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January 23, 2023

Via Online Submission, at <https://www.cfp.net/ethics/enforcement/comment-on-2022-proposed-revisions-to-procedural-rules>

Certified Financial Planner Board of Standards, Inc.
1425 K Street NW, Ste. 800
Washington, DC 20005

Re: CFP Board's Nov. 14, 2022 Proposed Changes to Procedural Rules governing the processes for investigating alleged misconduct and enforcing CFP Board's Code and Standards

Dear CFP Board:

The Financial Planning Association® (FPA®) appreciates the opportunity to comment on the Certified Financial Planner Board of Standards, Inc. (the "CFP Board") proposed changes to the *Procedural Rules* publicly released on November 14, 2022 (referred to herein as the "Nov. 2022 proposed *Procedural Rules*").

FPA is the leading membership organization for CERTIFIED FINANCIAL PLANNER™ professionals and those engaged in the financial planning process. FPA supports the CFP® certification as the designation that consumers should seek when engaging a financial planning professional and defends the integrity of the marks on behalf of FPA members. FPA also supports CFP Board's stated intent to provide a process to investigate alleged misconduct and enforce CFP Board's *Code and Standards* "in a manner designed to be fair to those whose conduct is being evaluated as well as credible to the public."¹

After FPA previously expressed it was **very concerned regarding significant issues of fairness and due process** in CFP Board's most recent prior proposed changes to its *Procedural Rules* to establish an Appeals Commission to adjudicate appeal hearings² – all considerations of which were ignored in CFP Board's adoption of the prior proposed changes – the November 2022 proposed changes to the *Procedural Rules* only heightens our

¹ See Enforcement, available at <https://www.cfp.net/ethics/enforcement> (last visited January 19, 2023).

² See FPA's Comment Letter dated December 14, 2021, available at <https://www.cfp.net/-/media/files/cfp-board/standards-and-ethics/enforcement/2021/submitted-comments-on-proposed-revisions-to-procedural-rules.pdf?la=en&hash=AE302F43F0F4B58F78039BFDDCF0F50F>.



concerns over CFP Board's multi-year shift to limit a CFP® professional's meaningful opportunity for a fair and impartial disciplinary process.

Of concern is how the Nov. 2022 proposed changes to the *Procedural Rules* attempt to tip the scales even further – *in favor of CFP Board* – to make it easier to penalize and publicly discipline CFP® professionals while simultaneously making it even more difficult for CFP® professionals to defend against allegations. Importantly, when considering CFP Board's governing documents as a whole, some of the mechanisms CFP Board has sought to employ strip CFP® professionals of rights and remedies embedded in well-established regulatory enforcement bodies, such as FINRA and the SEC.

Notwithstanding the fact that CFP Board is **not** a regulator, by way of example under FINRA's Enforcement process, respondents may appeal adverse decisions to the National Adjudicatory Council (NAC), wherein they can further appeal NAC decisions to the U.S. Securities and Exchange Commission, and then to federal circuit courts of appeals. In contrast, CFP Board's *Procedural Rules* only allow levels of review **within** CFP Board itself. Further, after exhausting CFP Board's internal enforcement processes, it has eliminated CFP® professionals' rights of judicial review or bringing actions in court by requiring mandatory arbitration for all claims arising out of or relating to any proceeding conducted pursuant to the *Procedural Rules*.

I. For the Above Reasons, FPA Respectfully Requests the CFP Board Suspend Implementation of Any Proposed Changes to the *Procedural Rules* Along with the Following Requests.

- 1) Immediately cease *ex post facto* applications of changes to disciplinary rules and procedures (*i.e.*, applying to pending disciplinary matters the current *Procedural Rules* that were not in effect at the time of the conduct at issue being investigated/disciplined absent informed consent of the Respondent);
- 2) Revisit FPA's and other commenters' objections to previously adopted changes to the *Procedural Rules* to the detriment of CFP® professionals, and address those questions and concerns that have gone unanswered for several years;
- 3) Provide an annotated version of the existing and proposed changes to the *Procedural Rules*, with commentary explaining the specific objectives and goals it seeks to achieve (similar to what CFP Board prepared when it had a major overhaul of its *Code and Standards* in October 2019);
- 4) After opportunity for review, hold meaningful discussions to address questions and concerns raised where CFP® professionals have a protected option to participate anonymously should they desire;
- 5) Engage interested parties with experience in CFP Board's disciplinary process – *other than CFP Board staff* – such as former Respondents and their counsel; and



- 6) After considering the informed input of stakeholders, open a new comment period at an appropriate time that allows sufficient time for CFP® professionals and interested parties to read, understand and submit comments (which is more than 60 days).

While it is impossible to address all the proposed changes in this letter, FPA relays its disagreement with the proposed changes and briefly addresses a few critical areas of concern.

II. CFP Board Did Not Provide a Copy Of The “Standing Order” At Issue And Appears To No Longer Engage Outside, Independent Counsel To Represent Peers Reviewing Disciplinary Matters But Instead Engages Its Own In-House CFP Board Staff Attorneys Thus Creating A Conflict Of Interest Without Any Evidence Of Necessary Protections Against Overreach Or Improper Influence Of Said Staff.

FPA notes CFP Board announced the Nov. 2022 proposed *Procedural Rules* “incorporate many terms of a Standing Order previously issued by the DEC that governs each case, or otherwise are consistent with existing practices”; however, CFP Board did not provide the “Standing Order” referenced, which FPA members also cannot find anywhere on CFP Board’s website.

Further, it is apparent CFP Board no longer engages outside, independent counsel to represent disciplinary Hearing Panel members. CFP Board now appears to only engage its own in-house CFP Board staff attorneys – *CFP Board employees* – to both represent and advise volunteers responsible for reviewing and hearing cases and taking appropriate action with respect to alleged violations of the *Code of Ethics and Standards of Conduct* (“*Code and Standards*”) and conduct reviewed pursuant to the *Fitness Standards for Candidates and Professionals Eligible for Reinstatement*.

While CFP Board has represented that CFP Board staff attorneys (or outside counsel in the past) were originally only available to provide interpretation of the *Code and Standards*, even minimal participation in that context is wholly inappropriate. Indeed, if the CFP® professionals serving as volunteers in disciplinary hearings cannot understand the *Code and Standards* without interpretations by legal counsel, how can any process penalizing another CFP® professional for failure to understand the same without the benefit of legal counsel be considered fair?

III. Adopting A Regulatory Model as Proposed by CFP Board Is Not Appropriate for A Peer-Review Enforcement Program And Cannot Be Claimed To Be Fair To CFP® Professionals When Meaningful Oversight Of CFP Board’s Enforcement Process Is, Effectively, Rendered Nonexistent.

CFP Board’s apparent pursuit to transition its enforcement of its *Code and Standards* to a regulatory model and disregard its bedrock peer review process is problematic for many reasons.



1) CFP Board Has Failed to Provide Any Evidence Of Its Implementation Of “Bifurcation Of The Detection And Investigation Functions From The Adjudication And Appeals Functions” To Ensure Adequate Separation Of CFP Board Enforcement Staff Necessary For Proposing Changes To Reinforce A Regulatory Model.

As a preliminary matter, CFP Board’s release of the Nov. 2022 proposed *Procedural Rules* changes appears to be the first time CFP Board has formally announced to CFP® professionals its alleged **completion** of any “bifurcation of the Detection and Investigation functions from the Adjudication and Appeals functions” among CFP Board staff.

Notwithstanding news articles describing CFP Board’s apparent efforts to shift its **peer review disciplinary process** to a **regulatory model** for enforcement of its *Code and Standards*, the lack of evidence and transparency on how CFP Board intends to accomplish its asserted intention to preserve fairness is very concerning.

Importantly, strict rules and policies govern the separation of staff within FINRA and the SEC for purposes of enforcement, which are publicly available. They are also routinely audited to ensure compliance and to preserve impartiality, fairness, and due process. In contrast, FPA members could not find any governing rules or policies in place on CFP Board’s website reflecting any evidence of said bifurcation of CFP Board staff or governing documents related to any separation of functions among such staff.³

Nevertheless, CFP Board’s apparent shift to change its disciplinary process to mirror a regulatory model,⁴ e.g., that of FINRA and the SEC in many ways—which, notably, ***IS NOT a peer review process or model***, but a regulatory model—simply stating CFP Board staff have been bifurcated into two departments is hollow

³ The only item FPA members could find on CFP Board’s website related to “bifurcation” was a press release linking to a news article in connection with the hiring of Tom Sporkin, available at <https://www.cfp.net/news/2021/02/new-cfp-board-enforcement-chief-brings-a-separation-of-functions> (last visited January 19, 2023) and similar informal press.

⁴ See NEW CFP BOARD ENFORCEMENT CHIEF BRINGS A SEPARATION OF FUNCTIONS, available at <https://www.cfp.net/news/2021/02/new-cfp-board-enforcement-chief-brings-a-separation-of-functions> (citing <https://www.wealthmanagement.com/regulation-compliance/new-cfp-board-enforcement-chief-brings-separation-functions>).



without any transparency regarding any existing policies, procedures and directives, etc. governing said bifurcation and separation of staff.⁵

Without any detailed information or transparency regarding CFP Board's operation in this context and no policies or procedures governing CFP Board's in-house counsel provided or made public (like exist for regulatory bodies who must have a separation of functions to ensure fairness, impartiality, and due process), stakeholders cannot be confident that such proposed bifurcation provides necessary and appropriate checks and balances necessary to prevent *ex parte* communications, for example.

2) CFP Board's Proposed Changes To Adopt Rules That Advance Its Transition To A Regulatory Model Are Inappropriate When CFP Board Has Immunized Itself From Liability And Has No Meaningful Oversight Of Its Enforcement Process.

Notwithstanding that CFP Board's apparent pursuit to mirror a regulatory model like FINRA and the SEC — **which cannot be compared to a peer review enforcement process** — a regulatory model as proposed by CFP Board is simply not appropriate for a **peer review** process enforcement program in the first instance. The primary reason being that CFP Board's *Terms and Conditions*, effectively, immunize CFP Board from oversight and liability.

At a basic level, the inherent problem with adopting a regulatory model by a non-regulator or a private entity governed by an entity-controlled contract (as opposed to a government agency), that also has the apparent freedom to change its rules at any given time and has stripped the opposing party (CFP® professionals in this instance) from bringing any challenge in court, is that they, effectively, answer to no one. In contrast to CFP Board's proposed model, FINRA has oversight by the SEC, for example, and, ultimately, the judicial system and courts of law.

Because of CFP Board's lack of oversight, changes adopted by CFP Board, however unfair or lacking due process, are ripe for abuse. To this end, it cannot be overlooked that before adopting a new disciplinary regime, CFP Board took away the right of every CFP® professional to challenge any disciplinary decision or unfairness by CFP Board in a court of law. It cannot be ignored that after CFP® professionals sued CFP Board over allegations of unfairness in its disciplinary process and enforcing its *Code and Standards*, CFP Board

⁵ See CFP Board's email sent to CFP® professionals on January 9, 2023 ("The proposed changes, summarized below, reflect recommendations ... following the bifurcation of the Detection and Investigation functions from the Adjudication and Appeals functions.")



unilaterally changed its *Terms and Conditions* to require that disputes only be brought in private arbitration and made additional changes to further insulate CFP Board from liability.⁶

For example, while CFP Board reportedly incurred over \$600,000 in attorney's fees less than halfway through a more than 3-year battle defending against an isolated dispute,⁷ it felt it was fair and appropriate to limit CFP® professionals' recovery to a nominal \$1,000 in damages and cap a CFP® professionals' recovery of attorney's fees to \$30,000 in any arbitral appeal or other dispute brought under CFP Board's mandated arbitration process.⁸

Of great concern is how CFP Board's *Procedural Rules* and proposed changes thereto reveal the unchecked power CFP Board has bestowed upon itself under its unilateral changes to its *Terms and Conditions* so as to allow itself to continue to modify and adopt new *Procedural Rules* and revise its *Terms and Conditions* as often as it pleases – and without regard due process and fairness well established in regulatory enforcement proceedings.

3) CFP Board's Adoption of Mechanisms Used by Regulators Are At Odds With A True Peer-Review Enforcement Program Touted To Be Fair To CFP® Professionals And Reveal CFP Board's Seemingly Unfettered Discretion Under Its Terms And Conditions To Change The *Procedural Rules* To Tip The Scales Even Further.

It appears whenever CFP Board faces obstacles in acting like a regulator or is challenged by a Respondent over lack of fairness or due process, it rewrites its own *Procedural Rules* in its favor - knowing that CFP® professionals will be hard pressed to challenge any outcome based on unfair *Procedural Rules* once they are adopted. However, simply adopting *Procedural Rules* does not automatically make them fair to CFP® professionals nor appropriate.

Further, it bears noting that the Nov. 2022 proposed *Procedural Rules* solely reflect recommendations developed by CFP Board's staff – *employees of CFP Board* – not members of CFP Board's Disciplinary and Ethics Commission ("DEC"), the CFP Board's Board of Directors, or Respondent CFP® professionals who have experienced CFP Board's disciplinary process under CFP Board's current or former *Procedural Rules*.

Not only do many provisions of the current *Procedural Rules* seek to mirror regulatory enforcement processes, a quick glance at the proposed and adopted *Procedural Rules* going back to 2019 reflect new

⁶ See section Q. (Limitation of Liability) of CFP Board's *Terms and Conditions*.

⁷ See *Financial Planning's reporting of \$600,000 Legal Tab in CFP Board Lawsuit*, available at <https://www.financial-planning.com/news/600-000-legal-tab-in-cfp-board-lawsuit> (April 24, 2014).

⁸ See sections Q. (Limitation of Liability) and S. (Attorney's Fees) under CFP Board's *Terms and Conditions*.



mechanisms cherry picked from regulatory enforcement codes and handbooks that benefit CFP Board with wide latitude to operate much like a regulator does⁹ – except without oversight by any government agency or even the judicial system.

However, CFP Board omitted items that would protect against overreach by CFP Board. For example, basic items like Respondent having a say in the scheduling of their hearing through a meet and confer, and published processes for a Hearing Panel member¹⁰ to follow when they have a conflict of interest that is known to the Hearing Panel member but not known to Respondent, are protections provided for by regulators that remain absent from CFP Board’s current and proposed *Procedural Rules*. Indeed, CFP Board’s *Procedural Rules* place the burden on the Respondent CFP® professional to seek recusal of a Panel Member – *even when a Panel Member is the only person with knowledge of any bias or a potential conflict*.¹¹ Moreover, Respondent has **only 7 calendar days from the time they are served by CFP Board with a Complaint¹² to investigate potential conflicts** with no information provided about potential Panel members except their name and employer.

By way of another example, regulators have the power to issue subpoenas, a power CFP Board does not have as a non-regulator. As a workaround, CFP Board gave themselves the ability to still contact third parties to request documents and information to build a case against a CFP® professional.¹³ However, CFP Board expanded that power by incorporating rules that force CFP® professionals to **release third parties from all liability and waive their rights against such third parties¹⁴** – even if those third parties provide false and defamatory information to CFP Board – something that, notably, neither FINRA nor the SEC has power to

⁹ Compare, for example, FINRA’s On the Record (“OTR”) mechanisms to CFP Board’s Oral Examinations under Article 1.1(d) of the *Procedural Rules*. Similarly, see FINRA’s Acceptance, Waiver and Consent mechanisms for settling enforcement actions akin to CFP Board’s new Consent Order requirements under Article 8.

¹⁰ The same applies for the DEC, the Settlement Review Panel members, and members of the Appeals Commission.

¹¹ “Respondent’s failure timely to file a motion for recusal will result in the waiver of an objection to the participation of the Member.” See Article 17.3 (b) of the current *Procedural Rules* (effective Feb. 21, 2022).

¹² While Article 17.3(b) of the current *Procedural Rules* (effective Feb. 21, 2022) states Respondent must file, within 7 calendar days of delivery of the list of potential of each member of the Hearing Panel, the DEC, the Settlement Review Panel, and/or Appeals Commission, this list has been routinely provided at the same time Respondent is served with the Complaint.

¹³ See Article 1.3 (DUTY OF COOPERATION) under CFP Board’s current *Procedural Rules*, effective Feb. 21, 2022, available at <https://www.cfp.net/-/media/files/cfp-board/standards-and-ethics/enforcement/2021/cfp-board-procedural-rules-revised-2022-01.pdf>

¹⁴ See Article 1.3(a)(5) under CFP Board’s current *Procedural Rules*, effective Feb. 21, 2022.



do. Additionally, if a CFP® professional does not comply with CFP Board's demands to speak to third parties by executing documents or rewriting existing agreements and contracts to allow such third parties immunity for speaking with CFP Board, a CFP® professional can face additional charges based on a failure to cooperate. Notwithstanding obvious concerns with CFP Board's power to have CFP® professional enter such agreements, under the Nov. 2022 proposed changes to the *Procedural Rules*, CFP Board seeks to expand this power even greater as discussed under **Section IV**.

IV. CFP Board's Attempt to Grant More Power To CFP Board Staff To Control Disciplinary Proceedings Wholly Contradicts CFP Board's *Peer-Review* Promise And Defies The Autonomy Required By A True *Peer-Review* Process.

First, allowing CFP Board staff to be a party to DEC deliberations where disciplinary action is decided, interpret the *Code and Standards* for hearing panels, the DEC or the Appeals Commission, and proposing changes to further codify CFP Board's staff's ability to control disciplinary proceedings and ability to improperly influence those deciding a fellow CFP® professional's fate, wholly contradicts CFP Board's promise of **peer-review** and defies the autonomy required by a true peer-review process.

Second, the Nov. 2022 proposed changes seek to vest even more power in CFP Board staff to control disciplinary proceedings by taking away certain decision-making authority on material matters from CFP® professionals **peers** and instead granting such authority to CFP Board staff, including, for example: deciding motions on behalf of the DEC and Hearing Panels both prior to and at the hearings, facilitating the hearings for the Hearing Panels, conducting the hearings and making relevant determinations on issues such as the order of proof, the allocation of time for argument, and the presentation of evidence, including deciding what evidence may be admitted by a CFP® professional in defense to any allegations. It is axiomatic that he who controls the evidence controls the outcome.

As such, FPA has concerns that CFP Board's proposed changes undermines the autonomy required by a true peer-review process and will not result in an enforcement process that is credible to the public and fair to those whose conduct is being evaluated.

Moreover, while CFP Board appears to allude to a potential mechanism for checks and balances as to decisions made by DEC Counsel by claiming the authority to be delegated to DEC Counsel under the proposed changes to the *Procedural Rules* would be "subject to potential override by the DEC",¹⁵ such a statement is not only false but rendered illusory as proposed. Indeed, while Article 17.10 of the Nov. 2022 proposed *Procedural Rules* states "[a] Hearing Panel may consider *de novo* and modify or reverse DEC Counsel's resolution of any motion or objections made pursuant to these *Procedural Rules*," it also states the parties are forbidden from submitting requests for a modification or reversal of DEC Counsel's decision. If a Respondent who disagrees

¹⁵ See CFP Board's email sent to CFP® professionals on January 9, 2023.



with a decision of DEC Counsel cannot even bring it to the attention of the Hearing Panel and DEC Counsel controls what the Hearing Panel sees and hears, how would any Hearing Panel of peers ever even be made aware of an improper decision by DEC Counsel? Likewise, Article 17.10 provides no override authority to the DEC or the Appeals Commission; it solely speaks to a Hearing Panel.

In summary, while CFP Board claims to enforce its *Code and Standards* through a **peer-review process**, the proposed changes to redirect decision making regarding disciplinary matters that are material to a Respondent's defense and shift that authority away from a Respondent's peers to in-house CFP Board staff attorneys, among other proposed changes, drastically stray from what has always been a **peer-review process** and fail to support a conclusion that the future of disciplinary processes forced upon CFP® professionals will reveal even a modicum of fairness now or in the future.

V. If Adopted As-Is, CFP Board Will Be Able To Contact And Interview Anyone Without Any Notice To Respondent Or Opportunity For The Respondent To Be Present With Their Counsel To Build A Case Against A CFP® Professional And Use Such "Evidence" Against A CFP® Professional.

Importantly, under the current *Procedural Rules*, CFP already has the authority to take oral examinations of third parties and potential witnesses upon notice to the Respondent and the opportunity for Respondent to appear for the oral examination, which is taken under oath, transcribed and provides the opportunity for Respondent's counsel to cross examine the witness.¹⁶

The proposed changes, however, would allow CFP Board to freely contact, question and interview anyone to help build a case against a CFP® professional – all without any notice to Respondent or opportunity for the Respondent to be present with their counsel to hear questions of CFP Board interviews of third parties, which will not be under oath or recorded but could still be used as evidence as against a CFP® professional. By CFP Board's admission, it desires to **"enable Enforcement Counsel to learn discrete information or send voluntary requests to a broad swath of Individuals"**¹⁷ without any apparent safeguards or limitations under the proposed *Procedural Rules*.

Notwithstanding that an inquiry by CFP Board to third parties, especially if not handled appropriately, could be as damaging as public discipline taken by CFP Board, CFP Board has not provided any adequate rationale for granting CFP Board staff with powers to pursue a fishing expedition with unfettered discretion or identified

¹⁶ See Article 1.2(d) (PROCEDURES FOR INVESTIGATION) under CFP Board's current Procedural Rules, effective Feb. 21, 2022.

¹⁷ See CFP Board's email sent to CFP® professionals on January 9, 2023.



any protections afforded Respondent under such circumstances in which CFP Board intends to use this investigative mechanism.

VI. CFP Board Has Over Eleven Years to Build A Case And File A Complaint Against Any CFP® Professional, While Those Against Which A Complaint Is Filed Have Approximately 90 Days To Seek And Engage Counsel To Prepare A Defense.

CFP Board has well **over eleven years** to build a case and file a complaint against any CFP® professional, while those against which a Complaint is filed have approximately 90 days after being served before going to trial to defend and protect their reputation. Inside of those 90 days leading up to the Hearing is really an average 30 to 60-day window, where there are multiple deadlines with which a Respondent CFP® professional must comply, including, but not limited to, seeking and engaging counsel, preparing a defense, drafting and filing an answer, engaging in settlement discussions to reach a resolution, preparing and producing all documents they may seek to use at any hearing, gather witnesses and sworn statements, among other obstacles.

Notwithstanding the already nearly impossible timeframe CFP® professionals have without any prior notice of a Complaint coming, CFP Board's proposed changes now seek to burden the accused with even more obligations in that ultra-expedited time frame with respect to expert witnesses.¹⁸ In contrast, CFP Board staff, specifically DEC Counsel, will have no deadlines under the *Procedural Rules* to respond to a Respondent on any motions regarding experts and many other items. Indeed, even under the current *Procedural Rules* as written, certain requests or Motions filed by a Respondent facing a disciplinary hearing can go unanswered by CFP Board up through and including the hearing date so as to preclude that Respondent from introducing material evidence and witnesses, which could deprive them of a full and fair hearing due to CFP's Board's imposition of strict deadlines for Respondents with almost no corresponding deadlines for DEC Counsel.

VII. CFP Board's Detailed Summary with Commentary Regarding Its Proposed Changes To *Procedural Rules* Does Not Address All Material Changes.

While CFP Board's detailed summary of its Nov. 2022 proposed *Procedural Rules* received via email by CFP® professionals appears to be an effort to provide more detail regarding the proposed changes that was absent from CFP Board's original November 2022 public release for comment¹⁹, it cannot be ignored that the bullet point summary does not address all material changes appearing in the 70-page redline document. As such,

¹⁸ See Article 10.3(c) of CFP Board's Nov. 2022 proposed changes to its *Procedural Rules*, for example.

¹⁹ CFP Board's detailed summary, sent to CFP® Professionals on January 9, 2023, remains absent from the CFP Board's website as of January 23, 2023. See SUMMARY OF THE PROPOSED REVISIONS, available at https://www.cfp.net/news/2022/11/cfp-board-requests-comments-on--proposed-revisions-to-procedural-rules_



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we have concerns that those who are relying on CFP Board's summary to understand the proposed changes will be significantly misled.

VIII. Conclusion

In summary, FPA has major concerns that the proposed changes to the existing *Procedural Rules* as written and in effect today, are potentially unfair to our CFP® professionals who may find themselves in disciplinary proceedings. FPA requests the CFP Board suspend consideration of implementation of any proposed changes to the *Procedural Rules* along with the other requests mentioned in Section I of this letter.

FPA welcomes the opportunity to discuss this Comment Letter with CFP Board. Please know FPA stands ready to further engage with CFP Board to address these critically important issues and will do everything we can to support the CFP Board in maintaining a fair disciplinary process and support the profession and our community of CFP® professionals.

Sincerely,

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