FREQUENTLY ASKED QUESTIONS ABOUT SECTION 3(a)(2) BANK NOTE PROGRAMS

Understanding Section 3(a)(2) Bank Note Programs

What is a Section 3(a)(2) bank note program?

A Section 3(a)(2) bank note program is a medium-term note ("MTN") program that enables an issuing bank to offer debt securities on a regular and/or continuous basis. The issuer (or a guarantor of the notes) must be a "bank," as defined in Section 3(a)(2) of the Securities Act of 1933 (the "Securities Act"). Bank note programs are exempt from registration under the Securities Act.

What is Section 3(a)(2)?

Section 3(a)(2) exempts any security issued or guaranteed by a bank from registration under the Securities Act. This exemption is based on the principle that, whether chartered under state or federal law, banks are highly and relatively uniformly regulated, and as a result will typically provide adequate disclosure about their business and operations, even in the absence of federal securities registration requirements. In addition, banks are also subject to various capital requirements that may help increase the likelihood that holders of their debt securities will receive timely principal and interest payments.

What is a "bank"?

Section 3(a)(2) broadly defines a "bank" to mean any national bank, or any banking institution organized under the law of any State, territory, or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official. To qualify as a bank under Section 3(a)(2), the institution must meet two requirements: (i) it must be a national bank or any institution supervised by a state banking commission or similar authority; and (ii) its business must be substantially confined to banking. Therefore, securities issued by bank holding companies, finance companies, investment banks and loan companies are not exempt from registration under Section 3(a)(2). Even though many investors may think of them as banks, their businesses are not substantially confined to banking. A securities offering by any of these institutions must be registered under the Securities Act unless the offering falls under another exemption from registration.

Is a non-U.S. bank eligible for a Section 3(a)(2) bank note program?

No; however, for purposes of the exemption from registration provided by Section 3(a)(2), the Securities

and Exchange Commission (the "SEC") deems a branch or agency of a foreign bank located in the United States to be a "national bank," or a "banking institution organized under the laws of any State, Territory, or the District of Columbia," provided that the nature and extent of federal and/or state regulation and supervision of the particular branch or agency is substantially equivalent to that applicable to federal or state chartered domestic banks doing business in the same jurisdiction. The determination with respect to the requirement of "substantially equivalent regulation," as well as the determination as to whether the business of the branch or agency in question "is substantially confined to banking and is supervised by the State or territorial banking commission or similar official" is the responsibility of issuers and their counsel. These determinations are made with regard to the banking regulations in effect at the time the securities are issued or guaranteed.

Source: Securities Issued or Guaranteed by United States Branches or Agencies of Foreign Banks, SEC Release No. 33-6661 SEC Docket (1973-2004), 36 SEC-DOCKET 746-1 (September 23, 1986).

Can the issuer be a finance company, if the securities are guaranteed by a bank?

Yes. As noted above, the Section 3(a)(2) exemption is also available for securities "guaranteed" by a bank. Whether an offering is guaranteed by a bank is interpreted broadly by the SEC. The staff of the SEC has taken the position in no-action letters that the term "guarantee" is not limited to a guaranty in a legal sense, but also includes arrangements in which the bank agrees to ensure the payment of a security. However, in a typical guaranteed offering, a bank's affiliate will serve as issuer of the relevant securities, and the entity that is a bank will execute a written guarantee of the payment obligations on those securities. Guarantees by a foreign bank (other than those by an eligible U.S. branch or agency) would not qualify for the Section 3(a)(2) exemption.

What are the differences between a Section 3(a)(2) bank note program and a registered MTN program?

There are more similarities than differences between the two programs. For a description of a registered MTN program, please see "Frequently Asked Questions About Medium-Term Note Programs," which can be found at http://www.mofo.com/files/Uploads/Images/080818FAQsMTN.pdf. Relevant differences between the two programs will be discussed in this FAQ.

What types of securities normally are sold through a Section 3(a)(2) bank note program?

A wide variety of securities can be offered through a Section 3(a)(2) bank note program. Bank notes can be senior or subordinated, fixed or floating rate, zero-coupon, non-U.S. dollar denominated, amortizing, multi-currency or indexed (structured) securities. Common reference rates for floating rate bank notes include LIBOR, EURIBOR, the prime rate, the Treasury rate, the federal funds rate and the CMS rate. Most bank note programs are rated "investment-grade" by one or more nationally recognized rating agencies.

Because bank notes are not subject to the SEC's registration requirements, structured bank notes sometimes are linked to different types of assets than registered structured notes, particularly when the investor is sufficiently sophisticated to understand the relevant risks. For example, because bank notes are not subject to the "strict liability" provisions of Sections 11

and 12 of the Securities Act, an issuer may be more comfortable linking the bank note to a complex underlying asset or investment strategy, which may be difficult to describe adequately in the context of a registered offering. In addition, registered offerings of equity-linked structured bank notes are typically linked only to large-cap U.S. stocks due to the "Morgan Stanley" SEC no-action letter. Some bank notes may be linked to debt securities (credit-linked notes), small-cap stocks, or securities that are traded only on non-U.S. exchanges.

Source: Morgan Stanley & Co. Incorporated, June 24, 2006. Under the terms of this no-action letter, if a linked stock does not satisfy the specified requirements, the issuer of the structured note must include in the prospectus for the structured notes detailed information about the issuer of the underlying stock (the "underlying stock issuer"). Issuers are reluctant to include this type of information, as they would face the possibility of securities law liability for their own documents if the relevant information about the underlying stock issuer was incorrect.

Regulations Governing Offerings Under Bank Note Program

Which U.S. or state regulations govern offerings under a Section 3(a)(2) bank note program?

The *Office of the Comptroller of the Currency (OCC)* regulates disclosure in connection with offers and sales of securities by *national banks and federally licensed U.S. branches and agencies of foreign banks (but not state banks)*. 12 C.F.R. Part 16, the OCC's Securities Offering Disclosure Rules (the "OCC Regulations"), provides that these banks may not offer and sell their securities until a registration statement has been filed and declared effective with the OCC, unless an exemption applies. Issuers are required to follow the form requirements of the form that they would use to register securities under the Securities Act if they were not exempt from such registration.

The OCC Regulations provide an exemption from the registration requirements if the securities would be exempt from registration under the Securities Act ***other*** than by reason of Sections 3(a)(2) or 3(a)(11), or the securities are offered in transactions that satisfy certain exemptions under the Securities Act, including the following:

- Regulation D offerings;
- Rule 144A offerings to qualified institutional buyers; and
- Regulation S offerings effected outside of the U.S.

On July 10, 2013, the SEC adopted amendments to Rule 144A and Rule 506 of Regulation D allowing general solicitation or general advertising of offers, provided that the securities are sold only to accredited investors (in the case of Rule 506 offerings) or QIBs (in the case of Rule 144A offerings). In a Rule 506 offering, the issuer must take reasonable steps to verify that the purchasers are accredited investors.

The SEC also added new disqualification provisions to Rule 506, prohibiting the use of the exemption by certain bad actors and felons. The new disqualification events apply to the issuer, persons related to the issuer and anyone who will be paid (directly or indirectly) remuneration in connection with the offering (placement agents and others). The new rules became effective as of September 23, 2013.

The OCC Regulations also contain an exemption for offers and sales of nonconvertible debt securities if a number of conditions are met under Part 16.6, including:

- the issuer or its parent bank holding company has a class of securities registered under §15(d) of the Securities Exchange Act of 1934 (the "Exchange Act"), or, in the case of issuances by a federal branch or agency of a foreign bank, such federal branch or agency provides the Comptroller the information specified in Rule 12g3-2(b) under the Exchange Act and provides investors with the information specified in Rule 144A(d)(4)(i) under the Securities Act;
- all offers and sales are to "accredited investors," as defined in Rule 501 under the Securities Act;
- the securities are "investment grade," as discussed below;
- the securities are sold in a minimum denomination of $250,000 and are legended to provide that they cannot be exchanged for securities in smaller denominations;
- prior to or simultaneously with the sale of the securities, the purchaser receives an offering document that contains a description of the terms of the securities, the use of proceeds and the method of distribution, and incorporates certain financial reports or reports filed under the Exchange Act; and
- the offering document and any amendments are filed with the OCC no later than the fifth business day after they are first used.

The new definition of "investment grade," which came into effect on January 1, 2013, does not require a specific rating for the relevant bank notes. Rather, the condition will be satisfied if the issuer of a security has "adequate capacity to meet financial commitments under the security for the projected life of the asset or exposure. An issuer has an adequate capacity to meet financial commitments if the risk of default by the obligor is low and the full and timely repayment of principal and interest is expected." An existing investment grade rating could be one factor that offering participants may take into consideration in determining whether an issue of bank notes is "investment grade" for purposes of the OCC Regulations. See also the discussion below under "Are any filings with FINRA required?"

Source: 12 C.F.R. Part 16 (2013); Alternatives to the Use of External Credit Ratings in the Regulations of the OCC, 77 Fed. Reg. 35,253 (2012).

The OCC's Subordinated Debt Comptroller's Licensing Manual (the "Licensing Manual") contains certain requirements if a national bank intends to count subordinated debt as Tier 2 capital. Among other requirements, the subordinated bank notes must have an original weighted average maturity of at least five years, and the note itself must bear a legend that it is not a deposit and is not insured by the FDIC. Appendix A to the Licensing Manual contains other provisions that must be included in the subordinated bank note and, consequently, are usually included in the relevant section of the offering document describing the subordination provisions.

Source: Subordinated Debt – Comptroller's Licensing Manual (November 2003), available at

http://www.occ.gov/publications/publications-by-type/licensing-manuals/subdebt.pdf.

For *state banks and state-licensed branches of foreign banks with insured deposits, the Federal Deposit Insurance Corporation (FDIC)* adopted a Statement of Policy Regarding the Use of Offering Circulars in Connection with Public Distribution of Bank Securities for state non-member banks (the "FDIC Policy"). The FDIC Policy requires that an offering circular include prominent statements that the securities are not deposits, are not insured by the FDIC or any other agency, and are subject to investment risk. The FDIC Policy states that the offering circular should include detailed prospectus-like disclosure, similar to the type contemplated by Regulation A or the offering circular requirements of the Office of the Thrift Supervision ("OTS") (the "OTS Regulations"). Note that, while the Dodd-Frank financial regulatory reforms mandated that the supervisory functions of the OTS be shifted to the OCC, the FDIC Policy predates the Dodd-Frank changes and therefore continues to refer to the OTS's requirements.

The FDIC Policy further states that the goals of the Policy will be met if the securities are offered and sold in a transaction that, among other options: (i) satisfied the requirements of Regulation D of the Securities Act relating to private offers and/or sales to accredited investors; or (ii) satisfied the information and disclosure requirements of the OTS Regulations, which require that debt securities be issued in denominations of $100,000 or more. If an offering meets these requirements, it will be deemed to satisfy the FDIC Policy's requirements. Nonetheless, an issuer may still want to include more detailed disclosure, as the policy emphasizes the applicability of the anti-fraud provisions of the Securities Act and Exchange Act to offerings by banks.

Source: See 61 Fed. Reg. 46808 (1996). The FDIC Policy was most recently revised in August 1996, and may be found at http://www.fdic.gov /regulations/laws/rules/5000-500.html#fdic5000 statementop. The OTS Regulations may be found at 12 C.F.R. Part 563g (2013).

State banks may also be subject to state banking regulations, including pre-issuance approval. For example, Section 5-5A-16 of Title 5, Banks and Financial Institutions, requires an Alabama state bank to obtain the prior written approval of the banking superintendent prior to the issuance of capital debentures, and O.C.G.A. Section 7-1-419 requires shareholder approval for a Georgia state bank to issue subordinated securities. State regulatory consultation, pre-approval or non-objection may also be required for issuance of "novel" or unusual debt instruments issued by state banks. Issuance of debt by New York branches or financing subsidiaries of foreign banks may require pre-issuance consultation with the New York State Department of Financial Services (the "NYDFS").

Source: New York State Banking Department Staff Interpretation of January 12, 2005.

An agency of a foreign bank subject to New York banking regulations would have to obtain a pre-offer no-objection letter from the Superintendent of the NYDFS, and would be able to sell only to certain authorized institutional purchasers in minimum denominations of $100,000.

Source: N.Y. Banking Law § 202-a(1) (McKinney 2012); N.Y. Comp. Codes R. & Regs. tit. 3, §§ 81.1-3 (2013).

Are any filings under the state securities, or Blue Sky, laws required?

Securities issued under Section 3(a)(2) are considered "covered securities" under Section 18 of the Securities Act. As a result, no state filings or fees may be required in offerings of Section 3(a)(2) bank notes. However, states may require certain notice filings and charge filing fees in connection with an offering. Most states do not require registration for bank notes offered by a foreign bank through its U.S. branch or agency under the principles of comity, on the theory that the domestic branch or agency is subject to oversight and regulation by U.S. banking authorities.

Do banks become subject to Exchange Act reporting if they issue securities under a Section 3(a)(2) bank note program?

Debt securities issued by banks under Section 3(a)(2) are not subject to the reporting requirements under the Securities Exchange Act of 1934 (the "Exchange Act"), which only requires registration of, and periodic reporting with respect to, equity securities issued by a bank.

On what basis will a bank become liable to investors in its bank notes?

Offerings under Section 3(a)(2) are subject to Section 10(b) of the Exchange Act and the anti-fraud provisions of Rule 10b-5 under the Exchange Act. Moreover, investors may have a fraud-based cause of action under state common or statutory law. Therefore, when considering an offering under Section 3(a)(2), a bank (and its underwriters) must take into consideration what disclosure is necessary to avoid liability under the anti-fraud provisions, even if the document does not need to comply with the specific form requirements of the SEC or another regulator. As a result, the form and content of bank note offering documents issued under Section 3(a)(2) are similar in many respects to that used for a registered offering. Securities offerings by a bank or guaranteed by a bank under Section 3(a)(2) are not subject to the civil liability provisions under Section 11 and Section 12(a)(2) of the Securities Act.

Are any filings with FINRA required under the Corporate Financing Rule?

Even though securities offerings under Section 3(a)(2) are exempt from registration under the Securities Act, public securities offerings conducted by banks must be filed with the Financial Industry Regulatory Authority, Inc. ("FINRA") for review under FINRA Rule 5110(b)(9), unless an exemption is available. For purposes of Rule 5110, a Section 3(a)(2) bank note program is a "public offering." One exemption from filing under Rule 5110 is that the issuer has outstanding investment grade rated unsecured non-convertible debt with a term of issue of at least four years, or that the issuance of non-convertible debt securities is so rated.

A slightly different exemption is applicable to bank note programs in which a broker-dealer affiliate of the issuer participates in the offering. That participation constitutes a "conflict of interest" for purposes of FINRA Rule 5121, and occurs frequently when the issuer is part of a large financial institution with an affiliated broker-dealer participating in the program. If the offering documents have the prominent conflicts of interest disclosure required by Rule 5121 and the securities are either investment grade rated or in the same series that have equal rights and obligations as investment grade rated securities, then no filing under Rule 5110 would be required. "Prominent disclosure"

for purposes of FINRA Rule 5121 means that the offering document include disclosure on the front page that a conflict of interest exists, with a cross-reference to the discussion within the offering document, and disclosure in any summary of the offering document.

If there are no outstanding securities of a national bank in the same series that are rated investment grade and have equal rights and obligations as the bank notes to be issued, the proposed offering is to be issued under Part 16.6 of the OCC Regulations and there is a "conflict of interest" within the meaning of FINRA Rule 5121, then the issuer must obtain an investment grade rating for the offered securities in order to avoid a filing under FINRA Rule 5110. This would be the case even if the national bank has made the "investment grade" determination discussed above under "Which U.S. regulations govern offerings under a Section 3(a)(2) bank note program?"

Source: FINRA Rules 5110 and 5121; FINRA Notice 09-49.

What other FINRA requirements are applicable to offerings from a bank note program?

- Suitability: FINRA members selling Section 3(a)(2) bank notes are subject to FINRA Rule 2111, the suitability rule. Under Rule 2111, a member firm or registered representative must perform a reasonable basis suitability determination before recommending a transaction or investment strategy involving a security. A reasonable basis suitability determination is necessary to ensure that a transaction or investment strategy is suitable for at least some investors. That determination will be more complicated with respect to structured bank notes, as compared to fixed or floating rate bank notes.
- Communication rules: Under FINRA Rule 2210, "Communications with the Public," certain "retail communications" (as defined in the rule) published or used broadly by a new FINRA member firm relating to a Section 3(a)(2) bank note program would have to filed with FINRA no later than ten business days prior to their first use. All retail communications are subject to approval by a principal of the member firm prior to first use or filing with FINRA. Institutional communications must be subject to a member firm's written procedures designed to ensure that the communications comply with applicable FINRA standards. All member communications, including those relating to a Section 3(a)(2) bank note program, must be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular bank note. The communications may not omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communication to be misleading.
- TRACE reporting: Transactions under Section 3(a)(2) must be reported through the Trade Reporting and Compliance Engine (TRACE). All brokers and dealers who are FINRA members have an obligation to report Section 3(a)(2) transactions to TRACE.
- FINRA filing requirements for private placements: FINRA Rule 5123 requires

members selling securities issued by non-members in a private placement to file the private placement memorandum, term sheet or other offering documents with FINRA within 15 days of the date of the first sale of securities, or indicate that there were no offering documents used. *Bank notes offered under Section 3(a)(2) are exempt from these filing requirements.*

How does a bank issuing Section 3(a)(2) bank notes avoid becoming an "investment company" required to be registered under the Investment Company Act of 1940?

Every investment company is subject to registration and regulation pursuant to the Investment Company Act of 1940 (the "Investment Company Act"), unless it is exempt. An investment company is defined broadly as an entity that holds itself out as being engaged primarily, or proposing to engage, in "investing, reinvesting or trading in securities" and also includes entities engaged, or that propose to engage, in the business of investing, reinvesting, owning, holding or trading in securities if securities represent 40% or more of the value of its total assets (excluding cash and government securities). As a result, issuers that are banks or specialized finance companies may inadvertently fall within the definition of an "investment company."

The Investment Company Act and the rules thereunder exempt U.S. banks and foreign banks from the requirements to register as an investment company. United States agencies or branches of foreign banks that are issuing bank notes are exempted from registration under the Investment Company Act under an SEC interpretive release, provided that the nature and extent of federal and/or state regulation and supervision of the particular branch or agency are substantially equivalent to those applicable to banks chartered under federal or state law in the same jurisdiction.

Finance subsidiaries of U.S. or foreign banks are also exempt from registration under the Investment Company Act, subject to certain conditions.

Rule 3a-5(a) provides that a "finance subsidiary will not be considered an investment company under Section 3(a) of the Investment Company Act and securities of a finance subsidiary held by the parent company or a company controlled by the parent company will not be considered "investment securities" under Section 3(a)(1)(C) of the Investment Company Act" if certain conditions are met. Rule 3a-5 defines "finance subsidiary," "parent company" and a "company controlled by the parent company," and also sets forth the conditions precedent for being a "finance company" within the meaning of that Rule.

Source: Sections 3(c)(3) and 2(a)(5) of the 1940 Act, Rules 3a-5 and 3a-6 under the 1940 Act and Status under the Investment Company Act of United States Branches or Agencies of Foreign Banks Issuing Securities, 1940 Act Release No. 17681 (Aug. 17, 1990).

Setting Up a Bank Note Program

What offering documents are used in a Section 3(a)(2) bank note program?

As a result of these applicable liability provisions described above, the offering documentation for bank notes is somewhat similar to that of a registered offering. An issuer typically has a base offering

document, usually called an "offering memorandum" or an "offering circular" (instead of a "prospectus"). That base document is supplemented for a particular offering by one or more "pricing supplements" that set forth the terms of the takedowns from the program. For offerings of more complex bank notes, such as "structured bank notes," different forms of "product supplements" may be used. The form of these documents is not subject to the relevant SEC form rules, and may vary somewhat from those used in a registered offering. However, the content (as well as the types of documents incorporated by reference) tends to be somewhat similar.

A U.S. bank will incorporate by reference into the offering circular the Exchange Act reports filed by its parent bank holding company, together with the bank's Call Reports.

These offering documents may be supplemented by additional offering materials, including term sheets and brochures. Because these offerings are not registered with the SEC, these additional documents are not subject to the SEC's "free writing prospectus" rules that apply to registered offerings or FINRA's filing rules under FINRA Rule 2210(c). However, in order to ensure that the disclosure is adequate, the issuers and underwriters that use these documents are careful about their content.

What agreements must a bank enter into to establish a Section 3(a)(2) bank note program?

In addition to the disclosure documents, the following documents are typically used to establish a bank note program:

- one or more paying agency agreements with a paying agent;
- a distribution agreement between the issuer and the selling agents or dealers; and
- an administrative procedures memorandum, which describes the exchange of information, settlement procedures, and responsibility for preparing documents among the issuer, the selling agents, the paying agent, and the applicable clearing system in order to offer, issue and close each issuance in the series of securities.

Additional agreements for a bank note program may include a calculation agency agreement or an exchange rate agency agreement.

In addition, at the time a program is established, the issuer generally is required to furnish a variety of documents to the selling agents, as would be the case in a typical underwritten or syndicated offering:

- officer's certificates as to the accuracy of the disclosure documents;
- legal opinions as to the authorization of the program, the absence of misstatements in the offering documents, the applicability of the Section 3(a)(2) exemption and similar matters; and
- a comfort letter (or agreed upon procedures letter) from the issuer's independent auditors (for a U.S. bank, the comfort letter may cover the parent bank holding company's financial statements and exclude the bank's call reports).

In the case of a U.S. bank that incorporates by reference the Exchange Act reports of its parent bank holding company, an officers' certificate and a representations certificate from the parent company will also be delivered at the program establishment. The

representations certificate will confirm, among other items, that the parent bank holding company has authorized the incorporation by reference of its Exchange Act reports into the offering circular.

Depending upon the arrangements between the issuer and the selling agents, some or all of these documents will be required to be delivered to the selling agents on a periodic basis as part of the selling agents' ongoing due diligence process. Some or all of these documents also may be required in connection with certain takedowns, such as large syndicated offerings of bank notes.

Is an indenture required for a Section 3(a)(2) bank note program?

No; however, some selling agents may require an indenture. Because banks are under extensive regulation from their respective regulatory authorities, most selling agents are comfortable with an issuing and paying agency agreement (IPA). An IPA differs from an indenture in that the issuing and paying agent does not stand in a fiduciary relationship to the bank note holders, as opposed to a trustee under an indenture governed by the Trust Indenture Act of 1939. Bank note holders must act independently without benefit of a trustee. For example, if a bank note issuer were to default with respect to payment of principal on its bank note, each bank note holder would have to individually declare an event of default and demand acceleration under the IPA, a role carried out by the trustee on behalf of the note holders under an indenture.

Are there any minimum denominations for bank note offerings?

Banks have often issued Section 3(a)(2) bank notes in minimum denominations of $100,000 or greater. The Securities Act, however, contains no requirements regarding minimum denominations for such securities. A review of several no-action letters reveals that the SEC has not directly conditioned the granting of any no-action letter on a bank security being issued in a denomination of $100,000 or greater. While issuers have identified large denominations in no-action letter requests as an argument in their favor, the SEC has not issued any statement indicating that issuances under Section 3(a)(2) are or should be conditioned on compliance with any minimum denomination requirements. In fact, the SEC has granted no-action letters in connection with the issuance of debt securities under Section 3(a)(2) in denominations as low as $1,000.

Source: The Sumitomo Bank, Limited, SEC No-Action Letter (June 4, 1973); McDonald & Co. Securities, Inc., SEC Staff No-Action Letter (Mar. 11, 1985) and Fireside Thrift Co., SEC No-Action Letter (Apr. 5, 1989).

As discussed above, Section 16.6(a)(3) of the OCC Regulations exempts the sale of nonconvertible debt from registration with the OCC if, among other conditions, the debt is sold in minimum denominations of $250,000.

Under the FDIC Policy, if an offering circular satisfies the requirements of the OTS Regulations, it does not need to include any statements which the FDIC otherwise requires. The OTS Regulations require a savings association to file an offering circular before the offer or sale of any security. Debt securities issued in denominations of $100,000 or more, however, are exempt from such registration.

As discussed above, an agency of a foreign bank subject to New York banking regulations would be able to sell only to certain authorized institutional purchasers in minimum denominations of $100,000.

By Bradley Berman, Of Counsel, and Lloyd S. Harmetz, Partner, in the Capital Markets Group and Jay G. Baris, Partner, in the Investment Management Group of Morrison & Foerster LLP

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