by executive management of the company in the misconduct; a significant profit to the company from the wrongdoing; egregiousness or pervasiveness of the misconduct within the company; or criminal recidivism.”³⁰

Under the revised CEP, which AAG Polite explained will incentivize self-reporting, the Criminal Division can decline to prosecute even in the face of aggravating circumstances if three conditions are met: 1) the company immediately made the voluntary self-disclosure once it became aware of allegations of misconduct; 2) the company had an effective compliance program and internal controls that helped identify the misconduct; and 3) the company provided “extraordinary cooperation” and undertook “extraordinary remediation.”³¹ If companies meet these conditions but their actions still warrant a criminal resolution, DOJ will generally recommend 50–75% percent off of the low end of the Sentencing Guidelines fine range and will not require a corporate guilty plea.³² For companies that fail to meet these conditions, AAG Polite emphasized that “failing to self-report, failing to fully cooperate, failing to remediate, can lead to dire consequences.”³³

Based on the statements made by CPSC Commissioners and DOJ officials, it is clear that they will increase criminal enforcement of CPSA violations. Thus, companies and lawyers must become familiar with the statutory requirements to prevent and defend against possible criminal charges.

III. Legal Analysis of the CPSA’s Criminal Penalty Provision

The statutory provision of the CPSA authorizing criminal penalties is 15 U.S.C. § 2070. This section provides for the imposition of fines, forfeiture, and incarceration for a “knowing and willful” violation of 15 U.S.C § 2068, which lists various acts

²⁹ *See id.*

³⁰ *Id.*

³¹ *See id.*

³² *See id.* In comparison, under the previous CEP, if companies met these conditions but their actions still warranted a criminal resolution, DOJ generally recommended up to 50 percent off of the low end of the Sentencing Guidelines fine range. *See id.* The new ceiling of 75 percent reflects DOJ’s commitment to self-disclosure, compliance, and cooperation.

³³ *Id.*

prohibited under the CPSA, including, for example, failing to furnish information that must be reported to CPSC. Although there is limited judicial precedent governing the interpretation of section 2070 due to the scarcity of criminal enforcement of the CPSA, we discuss below a few available sources that provide guidance on how prosecutors and courts may interpret this statute in future enforcement actions.

A. Requirements for Criminal Penalties

As noted above, section 2070 provides that the following penalties may be imposed for a criminal violation of the various provisions of section 2068: imprisonment up to five years, a fine pursuant to 18 U.S.C. § 3571, and/or forfeiture of assets associated with the violation.³⁴ It is worth noting two features of section 2070 that affect when these penalties may be imposed.

First, subsection (c) states that forfeiture may be imposed as a penalty under section 2070. The subsection then clarifies that forfeiture may be only imposed for a “criminal violation,” which the subsection defines to mean a violation of Chapter 47 (which includes 15 U.S.C. § 2068) “for which the violator is sentenced to pay a fine, be imprisoned, or both.”³⁵ In other words, forfeiture may be imposed whenever a violator is sentenced to imprisonment and/or a fine, but not as a standalone penalty.

Second, a “knowing and willful violation” is required for the imposition of both imprisonment and criminal fines under section 2070. On its face, subsection 2070(a) states that imprisonment may only be imposed for a “knowing and willful violation” of section 2068.³⁶ The statute does not explicitly specify the criminal intent standard that must be met to impose a fine.³⁷

³⁴ See 15 U.S.C. § 2070(a), (c).

³⁵ See 15 U.S.C. § 2070(c).

³⁶ “(a) Violation of section 2068 of this title is punishable by—

- (1) imprisonment for not more than 5 years for a knowing and willful violation of that section;
- (2) a fine determined under section 3571 of title 18; or
- (3) both.” 15 U.S.C. § 2070(a).

³⁷ The civil penalty provision of the CPSA, on the other hand, explicitly requires a “knowing” violation to impose a civil fine for violations of section 2068. See 15 U.S.C. § 2069(a)(1).

Extrinsic authorities, however, indicate that subsection (a) should be interpreted to require a knowing and willful violation for any criminal violation, including a fine. A helpful source is the legislative history of the statute, which reflects that “the ‘knowing and willful’ requirement means that the Commission must demonstrate in *any criminal prosecution* that a company both had knowledge of the facts that constitute the violation of the CPSA (knowing) and acted with the knowledge that its conduct was unlawful (willful).”³⁸ And although there is a paucity of case law interpreting section 2070, one state court decision involving a civil violation of the CPSA observed, in a footnote, that a knowing and willful violation was required to impose criminal violations under the statute, without differentiating between the form of the penalty.³⁹ Lastly, court filings in the *Gree* matter, discussed above, suggest that DOJ likewise interprets section 2070 to require a knowing and willful violation for a criminal prosecution under the statute, whether the resulting penalty is a fine, imprisonment, or both.⁴⁰ Together, these sources make a persuasive case that, despite the seeming omission in subsection 2070(a), a knowing and willful violation is required to trigger any of the criminal penalties provided in the statute.

³⁸ S. Rep. 110-265, at 18 (emphasis added).

³⁹ See *Aleo v. SLB Toys USA*, 466 Mass. 398, 419 n.24 (2013) (“Violations of 15 U.S.C. § 2068 may also trigger criminal penalties, but only where the prohibited conduct was both ‘knowing and willful.’”).

⁴⁰ See Plea Agreement for Def. *Gree USA, Inc.*, ¶ 7 (C.D. Cal. Oct. 28, 2021) (recommending a criminal fine and reciting the law as follows: “for defendant to be guilty of the crime charged in the single-count information, that is, Failure to Furnish Information Required by 15 U.S.C. § 2064(b)(3) and (4), in violation of Title 15, United States Code, Sections 2068(a)(4) and 2070, the following must be true: defendant knowingly and willfully failed immediately to inform the United States Consumer Product Safety Commission upon obtaining information which reasonably supported the conclusion that defendant’s dehumidifiers contained a defect which created a substantial product hazard, that is, a substantial risk of injury to the public, and created an unreasonable risk of serious injury or death”); Indictment, ¶ 13, *United States v. Chu*, No. 2:19-cr-00193-DSF (C.D. Cal. Mar. 28, 2019) (“A knowing and willful violation of 15 U.S.C. § 2068 was a criminal offense.”); Indictment, ¶ 5, *United States v. Hu*, No. 1:13-cr-00068-DLI (C.D. Cal. Feb. 4, 2013) (“A knowing and willful violation of section 2068(a)(1) or 2068(a)(2)(D) was a felony, under 15 U.S.C. § 2070.”).

B. Mens Rea Standard

The next logical question, then, is how to interpret the *mens rea* standard—i.e., a *knowing and willful* violation—that must be satisfied in a criminal prosecution under section 2070(a). Importantly, a civil penalty may be imposed under 15 U.S.C. § 2069 for a *knowing* violation of the CPSA; thus, the difference between a criminal and civil violation comes down to whether willfulness can be shown. Although section 2069 (the civil penalty provision) specifies the meaning of “knowingly,”⁴¹ the CPSA does not provide a definition of willfulness. And as noted above, there is a lack of squarely apposite judicial precedent because of the minimal criminal enforcement of the CPSA to date.

Once again, the legislative history currently provides helpful guidance. The Senate Report for the statute states that “the ‘knowing and willful’ requirement means . . . knowledge of the facts that constitute the violation of the CPSA (knowing) **and acted with the knowledge that its conduct was unlawful (willful)**.”⁴² This interpretation of the willfulness standard is consistent with case law in the general criminal context, which teaches that a “‘willful’ violation of a statute” occurs when the defendant “acted with knowledge that the conduct is unlawful.”⁴³

It is worth noting that litigants have taken the position that a higher intent standard should apply in a criminal prosecution under the CPSA. Recently, the individual defendants in the *Gree* matter filed a motion to dismiss their indictments, arguing that the so-called “*Cheek* standard” should apply in the CPSA context.⁴⁴ This standard, which governs cases involving willful violations of the tax laws, requires the

⁴¹ See 15 U.S.C. § 2069(d) (“As used in the first sentence of subsection (a)(1) of this section, the term “knowingly” means (1) the having of actual knowledge, or (2) the presumed having of knowledge deemed to be possessed by a reasonable man who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations.”).

⁴² S. Rep. 110-265, at 18 (emphasis added).

⁴³ See *Bryan v. United States*, 524 U.S. 184, 191–92 (1998); see also *id.* at 191 (“As a general matter, when used in the criminal context, a ‘willful’ act is one undertaken with a ‘bad purpose’ and a ‘culpable state of mind’”).

⁴⁴ Mot. to Dismiss, 10–11, *United States v. Chu*, No. 2:19-cr-00193-DSF (C.D. Cal. Jan. 30, 2023).

jury to find that the defendant was aware of the specific provision of the tax code that he was charged with violating.⁴⁵ As the Supreme Court has explained, this heightened *mens rea* standard has historically been adopted only in cases involving “highly technical statutes that present[] the danger of ensnaring individuals engaged in apparently innocent conduct.”⁴⁶ According to the *Gree* defendants, the complexity of the CPSA is “comparabl[e]” to the tax code, justifying a similar requirement that knowledge of the law be required for a criminal violation of the CPSA. It remains to be seen to what degree such an argument will gain traction. In the meantime, the currently available guidance indicates that, as in the general criminal context, a “willful” violation of the CPSA is one where the defendant “acted with the knowledge that its conduct was unlawful.”

IV. Conclusion

In 2021, DOJ announced the resolution of *United States v. Gree*, the first corporate criminal enforcement action brought under the CPSA.⁴⁷ Less than two years later, it is clear that *Gree* will not be the last criminal CPSA action. Recent statements by CPSC Commissioners and DOJ officials respectively show a willingness to make criminal referrals for CPSA violations and an eagerness to investigate and prosecute corporate wrongdoing. Although there is limited judicial precedent governing this area, our analysis provides an early guide to companies and lawyers needing to navigate this new terrain.

⁴⁵ See, e.g., *Cheek v. United States*, 498 U.S. 192, 201 (1991).

⁴⁶ *Bryan*, 524 U.S. at 194–95.

⁴⁷ U.S. Dep’t of Just., *supra* note 1; see *Sicinski et al.*, *supra* note 1.

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