

NATIONAL GOVERNMENT ETHICS

SUMMIT

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Ethics Rules That Impact SGEs

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What are SGEs?

Are they really “special”?

**What should I generally
know about SGEs?**

What is an SGE?



18 USC 202(a)

For the purpose of sections 203, 205, 207, 208, and 209 of this title the term **“special Government employee”** shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, **with or without compensation**, for **not to exceed one hundred and thirty days** during any period of **three hundred and sixty-five consecutive days**, **temporary duties** either on a full-time or intermittent basis, a part-time United States commissioner, a part-time United States magistrate judge, or, regardless of the number of days of appointment, an independent counsel appointed under chapter 40 of title 28 and any person appointed by that independent counsel under section 594(c) of title 28. Notwithstanding the next preceding sentence, every person serving as a part-time local representative of a Member of Congress in the Member’s home district or State shall be classified as a special Government employee. Notwithstanding section 29(c) and (d) [1] of the Act of August 10, 1956 (70A Stat. 632; 5 U.S.C. 30r(c) and (d)), a Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or employee of the United States, shall be classified as a special Government employee while on active duty solely for training. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is voluntarily serving a period of extended active duty in excess of one hundred and thirty days shall be classified as an officer of the United States within the meaning of section 203 and sections 205 through 209 and 218. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is serving involuntarily shall be classified as a special Government employee. The terms “officer or employee” and “special Government employee” as used in sections 203, 205, 207 through 209, and 218, shall not include enlisted members of the Armed Forces.

What do I really need to know about SGEs?

They are employees

They are “special”

Duties are temporary

Don't have to pay them

Provide expert advice/independent judgment

Limited rules apply

See 5 U.S.C. 2105

130 or less days/365

See 18 U.S.C. 202

Help ensure committee balance

Executive Branch Workforce

4,122,000*

Civilians

2,663,000*

Uniformed military

1,459,000*

Total SGEs

45,748*

Total SGE Report
Filers

26,204*

*2014 Annual OGE
Survey Questionnaire

* OPM Website
Information

What kind of SGE am I?



An SGE Generalization

SGEs serving as members on Federal Advisory Committees subject to FACA

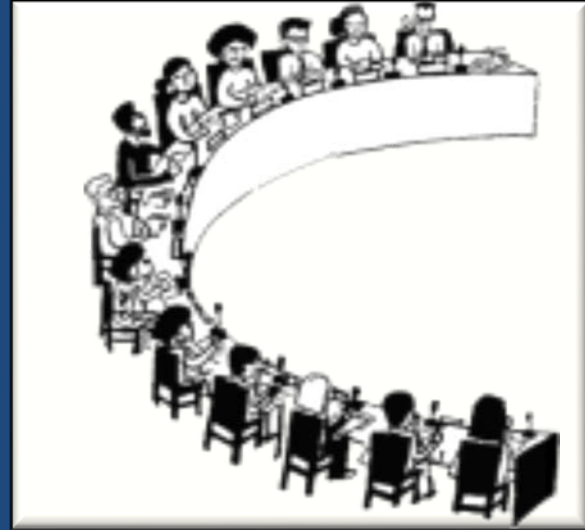
SGEs performing duties in a Non-FACA setting (e.g., as experts, consultants, members of non-FACA committees etc.)

FACA SGEs

NON-FACA SGEs

FACA

- Enacted in 1972 (5 U.S.C. App)
- Applies only to the executive branch
- Provides independent and accessible advice
- Formalizes process for establishing, operating, overseeing & terminating advisory committees
- Requires that committees are advisory only
- FACA regulations: 41 C.F.R. Parts 101-6 and 102-3



Advisory Committee SGEs

Question	Response
Agencies with SGEs on Advisory Committees	Yes – 86 No – 51
FACA Committee Members	28,248
SGEs on Non-FACA Committees, Boards, and Commissions	2,289
* 2014 OGE Annual Questionnaire	30,537 (total)

Designating the "status" of committee members



FACA Rule Says

**DAEO should be consulted
prior to appointing members.**

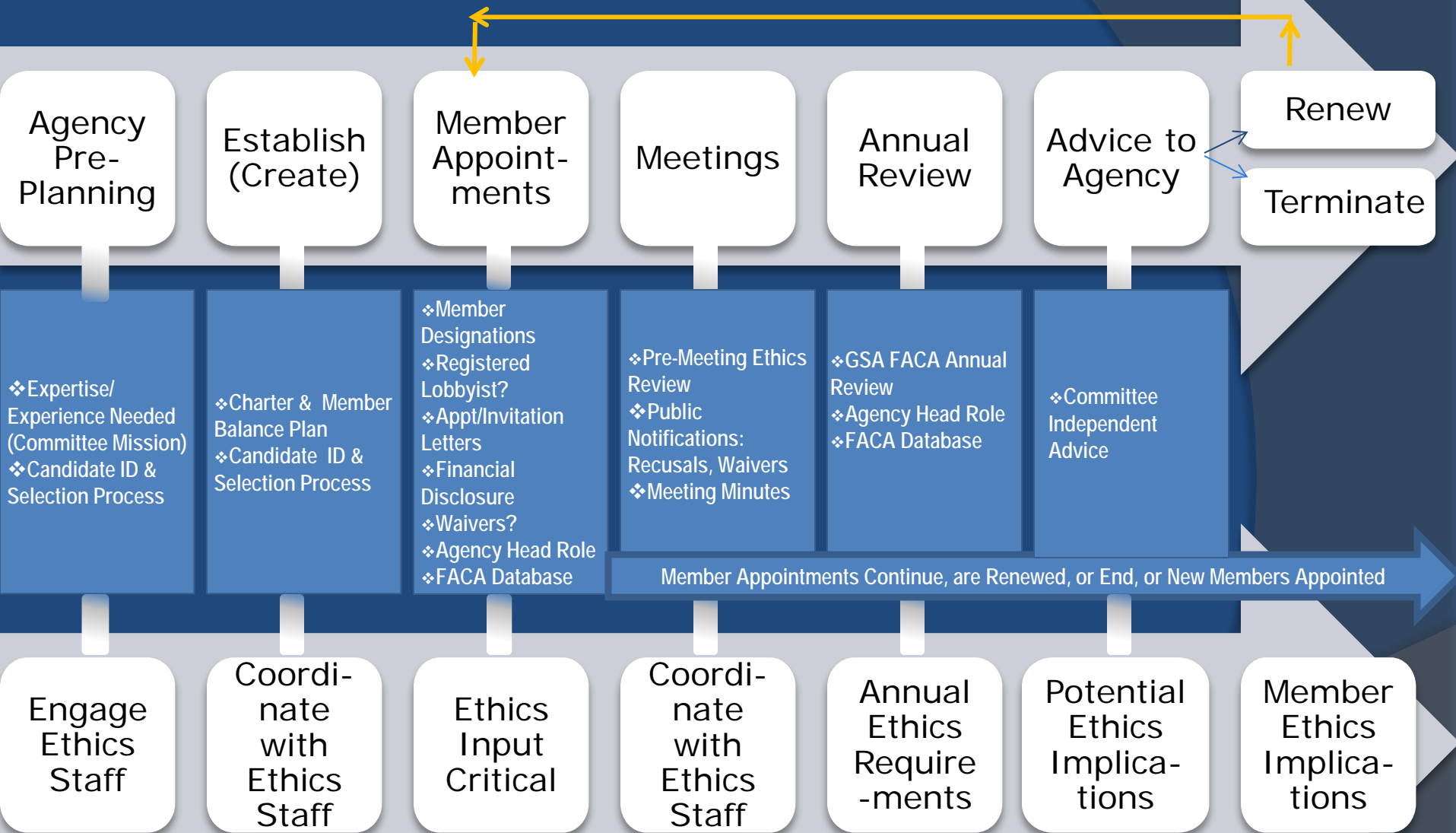
Appendix A to Subpart C of Part 102-3,
Section IV, at 41 C.F.R. Part 102-3



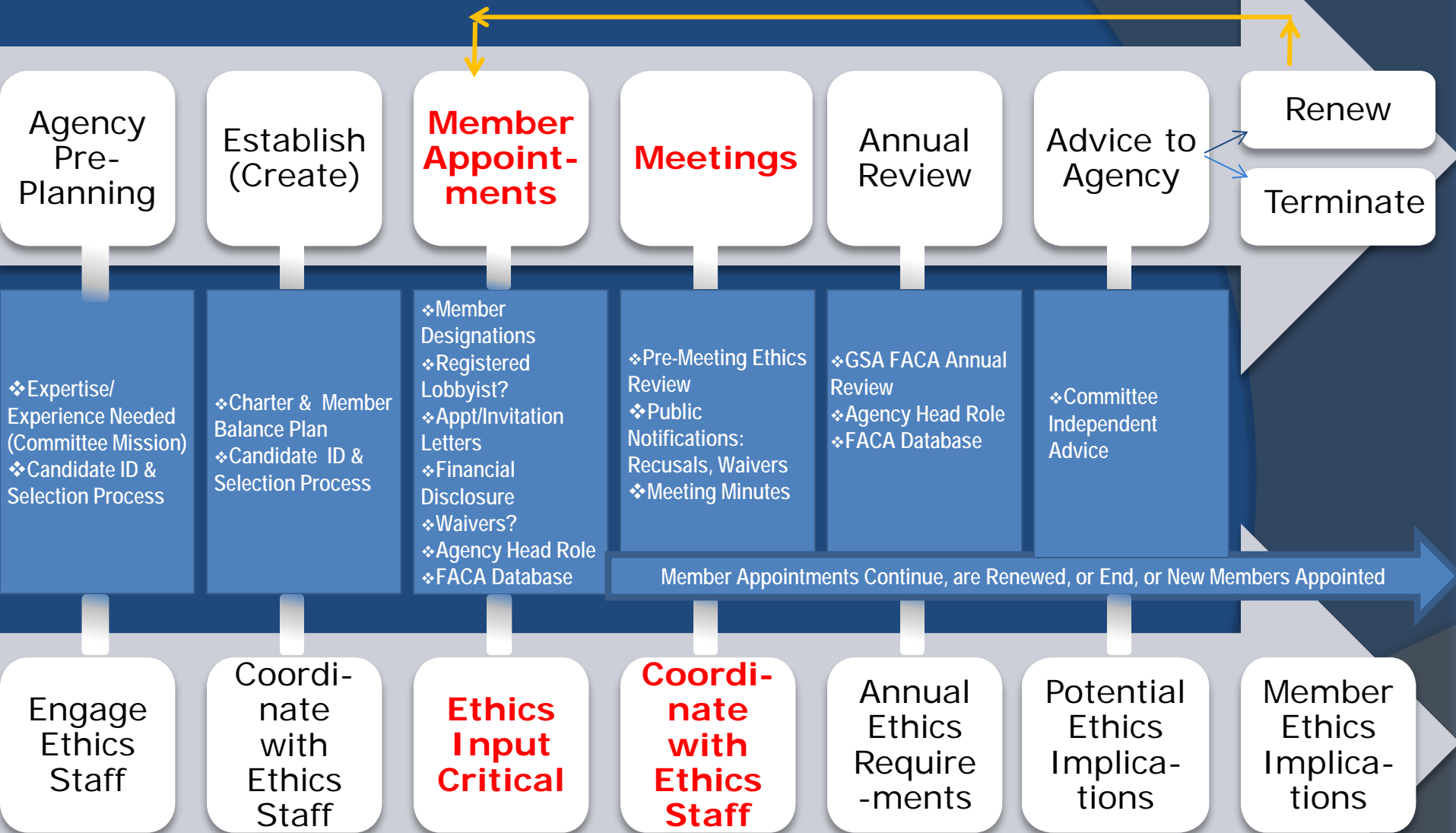
**Agency must assure that the interests
and affiliations of members are reviewed
for conformance with ethics rules.**

41 C.F.R. § 102-3.105

Life Cycle of a FACA Committee



Life Cycle of a FACA Committee



Non-FACA SGEs Designations

NON-FACA SGEs (e.g., individual experts, consultants, etc.) are appointed pursuant to the agency's own internal personnel rules and procedures in conformance with other relevant authorities. Agencies must also designate the status of Non-FACA SGEs for ethics purposes.

72) Does your agency have written policies or procedures for designating SGE status?*

(Source: **2014** Agency Questionnaire)

Yes **40**

No **30**

N/A **16**

73) Which office at your agency makes a determination that an individual is an SGE?

(Source: **2014** Agency Questionnaire)

Ethics Office **47**

Human Resources **29**

Appointing Office **21**

Other **24**

Don't Mix Up Your SGEs with Representatives

A representative is **not an employee**.

Represent specific interest groups
(e.g., industry, consumers, labor, etc.)



They “**represent a particular bias**” on advisory committees

See 93 x 14 and 00 x 1

Designation Factors

(82 x 22)

Compensation

SGE status

Recommended
by outside groups
or organizations

Tends to support
Representative
status

Authority to bind
(act as spokesperson
for outside entity)

Representative
Status

U.S. Spokesperson

SGE status

What documents help in designating member status?

- ❑ Legislation/Statute
- ❑ Presidential Executive Order; or
- ❑ Internal Agency Documents



Source: 82 x 22, 05 x 4

OGGE GUIDANCE

1982 (Designation)

2000 (SGEs)

2003 (Financial Disclosure)

2004 (Best Practices)

2005 (Appointments)

2007 (Counting of Days)

OLC GUIDANCE (Various years)

FOCUS ON FACCA - SGEs

1982 (Designation)

2000 (SGEs)

2003 (Financial Disclosure)

2004 (Best Practices)

2005 (Appointments)

2007 (Counting of Days)

OGE Opinions (Various years)

Focus on Non-FACA SGEs

1982 (Designation)

2000 (SGEs)

2003 (Financial Disclosure)

2004 (Best Practices)

2005 (Appointments)

2007 (Counting of Days)

OLC GUIDANCE (Various years)

Advisory Committee Best Practices

1. Ensure a systematic approach for designations
2. **Be involved early on in the appointment process**
3. Establish points of contact for member ethics issues
4. Ensure member status is on appointment documents
5. Ensure SGE members know their role on the committee
6. Provide SGE members with training materials promptly
7. Ensure representatives know the group they are representing

**What core ethics rules
apply to SGEs?**

**How do you better
manage your SGEs'
ethics issues?**

Laws & Regulations



- Criminal statutes (18 USC 201-209)
- Standards of Conduct (5 CFR 2635)
- Financial disclosure (5 CFR 2634)
- Ethics training (5 CFR 2638)
- Others, e.g., Emoluments Clause, Foreign Gifts & Decorations Act, Hatch Act

Ethics Issues on Panels



- Panel Formation
 - Work with DFO/CMO/Management to collect financial disclosure information
 - Type of matter(s) to be considered
 - Determine ethics issues, apply remedy
- Panel Operation & Termination
 - Vet ethics issues before each new matter and for post-employment
 - Communication during charter and membership renewal

Avoiding Problems



- Disclosure forms require follow-up
- Don't forget about subcommittees
- Work with DFO on committee charge
- Know when the matter...matters
- If it's not documented, it didn't happen
- Remember your remedies
- Expect the unexpected

Major Differences for SGEs Not on FACA Panels



- No 5 CFR 2640.203(g) exception
- No emoluments clause exception
- No 18 USC 208(b)(3) waivers
- Not as easy to find as panel members
- Who's minding your store?

Before, During & After



- Before:
 - Better to vet SGEs before they show up
 - Watch out for “resurrected” employees
 - SGEs are “Special” not “special”
- During:
 - No disclosure, no excuse
 - Watch those days
 - Be the reference
 - The more you ask, the more you know
- After:
 - SGEs still are NOT “special”
 - Watch the days...and the money
 - Might see them again as they “transition”

Some Parting Words of...Wisdom?



- It's "déjà vu" all over again
- The "Oath of Office" is more than just pretty words
- Where you sit matters, not where you stand
- Know yourself and others
- You are never alone

What other ethics rules should ethics officials be aware of that apply to SGEs?

SGE Transition

FACA SGEs

Unlikely turnover

Term appointments

Not PA

Non-FACA SGEs

Intent to nominate

Advisor/counselor

DO-01-009
(3/15/01)

Financial Disclosure

FACA SGEs:

- Current employment, previous employment within the last 12 months, and seeking for employment
- Leave of Absence
- Stock Ownership
- Committees and boards

Financial Disclosure

- Honorarium or travel payment within the last 12 months
- Family relationship, business or professional partnership
- PhD students and advisor
- Collaborators including co-authors and co-editors
- Catch All

Financial Disclosure

Non-FACA SGEs:

- 278e
- 450

Training

FACA SGEs:
NSF Panelists

Non-FACA SGEs:
Experts/Consultants

Disqualifications

Misuse of Position

Representation

Gifts/Exceptions
Foreign Governments

Federally Registered Lobbyists FACA-SGEs

A Presidential memorandum dated June 18, 2010 directed Executive agencies not to appoint or re-appoint Federally registered lobbyists to advisory committees, review panels, or other similar groups.

Revised guidance from OMB dated August 13, 2014 (79 Fed. Reg. 47482) indicated ban does not apply to representatives.

I HEREBY certify that I am NOT a Federally registered lobbyist, or I have ceased active lobbying as reflected in a filed bona fide de-registration, or I have been de-listed by my employer, or I have been absent from a quarterly lobbying report for three consecutive quarters.

Source: (<http://www.whitehouse.gov/the-press-office/presidential-memorandum-lobbyists-agencyboards-and-commissions>)

Lobbying- Non-FACA SGEs

Which **hat** are you wearing?

Personal, Dean, President of Scientific Society, NSF

- Direct Lobbying
- Grass Roots Lobbying

Political Activity- FACA-SGEs

Not while “on duty” – the period of any day in which the SGE is actually performing Government business

Review panel meets 8:00 am - 3:00 pm

Can attend a political fundraiser at 5:00 pm

Can solicit political contributions from the attendees

- Not in any room or building occupied in the conduct of government business
- Not wearing official insignia or identifying the office or position of SGE

Political Activity Non-FACA SGEs

- NOT on duty, in federal workplace, government indicia
- 24/7: No use of position, subordinates, agency resources, non-public info, or fundraising

GAO SGE ENGAGEMENT

Announced in June 2015

Case Study Agencies: NSF, HHS, DOJ,
State, and NRC

Other contacts: OGE and OPM

At Request of Senator Grassley, Ranking
Member, Senate Judiciary Committee

GAO Focus

- How designated as SGEs
- How are SGEs tracked
- SGE ethics compliance - who is responsible for training and how is financial disclosure monitored

THE END

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