

FINANCIAL REGULATORY DEVELOPMENTS FOCUS

In this week's newsletter, we provide a snapshot of the principal U.S., European and global financial regulatory developments of interest to banks, investment firms, broker-dealers, market infrastructure providers, asset managers and corporates.

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AML/CTF, Sanctions and Insider Trading

FINRA Updates AML Rules to Conform to Upcoming Customer Due Diligence Requirements

On May 3, 2018, the Financial Industry Regulatory Authority published amendments to FINRA Rule 3310, the anti-money laundering compliance program rule. The FINRA amendments seek to harmonize Rule 3310 with the Customer Due Diligence Requirements for Financial Institutions rule issued by the U.S. Financial Crimes Enforcement Network on May 11, 2016. Amended Rule 3310 requires firms to conduct ongoing customer due diligence, establish procedures to understand the nature and purpose of customer relationships for the purpose of developing a customer risk profile, conduct ongoing monitoring to identify and report suspicious transactions and, on a risk basis, maintain and update customer information, including information regarding the beneficial ownership of legal entity customers. Amended Rule 3310 becomes effective on May 11, 2018, which coincides with the compliance date for FinCEN's CDD Rule.

The full text of Regulatory Notice 18-19 is available at: <http://www.finra.org/industry/notices/18-19>.

Bank Prudential Regulation & Regulatory Capital

US Federal Reserve Board Approves Amendments to Regulation A

On May 7, 2018, the U.S. Board of Governors of the Federal Reserve System approved final amendments to Regulation A (Extensions of Credit by Federal Reserve Banks). The amendments make technical changes to provisions regarding establishing the primary credit rate in a financial emergency and delete obsolete provisions of Regulation A. With respect to the former, Regulation A will be amended to provide that in a financial emergency (defined as "a significant disruption to the U.S. money markets resulting from an act of war, military or terrorist attack, natural disaster, or other catastrophic event"), the primary credit rate will be the target federal funds rate or, if the Federal Open Market Committee has established a target range for the federal funds rate, a rate corresponding to the top of the target range. The amendments also delete references to credit ratings for Term Asset-Backed Securities Loan Facilities, given that the program has expired. The amendments to Regulation A will take effect on June 8, 2018.

The full text of the final rule is available at:

<https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20180507a1.pdf>.

US Federal Reserve Board Vice Chairman for Supervision Randal Quarles Discusses Liquidity Regulation and the Federal Reserve Board's Balance Sheet

On May 4, 2018, U.S. Federal Reserve Board Vice Chairman for Supervision Randal Quarles discussed the relationship between liquidity and other post-crisis regulation and the Federal Reserve Board's balance sheet. Referencing the Federal Reserve Board's recent proposals to modify the enhanced supplementary leverage ratio and stress capital buffer, Vice Chairman Quarles noted that changes to financial regulations can serve to encourage prudent behavior without any material capital reduction or cost to the system's resiliency and can lead to greater efficiency of the financial system as a whole. Vice Chairman Quarles discussed the role that insufficient liquidity played in the financial crisis, and explained that post-crisis regulation, such as the introduction of the Liquidity Coverage Ratio in 2014, has resulted in changes to market dynamics and bank behavior. In particular, he noted that many large banks have adjusted their funding profiles, reducing their reliance on short-term wholesale funding, and their asset profiles, increasing their holdings of cash and other high-quality liquid assets. Noting that many institutions rely on their reserve balances at the Federal Reserve to meet their LCR HQLA requirements, Quarles discussed the impact that shrinking the Federal Reserve's balance sheet could have on such holdings. Vice Chairman Quarles

concluded that there is a significant amount of heterogeneity in how these institutions meet their LCR requirements and reserve balances are only one type of available HQLA. Quarles noted that the Federal Reserve will monitor how the distribution of reserve balances evolves as well as the volume and composition of deposits and movements in interest rates in continuing to shrink the Federal Reserve's balance sheet and make other monetary policy decisions.

The full text of Vice Chairman Quarles's speech is available at:

<https://www.federalreserve.gov/newsevents/speech/quarles20180504a.htm>.

UK Prudential Regulation Authority Finalizes Model Risk Management Principles for Stress Testing

On April 30, 2018, the Prudential Regulation Authority published a Policy Statement and a finalized Supervisory Statement following a consultation which ran from December 2017 to March 2018 on model risk management principles for stress testing. In the consultation, the PRA proposed that firms that use stress testing models, and that participate in the Bank of England's annual concurrent stress test, should follow in full a set of four proposed principles when establishing and adopting risk management practices in relation to their models. Firms not participating in the BoE's annual stress test should instead seek to apply the four principles on a proportionate basis, taking into account their size, complexity, risk profile and the relevance to the firm of using stress test models.

The Policy Statement sets out feedback on the three responses it received to the consultation. The PRA has made a number of changes to the consultation draft of the Supervisory Statement to address issues raised by respondents. In particular, the PRA has made changes to the wording of Principles 1.2 (Model Inventory), 2.1 (Board oversight), 2.3 (Model developers, owners, users and control functions), 3.1 (Model purpose and design), 3.7 (Business Involvement), 3.8 (Model uncertainty), 3.9 (Model Monitoring), 4.1 (Scope and validation of review) and 4.2 (Independence). In addition, it has included a further section in the Supervisory Statement to set out its expectations on the application of materiality considerations.

The expectations in the finalized Supervisory Statement take effect on June 1, 2018. All firms applying the principles should undertake a self-assessment of their stress test model risk management practices against the principles. This should be done as part of the Internal Capital Adequacy Assessment Process. Firms' findings should be reported in the ICAAP documents from January 1, 2019 onwards, depending on the frequency of the Supervisory Review and Evaluation Process.

The Policy Statement (PS7/18) is available at: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/policy-statement/2018/ps718.pdf>, the finalized Supervisory Statement (SS3/18) is available at: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/supervisory-statement/2018/ss318.pdf> and details of the consultation are available at: <https://finreg.shearman.com/uk-prudential-regulation-authority-consults-on->.

UK Prudential Regulation Authority Finalizes Policy on Groups and Double Leverage

On April 30, 2018, the PRA published a Policy Statement setting out its proposals to amend the Groups policy framework it has in place for the application of prudential standards to firms on an individual and consolidated basis within banking groups.

The PRA consulted between October 2017 and January 2018 on proposals to enable: (i) assessment and mitigation of the risks to group resilience due to the use of "double leverage" (which occurs when one or more parent entities in a group funds some of the capital in its subsidiaries by raising debt or lower forms of capital externally); (ii) assessment and mitigation of the risks highlighted by prudential requirements applied

by local national regulators on overseas subsidiaries of U.K. consolidation groups; and (iii) improved monitoring of the distribution of financial resources across different group entities.

Following feedback received, the PRA has made three changes to the proposals, which it does not consider to be significant changes. The first and second changes affect the PRA Supervisory Statement, “The Internal Capital Adequacy Assessment Process (ICAAP) and the Supervisory Review and Evaluation Process (SREP)” by: (a) changing the definition of “double leverage” so that it is accounting based to reflect the reporting practices of stand-alone holding companies; and (b) clarifying the level of application of the double leverage formula. The third change affects the PRA Statement of Policy, “The PRA’s methodologies for setting Pillar 2 capital” by amending the formula for double leverage.

The changes are set out in:

- an amendment within the Internal Capital Adequacy Assessment part of the PRA rulebook;
- an update to PRA Supervisory Statement, “The Internal Capital Adequacy Assessment Process (ICAAP) and the Supervisory Review and Evaluation Process (SREP);”
- an update to PRA Statement of Policy, “The PRA’s methodologies for setting Pillar 2 capital;” and
- an update to PRA Supervisory Statement, “The PRA’s approach to supervising funding and liquidity risks.”

The PRA rulebook change, updated Supervisory Statements and updated Statement of Policy will all take effect on January 1, 2019. The PRA recommends that, where practical and applicable, firms should continue to aim to incorporate the policy proposals in their ICAA and Individual Liquidity Adequacy Assessment (ILAA) submissions ahead of full implementation.

The Policy Statement (PS9/18) is available at: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/policy-statement/2018/ps918.pdf>, the updated Supervisory Statement on ICAAP and SREP (SS31/15) (January 2019) is available at: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/supervisory-statement/2018/ss3115update-april-2018.pdf>, the updated Statement of Policy on the PRA’s methodologies for setting Pillar 2 capital (January 2019) is available at: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/statement-of-policy/2018/the-pras-methologies-for-setting-pillar-2a-capital-update-april-2018-effective-october-2018.pdf> and the updated Supervisory Statement on liquidity and funding risks (SS24/15) is available at: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/supervisory-statement/2018/ss2415update-april-2018.pdf>.

UK Regulator Confirms Revised Pillar 2 Reporting Requirements

On April 30, 2018, the PRA published a Policy Statement confirming that updated Pillar 2 reporting requirements will apply from October 1, 2018 for banks, building societies and PRA-designated investment firms. This follows the PRA’s consultation on the proposed updates, which ran from December 6, 2017 to March 5, 2018. The PRA proposed a new data item to capture stress-testing data currently included in firms’ ICAAP documents. This change aims to increase transparency and comparability in stress test data provided alongside ICAAP documents and to decrease the operational risks associated with capturing stress test data manually. The PRA also proposed reducing the frequency of reporting of the data items in the Reporting Pillar 2 part of the PRA Rulebook for some firms as well as consolidating the definition of several reporting parts of the PRA Rulebook into the Glossary.

The PRA received no responses to the consultation and is proceeding with the proposals as consulted, except for: (i) adding wording to Rule 2.9 of Reporting Pillar 2 to clarify that it applies to firms with total assets equal to or greater than £5 billion at the relevant level of consolidation used as the basis of their ICAAP; (ii) moving the definition of ‘Supervisory Reporting ITS’ to the central Glossary; and (iii) making minor amendments to reflect a change in terminology from ‘Firm Data Submission Framework (FDSF)’ to ‘Stress Testing Data Framework (STDF).’

The PRA has also published updated rules, an updated Supervisory Statement on Pillar 2 Reporting (SS32/15) and an updated Statement of Policy on the PRA’s methodologies for setting Pillar 2 capital. Further updates to the Supervisory Statement and the Statement of Policy will apply from January 1, 2019 as a result of the PRA’s amendment to the Groups policy and double leverage.

The Policy Statement is available at: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/policy-statement/2018/ps818.pdf>, the updated Supervisory Statement (October 2018) is available at: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/supervisory-statement/2018/ss3215update-april-2018.pdf>, the updated Statement of Policy (October 2018) is available at: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/statement-of-policy/2018/the-pras-methodologies-for-setting-pillar-2a-capital-update-april-2018-effective-october-2018.pdf> and the updated PRA Rulebook rules are available at: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/policy-statement/2018/ps818app1.pdf>.

Consumer Protection

US Department of Labor Issues Guidance on Fiduciary Rule Compliance

On May 7, 2018, the U.S. Department of Labor issued a Field Assistance Bulletin regarding an anticipated mandate by the United States Court of Appeals for the Fifth Circuit effectuating its opinion that vacates the Fiduciary Rule and related exemptions and amendments in their entirety. The DOL guidance notes that fiduciaries may continue to rely on its previously issued temporary enforcement policy, which notes that the DOL will not pursue prohibited transaction claims against fiduciaries who are working in good faith to comply with certain prohibited transaction exemptions issued in connection with the Fiduciary Rule or treat those fiduciaries as violating the applicable prohibited transaction rules. In addition, the temporary enforcement policy notes that investment advice fiduciaries may also choose to rely upon other available exemptions to the extent applicable after the Fifth Circuit’s decision.

The full text of the DOL bulletin is available at: <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-02>.

Derivatives

US Treasury Counselor to the Secretary Craig Phillips Discusses Regulatory Reform

On April 30, 2018, U.S. Treasury Counselor to the Secretary, Craig Phillips, spoke at the International Swaps and Derivatives Association’s 33rd annual general meeting regarding regulatory policies of relevance to ISDA members. Mr. Phillips expressed Treasury’s support for the recent white paper released by U.S. Commodity Futures Trading Commission Chairman J. Christopher Giancarlo. Mr. Phillips also discussed the reports that have been released by Treasury with respect to the Core Principles identified in President Trump’s Executive Order 13772, noting that Treasury is currently working on finalizing its report with respect to non-bank financial companies, financial technology and innovation, which he noted will be released in the

near future. Mr. Phillips summarized a number of key recommendations from each report that has been released, and specifically noted several recommendations with respect to better calibration of post-crisis OTC derivative reforms and further regulation regarding the oversight and resolution process for CCPs. Mr. Phillips was critical of proposals issued by the European Commission and European Central Bank with respect to EU and non-EU CCPs, noting that the proposals include redundant and unnecessary recognition requirements, increase costs for firms and may fragment global markets. Finally, Mr. Phillips discussed LIBOR and work by the Federal Reserve Board's Alternative Reference Rates Committee to promote LIBOR alternatives, such as the Secured Overnight Financing Rate, which is now being published by the Federal Reserve Bank of New York.

The full text of Mr. Phillip's remarks is available at: <https://home.treasury.gov/news/press-releases/sm0377>.

EU Supervisory Authorities Consult on Aligning EMIR Clearing and Risk-Mitigation Obligations For Securitizations With Those For Covered Bonds

On May 4, 2018, the Joint Committee of the European Supervisory Authorities published two consultations on proposed amendments to: (i) Regulatory Technical Standards on the clearing obligation under the European Market Infrastructure Regulation for certain classes of OTC derivatives; and (ii) RTS on risk-mitigation techniques for OTC derivative contracts not cleared by a CCP. The proposed changes aim to incorporate the provisions of the Securitization Regulation (also known as the STS Regulation), which entered into force on January 17, 2018.

The Securitization Regulation notes that there is a degree of substitutability between covered bonds and securitizations. The Securitization Regulation therefore amends EMIR, among other things, to ensure consistency of treatment between the regime for derivatives transactions associated with covered bonds and the one for securitizations, with respect to the clearing obligation and the margin requirements for non-centrally cleared OTC derivatives. The ESAs have been mandated to make the necessary changes to existing RTS to effect consistent treatment.

Under EMIR, derivatives transactions associated with covered bonds benefit from an exemption from the clearing obligation, provided that the OTC derivatives have been used only to hedge interest rate or currency mismatches and that there are arrangements in place which adequately mitigate counterparty credit risk. Covered bonds are also subject to special provisions on the level and type of collateral required with respect to OTC derivative contracts.

The first consultation, on amendments to the EMIR clearing obligation, sets out proposed amendments to relevant existing RTS, to extend the exemption from the clearing obligation to Simple, Transparent and Standardized (or STS) securitizations.

The second consultation, on risk-mitigation techniques, sets out proposed amendments to the existing RTS, to extend to STS securitizations the provisions on the level and type of collateral for risk mitigation that were adopted for covered bonds. The proposed treatment will apply only where a STS securitization structure meets a specific set of conditions equivalent to the ones required to covered bonds issuers.

The proposals in either consultation only cover securitizations that qualify as STS securitizations under the Securitization Regulation. Comments on both consultations are requested by June 15, 2018. A public hearing will take place at the EBA's premises on May 31, 2018, from 15.00 to 16.00 U.K. time.

The consultation on the EMIR clearing obligation is available at: <https://www.esma.europa.eu/press-news/consultations/consultation-amendments-emir-clearing-obligation-under-securitisation> and the consultation on risk-mitigation techniques for non-centrally cleared OTC derivatives is available at:

<https://www.eba.europa.eu/regulation-and-policy/market-infrastructures/draft-regulatory-technical-standards-on-risk-mitigation-techniques-for-otc-derivatives-not-cleared-by-a-central-counterparty-ccp-/regulatory-activity/consultation-paper>.

The relevant existing RTS on the clearing obligation are available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2205&from=EN> and <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02016R1178-20160720&from=EN>.

The existing RTS on risk-mitigation techniques (Regulation (EU) No 2016/2251) is available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R2251&from=EN>.

FinTech

US District Court Dismisses Challenge to Office of the Comptroller of the Currency FinTech Charter

On April 30, 2018, the U.S. District Court for the District of Columbia granted the U.S. Office of the Comptroller of the Currency's motion to dismiss a lawsuit brought by the Conference of State Bank Supervisors challenging the OCC's authority to grant special purpose national bank charters to companies that provide bank-like services but do not accept deposits (largely FinTech companies.) The D.C. District Court's decision follows the December 2017 dismissal by the U.S. District Court for the Southern District of New York of a similar lawsuit filed by the New York State Department of Financial Services against the OCC. The court found that CSBS did not have standing to bring the action, as it did not plead an injury in fact and that any of the grounds asserted by the CSBS were speculative and contingent on whether the OCC in fact charters a FinTech company, and that regardless, CSBS failed to identify an imminent injury to a particular member of its organization. In addition, the court dismissed the action on ripeness grounds, citing, among other reasons, that the OCC still has yet to issue a charter to a FinTech company.

The full text of the court's decision is available at: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2017cv0763-19.

Payment Services

New Payment Systems Operator for UK Retail Payment Systems

On May 1, 2018, the BoE and the Payment Systems Regulator announced that the New Payment System Operator is now responsible for the operation of BACS and Faster Payments, two U.K. retail payment systems. The NPSO is expected to assume responsibility for the Cheque and Credit Clearing Company over the next few months. The consolidation of the three payment systems was one of the recommendations made in the Payments Strategy Forum's November 2016 report, which sets out a wide-ranging strategy for reforming the U.K. retail payments industry. The NPSO will also be responsible for delivering the New Payments Architecture, which is an industry-led initiative to increase competition, resilience and innovation across the payments and banking industry.

The BoE and PSR announcement is available at: <https://www.bankofengland.co.uk/-/media/boe/files/news/2018/may/consolidation-of-three-uk-payment-system-operators.pdf> and the NPSO press release is available at: <http://www.newpso.uk/news.html#nps018>.

Securities

EURIBOR Administrator Starts Three-Month Testing Phase for Hybrid Methodology

On May 2, 2018, the European Money Markets Institute announced the start of the testing phase for a new hybrid methodology it proposes to introduce to determine Euribor. The testing phase will run from May 2, 2018 to July 31, 2018.

EMMI launched a consultation on the introduction of the hybrid methodology and on some related issues in March 2018. That consultation closes on May 15, 2018 and EMMI intends to publish a summary of responses in June 2018.

The testing phase will involve EMMI conducting data analysis and assessing the methodology's parameters. EMMI hopes to gain a better understanding of panel banks' overall contribution patterns and how they make submissions using Level 3 of the three-level "hybrid" methodology. Based on the results, EMMI will launch a second consultation in Q3 2018.

It is intended that the new hybrid methodology will be launched by Q4 2019 at the latest, in line with the transitional period provided by the EU Benchmarks Regulation.

The EMMI announcement is available at: <https://www.emmi-benchmarks.eu/assets/files/D0184A-2018-State%20of%20play%20hybrid%20methodology-%20testing%20phase.pdf> and details of the March 2018 consultation are available at: <https://finreg.shearman.com/european-money-markets-institute-consults-on-hybr>.

Upcoming Events

May 31, 2018: BoE and Centre for Economic Policy Research conference on competition and regulation in financial markets

May 31, 2018: public hearing on ESAs' consultations on amendments to EMIR RTS in the context of the Securitization Regulation

June 12, 2018: FCA Asset Management Conference

June 27, 2018: EBA public hearing on draft Guidelines on disclosure of non-performing and forborne exposures (registration closes June 5, 2018)

Upcoming Consultation Deadlines

May 10, 2018: CMA consultation on financial performance and profitability in the investment consultancy and fiduciary management sectors

May 10, 2018: CMA consultation on the competitive landscape in the investment consultancy and fiduciary management sectors

May 11, 2018: CMA consultation on barriers to entry and expansion in the investment consultancy and fiduciary management sectors

May 11, 2018: FCA survey of European Economic Area firms currently operating in the U.K. under a passport

May 15, 2018: European Commission consultation on extending the transitional measures for exposures to CCPs

May 16, 2018: PRA consultation on guidance on the eligibility of guarantees as unfunded credit protection for capital requirement purposes

May 21, 2018: Federal Reserve and OCC proposed amendments to supplementary leverage ratio calculations for GSIBs and their insured depository institution subsidiaries

May 23, 2018: European Commission's legislative proposals to address NPL build-up in the EU

May 23, 2018: European Commission's proposed Regulation on the law applicable to the third-party effects of assignments of claims

May 23, 2018: ESMA consultations on draft technical standards on the application for registration of a securitization repository and on draft advice to the European Commission on supervisory fees for securitization repositories

May 24, 2018: FSB second consultation on UPI governance

May 25, 2018: ESMA consultation on supplementary guidance on the CRA endorsement regime

May 25, 2018: Basel Committee consultation on revisions to Pillar 3 Framework

May 27, 2018: EBA consultation on extending the Joint Committee Guidelines on complaints-handling for the securities and banking sectors

May 28, 2018: ECB consultation on proposed guide to internal models

June 4, 2018: European Commission proposed EU covered bonds legislative package

June 5, 2018: HM Treasury consultation on cash and digital payments in the new economy

June 5, 2018: ECB consultation on cyber resilience oversight expectations for Eurozone Financial Market Infrastructures

June 8, 2018: PSR consultation on its review of PSR Directions made in 2015

June 8, 2018: EBA consultation on draft EBA Guidelines on Management of Non-Performing and Forborne Exposures

June 12, 2018: European Commission proposed amending Regulation on cross-border payments in the EU

June 15, 2018: ESAs' consultation on revised RTS relating to the EMIR clearing obligation for certain classes of OTC derivatives

June 15, 2018: ESAs' consultation on revised RTS on risk-mitigation techniques for OTC derivative contracts not cleared by a CCP

June 20, 2018: FCA consultation on Model Driven Machine Executable Regulatory Reporting

June 20, 2018: Basel Committee consultation on revisions to minimum capital requirements for market risk

June 21, 2018: FCA consultation on its approach to supervision

June 21, 2018: FCA consultation on its approach to enforcement

June 28, 2018: FCA consultation on revising the Financial Crime Guide to include insider dealing and market manipulation

July 5, 2018: FCA consultation on improving disclosure by AFMs to their investors (part of the Asset Management Market Study)

July 9, 2018: FCA consultation on its approach to ex post impact evaluation

July 17, 2018: EBA consultation on draft Guidelines on the exposures to be associated with high risk

July 20, 2018: EBA consultation on draft guidelines on STS criteria for ABCP securitization

July 20, 2018: EBA consultation on draft guidelines on STS criteria for non-ABCP securitization

July 27, 2018: EBA consultation on draft Guidelines on disclosure of non-performing and forborne exposures

THIS NEWSLETTER IS INTENDED ONLY AS A GENERAL DISCUSSION OF THESE ISSUES. IT SHOULD NOT BE REGARDED AS LEGAL ADVICE. WE WOULD BE PLEASED TO PROVIDE ADDITIONAL DETAILS OR ADVICE ABOUT SPECIFIC SITUATIONS IF DESIRED. IF YOU WISH TO RECEIVE MORE INFORMATION ON THE TOPICS COVERED IN THIS PUBLICATION, YOU MAY CONTACT YOUR USUAL SHEARMAN & STERLING REPRESENTATIVE OR ANY OF THE FOLLOWING:

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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