

Client Alert: Application of Sarbanes-Oxley Act of 2002 to Non-U.S. Companies

I. Introduction

The recently adopted Sarbanes-Oxley Act of 2002 (the "Act"), which is aimed at restoring investor confidence in U.S. securities markets, applies to both U.S. and non-U.S. issuers. Accordingly, the Act applies to non-U.S. companies that are required to file reports with the U.S. Securities and Exchange Commission (the "SEC"), including, generally:

- all non-U.S. companies that have securities listed on the New York Stock Exchange (the "NYSE"), other national securities exchanges or Nasdaq; and
- all non-U.S. companies that are required to file an annual report on Form 20-F or Form 40-F.

Certain provisions of the Act also apply to non-U.S. issuers that have filed with the SEC under the Securities Act of 1933 (the "1933 Act") a registration statement that has not yet become effective and has not yet been withdrawn.

The provisions of the Act do not apply to non-U.S. companies that are exempt from SEC filing requirements under Rule 12g3-2(b) of the Securities Exchange Act of 1934 (the "1934 Act"). Rule 12g3-2(b) provides that an issuer is exempt from Section 12(g)¹ of the 1934 Act if the issuer (or a government official or agency of the country of the issuer's domicile or in which it is incorporated) furnishes certain information to the SEC (*i.e.*, information it is required to make public, information it has filed with a stock exchange on which its securities are traded, etc.).

Several requirements of the Act are currently effective:

- CEOs and CFOs must certify periodic reports (Form 20-F and Form 40-F) filed with the SEC;²

¹ Section 12(g) of the 1934 Act requires issuers to register their equity securities with the SEC if, as of the last day of its most recent fiscal year, the issuer has a class of equity securities held of record by 500 or more persons and has total assets in excess of \$10 million.

² Sections 302 and 906 of the Act.

- Companies must establish formal, internal disclosure controls and procedures to meet their SEC reporting obligations;
- Companies may not make, arrange, renew or modify loans to or for directors and executive officers; and
- CEOs and CFOs must disgorge compensation and profits earned prior to a restatement of a company's financials due to "misconduct."

Additional provisions relating principally to audit committees and disclosure requirements will become effective in 2003.

II. Currently Effective Provisions

CEO and CFO Certification of Periodic Filings Under Section 302 and Section 906 of the Act. On August 27, 2002, the SEC adopted rules implementing Section 302 of the Act requiring CEOs and CFOs to certify periodic reports on Form 20-F or Form 40-F (not limited to financial information) for periods ending after August 29, 2002.³ The SEC has determined that certifications are not required for reports on Form 6-K, including those containing financial statements.

Under the new rules, the CEO and CFO must certify (the "302 certification") in the relevant periodic report that they individually have reviewed the report and that, based on their knowledge:

- the report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which the statements were made, not misleading; and
- the financial statements and other financial information included in the report fairly present in all material respects the financial condition, results of operations and cash flows of the issuer.⁴

The CEO and CFO must also certify that they:

³ See Securities and Exchange Commission Release No. 33-8124. A copy of this Release is available on the SEC website at <http://www.sec.gov/rules/final/33-8124.htm>.

⁴ The use of the phrase "fairly present" indicates that the SEC intended to establish a standard of overall material accuracy and contemplates that it is broader than technical compliance with generally accepted accounting principles ("GAAP") and Forms 20-F and 40-F reconciliation requirements.

- are responsible for establishing and maintaining “disclosure controls and procedures”;
- have designed such disclosure controls and procedures to ensure that material information relating to the issuer is made known to such officers by others within the company, particularly during the period for which the periodic reports are being prepared;
- have, within 90 days of the date of the report, evaluated and presented in the report their conclusions on the effectiveness of the disclosure controls and procedures;
- have disclosed to the issuer’s auditors and audit committee (i) all significant deficiencies in the issuer’s internal controls regarding financial reporting and (ii) any fraud involving employees with a significant role in such internal controls; and
- indicated in the report whether there were any significant changes in the issuer’s internal controls subsequent to its evaluation, including corrective actions with regard to significant deficiencies and material weaknesses.

Forms 20-F and 40-F have been amended to incorporate the certifications required by Section 302 of the Act. The form of certification now included in Form 20-F and Form 40-F are attached as Annex A. The wording of the certification may not be modified.

Both U.S. and non-U.S. companies should immediately adopt procedures to facilitate the certification of periodic reports now required by the CEO and CFO, if such procedures are not already in place or now appear inadequate in light of the requirements of the Act. Such procedures may include, but are not limited to:

- establishing a disclosure committee. The membership of this committee is not mandated by the Act, however issuers should consider including the principal accounting officer or controller, the general counsel, the principal risk management officer, the investor relations officer and, if appropriate, business division heads;
- conducting regular meetings of the disclosure committee to review and discuss disclosure issues;
- preparing a timetable setting forth critical deadlines and assigning responsibilities to particular persons during the disclosure process;
- conducting drafting sessions for periodic reports, which may include external auditors and outside counsel;

- preparing a written disclosure policy or guidelines, including a disclosure committee charter, to be used by those employees and advisors involved in the preparation of periodic reports;
- adopting internal policies to which subordinate officers should adhere when preparing periodic reports; and
- reviewing peer company filings and disclosure.

Separately, effective July 30, 2002, Section 906 of the Act requires that each periodic report containing financial statements filed with the SEC be “accompanied” by a written statement (the “906 certification”) by the issuer’s CEO and CFO that the report “fully complies with the requirements” of Section 13(a) or 15(d) of the 1934 Act and that “information contained in the periodic report fairly presents, in all material respects, the financial condition and results of the issuer.” A 906 certification, a suggested form of which is annexed as Annex B, must be submitted (in addition to the 302 certification) with each report filed with the SEC. Although the Act does not specify how the 906 certification should be submitted to the SEC, we believe any of the following methods for submission should be sufficient:

- attaching the certification as an exhibit to the periodic report;
- including the certification on the signature page of the periodic report, following the 302 certification; or
- transmitting the certification via EDGAR as correspondence, if the filing of the periodic report is made via EDGAR.

A CEO or CFO who provides the 906 certification *knowing* that the report does not comply with the requirements of the applicable securities laws faces a fine of up to \$1 million and up to 10 years in prison. A CEO or CFO who *willfully* provides this certification knowing that the report does not comply with the applicable securities laws faces a fine of up to \$5 million and up to 20 years imprisonment.

Disclosure Controls and Procedures. As discussed above, issuers must establish and maintain an overall system of disclosure controls and procedures adequate to meet their SEC reporting obligations. These rules are intended to complement existing requirements for reporting companies to have in place internal controls regarding their financial reporting obligations. Within the 90-day period prior to filing a Form 20-F or Form 40-F, issuers must evaluate the effectiveness of the design and operation of the disclosure controls and procedures. Reports on Form 20-F and Form 40-F will have to include disclosure

concerning the evaluation of the issuer's disclosure controls and procedures and any changes to the issuer's internal controls regarding its financial reporting obligations.

Prohibition on Loans to Directors and Executive Officers. Section 402 of the Act provides that companies can no longer extend or arrange for the extension of credit in the form of a personal loan, whether directly or through a subsidiary, to or for their directors and executive officers (or equivalent). Extensions of credit actually made by companies before July 30, 2002 are exempt from this prohibition, so long as the loan provisions are not materially modified in the future. However, renewals of existing loans are not permitted. New loans made pursuant to corporate loan programs in effect before July 30, 2002 are not allowed, even though the loan program was adopted before the Act became effective. A number of commentators had expected the SEC to exempt non-U.S. issuers from the prohibition on director and executive officer loans. However, the SEC has not done so and the prohibition applies to non-U.S. companies.

In the absence of official guidance from the SEC, practitioners and commentators have analyzed some of the customary financial arrangements between issuers and their directors and executive officers and concluded that they should not be prohibited. In particular, there appears to be a growing consensus that cashless exercises of options should be permitted if the issuer's involvement in arranging the cashless exercises is limited and delivery of and payment for the option stock takes place simultaneously. The SEC recently indicated that it did not intend to provide any guidance on the issue of cashless exercises of options.

We believe that, subject to future official guidance, it would be reasonable for issuers to continue to provide indemnification advances and other bona fide business advances to directors and executive officers such as travel advances or company credit cards issued for business purposes. These advances should not be construed as extensions of credit. However, issuers should review these and other financial arrangements with their officers and executive directors to determine if such arrangements involve extensions of credit.

Although it initially appeared that none of the limited exceptions to this ban would be meaningful for non-U.S. companies, the SEC recently indicated that one important exemption may apply to non-U.S. companies. This exemption allows a bank to make a loan to its directors and executive officers if the deposit is insured by the U.S. Federal Deposit Insurance Corp. ("FDIC"). While U.S. banks typically are FDIC insured, non-U.S. banks (and their U.S. branches) generally are not. However, the SEC has indicated that with respect to this exemption, non-U.S. banks may receive the same treatment as U.S. banks.

Disgorgement of CEO and CFO Compensation and Profits Earned Prior to a Restatement. If an issuer is required to restate its financials due to material noncompliance with financial reporting requirements as a result of misconduct, the issuer's CEO and CFO must reimburse to the issuer (i) any bonus or other incentive-based or equity-based compensation he or she received from the issuer during the 12-month period after the non-complying financial document was filed with the SEC or otherwise made public and (ii) any profits he or she realized from the sale of the issuer's securities during that 12-month period.

III. New Audit Committee and Auditor Independence Requirements - To Be Effective in 2003⁵

The Act establishes a new non-governmental agency, called the Public Company Accounting Oversight Board (the "Board"), the function of which is to oversee public accountants in their auditing of public companies. The SEC must appoint the initial members of the Board by October 28, 2002, and these initial members have until April 26, 2003 to organize the Board to enable the SEC to determine that the Board is operational. Each public accounting firm will have six months thereafter to register with the Board.

The Act covers any non-U.S. public accounting firm that prepares or furnishes an audit report with respect to any issuer subject to the Act. The Act also gives the Board authority to conclude that a non-U.S. public accounting firm that does not issue audit reports nevertheless plays such a significant role in preparing and furnishing reports for particular issuers that the firm should be treated as a public accounting firm for purposes of registration and oversight by the Board.

The SEC, in addition to the Board (which will act subject to SEC approval), has the authority to exempt any non-U.S. public accounting firm from any provision of the Act, any Board rules or any SEC rules. The SEC has not yet adopted rules clarifying the applicability of the Act to non-U.S. public accounting firms.

The SEC may elect to exempt non-U.S. issuers and non-U.S. accounting firms from certain of the following provisions, but we expect many of the provisions will ultimately be applicable to non-U.S. companies.

⁵ It is important to note, however, that the preapproval of auditor's services requirement discussed below appears to be effective now.

Audit Committee Membership—Effective by April 26, 2003. The Act requires the SEC to issue rules by April 26, 2003 directing national securities exchanges and national securities associations to prohibit the listing of securities of any company that does not comply with specified standards related to their audit committees. These standards require that:

- the audit committee be directly responsible for the appointment, compensation and oversight of the work of any registered public accounting firm employed by the issuer, and that each registered public accounting firm report directly to the audit committee;
- all members of the audit committee be independent directors, meaning that members are prohibited from receiving any consulting, advisory or other compensatory fee from, or being an affiliated person of, the company or its subsidiaries (except in their capacity as directors or members of a committee of the board of directors) ;
- the audit committee establish procedures to receive and consider complaints received by the issuer or made by its employees (including anonymous submissions) regarding accounting or auditing matters; and
- the audit committee have the authority to engage independent counsel and other advisers, as it deems necessary.

Subject to the SEC's rulemaking defining the term "affiliated person," this provision may disqualify certain directors of non-U.S. companies who are considered independent under applicable foreign laws. To the extent that this rule, or any other provision of the Act, conflicts with the local corporate law of a non-U.S. country, careful consideration will need to be given as to how to proceed.

In addition, the Act provides that, if a company does not have an audit committee in place, the entire board of directors will be deemed to be members of the audit committee and will be subject to all requirements relating to audit committees.

The NYSE has proposed that non-U.S. issuers be exempt from the audit committee independence requirement, but that they be required to disclose any significant ways in which their corporate governance practices differ from those followed by U.S. NYSE-listed companies. The SEC has not yet responded to the NYSE proposal and it is thus unclear whether non-U.S. issuers will be subject to this rule when it becomes effective.

The NYSE proposals would heighten the standards for independence for audit committee members, by adding the following:

- audit committee members may not receive from the issuer any compensation other than directors' fees, either in the form of cash or equity, consistent with the Act; and
- an individual may not serve on the audit committee if such individual simultaneously serves on the audit committee of more than three public companies, unless the issuer limits the number of audit committees upon which its audit committee members may serve or the board of directors determines that the service will not impair the ability of that individual to serve effectively on the issuer's audit committee. Such determination must be disclosed in the issuer's annual proxy statement.

Nasdaq has also proposed corporate governance reforms and is currently discussing the reforms with the SEC. These proposals would increase the standards for independence for audit committee members, and include the following:

- audit committee members may not receive any payment other than payment for board or committee service, consistent with the Act;
- an individual may not serve on the audit committee if such individual is deemed to be affiliated with the issuer or a subsidiary of the issuer; in this regard, a member of the audit committee may not own or control 20% or more of an issuer's voting securities, or such lower percentage as may be determined by the SEC in rulemaking under the Act; and
- audit committee members must meet the Nasdaq independence definition, subject to certain limited exceptions. A non-independent director may serve on the audit committee if the board of directors determines that "exceptional and limited circumstances" require that such person's membership on the audit committee is in the best interests of the company and its shareholders. An "exceptional and limited circumstances" exception is available for an individual who is not an officer or current employee or a family member of such person.

In addition, Nasdaq proposes to require non-U.S. issuers to disclose in their annual reports filed with the SEC any exemptions from the Nasdaq requirements they have been granted, as well as any alternative measures taken in lieu of the waived requirements. Non-U.S. companies making their initial public offering or first U.S. listing on Nasdaq must also disclose any such exemptions in their registration statement.

Nasdaq has indicated that it will make formal rule filings and publish such rules for public comment after it has concluded its discussions with the SEC. It is not clear when Nasdaq expects to make those rules available for comment.

Audit Committee Financial Expert—Effective by January 26, 2003. The SEC is required to issue final rules by January 26, 2003 providing that a listed company must disclose whether at least one member of its audit committee is a “financial expert” (as defined by the SEC), or explain why this is not the case.

When determining whether a particular person is a “financial expert,” the SEC must consider whether such person has experience as a public accountant, auditor, principal financial officer, comptroller or principal accounting officer of an issuer and has an understanding of, among other things, the preparation of financial statements and audit committee functions.

Preapproval of Auditor’s Services. Under the Act, an issuer’s audit committee must preapprove all services, whether auditing or otherwise, to be provided to the issuer by its auditor.

Internal Accounting Control Reports—Effective after SEC rulemaking (no deadline has been established for rule issuance). The SEC is required to issue rules requiring annual reports to contain an “internal control report,” acknowledging management’s responsibility for establishing adequate internal control structures and procedures for financial reporting and containing an assessment of the effectiveness of those controls and procedures. Auditors will attest to and report on management’s assessment.

Prohibition on Non-Audit Services—Effective in 2003 (after the external auditing firm is registered with the Board). The new law prohibits a registered public accounting firm that performs audit services for an issuer from providing to the issuer, contemporaneously with the audit, any non-audit services, including:

- bookkeeping services or other services relating to accounting records or financial statements;
- financial information systems design and implementation;
- appraisal or valuation services, fairness opinions or contributions-in-kind reports;
- actuarial services;
- internal audit outsourcing services;

- management functions or human resources;
- broker or dealer, investment adviser or investment banking services;
- legal services and expert services unrelated to the audit; and
- any other service that the Board determines by regulation is impermissible.

An issuer may engage its auditor for certain tax or other non-audit services (other than those listed above) following preapproval by the issuer's audit committee and must disclose such engagement in its 1934 Act reports.

Audit Partner Rotation—Effective in 2003 (upon registration of registered public accounting firms). The Act requires that the lead audit partner and reviewing partner at an issuer's registered public auditing firm rotate at least every five years by making it unlawful for a registered public accounting firm to audit a client if the lead audit partner or reviewing partner has performed audit services for that issuer in each of the five previous years.

Improper Influence on Conduct of Audits—Effective by April 26, 2003. The SEC must issue final rules by April 26, 2003 prohibiting officers and directors from fraudulently influencing or misleading the auditors of an issuer for the purpose of rendering the financial statements being audited materially misleading.

IV. Enhanced Disclosure Requirements

The Act establishes a number of new disclosure requirements and directs the SEC to promulgate rules to implement the statutory provisions, generally by January 26, 2003 (except that no deadline for rulemaking was established with regard to "real time" disclosure of material changes).

Code of Ethics for Senior Financial Officers—Effective by October 28, 2002. Under the Act, issuers must disclose in their periodic reports whether they have adopted a code of ethics for senior financial officers applicable to their principal financial officer and comptroller or principal accounting officer, or provide an explanation as to why no code is in place.

"Real Time" Disclosure of Material Changes. Issuers will be required to disclose to the public "on a rapid and current basis" such additional information concerning material changes in the financial condition or operations of the issuer as the SEC determines, by rule, "is necessary or useful for the protection of investors and in the public interest." This information must be in plain English and may include trend and qualitative information and

graphic presentations, as determined by the SEC. The SEC has not yet adopted rules to implement this provision of the Act, and it is currently unclear if the SEC will exempt non-U.S. companies from this provision.

In June 2001, the SEC proposed a rule adding eleven new items that would require a company to file a report on Form 8-K under the 1934 Act. The SEC also proposed a rule accelerating the filing deadline for such Form 8-K filings by requiring companies to file a report on Form 8-K within two business days after the occurrence of a triggering event. The SEC did not propose to amend Form 6-K to require the disclosure of any specific information or to change the illustrative list of items. The SEC may take a similar position with respect to the “real time” disclosure requirement, however no guidance has been issued to date.

Disclosure of Off-Balance Sheet Transactions—Effective by January 26, 2003. Periodic financial reports must include disclosure of all material off-balance sheet transactions, arrangements, obligations and other relationships with unconsolidated entities or other persons that may have a material current or future effect on the financial condition, results of operations, liquidity, capital expenditures, capital resources or significant components of revenues or expenses of the issuer.

Pro Forma Information—Effective by January 26, 2003. All *pro forma* financial information included in SEC filings or in any other public disclosures (*e.g.*, press releases) must be presented in a manner that:

- does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the *pro forma* financial information, in light of the circumstances under which it is presented, not misleading; and
- reconciles the *pro forma* information with the financial condition and results of operations of the issuer under GAAP.⁶

⁶ In December 2001, the SEC issued a release cautioning public companies to make sure they do not mislead investors when presenting *pro forma* financial results, which means results presented using any methodology other than GAAP. The SEC recommended that issuers reconcile *pro forma* presentations to GAAP results and that it will not deem the use of such *pro forma* information as misleading merely due to its deviation from GAAP if in the same statement the company discloses how it has deviated from the GAAP and the amount of such deviation. The Act is consistent with this release.

Prohibition of Officer and Director Trading During Employee Plan Blackout Periods—Effective by January 26, 2003. The Act prohibits transactions in issuer equity securities by directors and executive officers during employee plan “blackout periods” relating to such securities. A blackout period is any period of more than 3 consecutive business days during which at least 50% of the participants in a company sponsored employee plan are temporarily suspended from purchasing or selling issuer equity securities held in an issuer’s plan. Issuers are required to provide timely notice to directors and executive officers, as well as the SEC, of applicable blackout periods. The Act sets forth a number of exceptions to blackout periods and authorizes SEC rulemaking in this area.

V. New Criminal and Civil Enforcement Provisions

The new law creates several new crimes related to fraudulent activities and increases criminal penalties for a number of existing securities fraud crimes. For example, the Act makes it a crime to knowingly execute, or attempt to execute, a scheme or artifice (i) to defraud any person “in connection with any security” of a 1934 Act reporting company or (ii) to obtain, by means of false or fraudulent pretenses, representations or promises or any money or property in connection with the purchase or sale of any such security.

Crimes related to the destruction, alteration or falsification of corporate audit records and records in Federal investigations and bankruptcy cases are also codified under the Act. In addition, maximum penalties for mail and wire fraud are increased from five to 20 years imprisonment, and the statute of limitations for private securities fraud actions is extended to five years after commission of the fraud (or two years after its discovery). Civil penalties levied by the SEC as a result of judicial or administrative action may be directed to a fund for the benefit of harmed investors.

Whistleblower Protections. The Act creates new laws protecting corporate whistleblowers from retaliation by their employers.⁷ Criminal sanctions, including fines and up to ten years imprisonment, will be imposed on those who “knowingly, with the intent to retaliate” act against a whistleblower. This provision applies to all issuers and is not limited to whistleblowing on U.S. securities law violations, but is instead applicable to any U.S. federal offense. In addition, the Act provides a civil cause of action for employees who are discharged or suffer discrimination due to whistleblowing activities. This provision applies to all issuers and is limited to whistleblowing on U.S. securities law violations.

⁷ "Whistleblower" is a colloquial expression referring to an employee who reports employer misconduct to law enforcement or company officials.

VI. Miscellaneous

Increased SEC Review of Issuers. The SEC will review each issuer's disclosures at least once every three years, and more frequently for certain issuers, such as:

- issuers that have issued material restatements of their financial results;
- issuers experiencing significant volatility in their stock price compared to other issuers;
- issuers with large market capitalization;
- emerging companies with disparities in price-to-earning ratios;
- issuers whose operations significantly affect any material sector of the U.S. economy; and
- other issuers as the SEC may determine.

October 14, 2002

Form of 302 Certification

CERTIFICATION

I, [identify the certifying individual], certify that:

1. I have reviewed this annual report on [Form 20-F] [Form 40-F] of [Company] (the “registrant”);
2. Based on my knowledge, this annual report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this annual report;
3. Based on my knowledge, the financial statements, and other financial information included in this annual report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this annual report;
4. The registrant’s other certifying officers and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-14 and 15d-14) for the registrant and have:
 - a) designed such disclosure controls and procedures to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this annual report is being prepared;
 - b) evaluated the effectiveness of the registrant’s disclosure controls and procedures as of a date within 90 days prior to the filing date of this annual report (the “Evaluation Date”); and
 - c) presented in this annual report our conclusions about the effectiveness of the disclosure controls and procedures based on our evaluation as of the Evaluation Date;
5. The registrant’s other certifying officers and I have disclosed, based on our most recent evaluation, to the registrant’s auditors and the audit committee of registrant’s board of directors (or persons performing the equivalent function):
 - a) all significant deficiencies in the design or operation of internal controls which could adversely affect the registrant’s ability to record, process, summarize and report financial data and have identified for the registrant’s auditors any material weaknesses in internal controls; and
 - b) any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant’s internal controls; and
6. The registrant’s other certifying officers and I have indicated in this annual report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of our most recent evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

Date:

[Signature]

[Title]

* Provide a separate certification for each principal executive officer and principal financial officer of the registrant.

Form of 906 Certification

WRITTEN STATEMENT OF CHIEF EXECUTIVE OFFICER AND CHIEF FINANCIAL OFFICER

Each of the undersigned, the Chief Executive Officer and Chief Financial Officer of [Company] (the "Company"), hereby certifies, pursuant to 18 U.S.C. §1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that the Company's [Report], as filed with the Securities and Exchange Commission on the date hereof (the "Report"), fully complies with the requirements of [section 13(a)] [or] [section 15(d)] of the Securities Exchange Act of 1934 and that information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

Dated:

Chief Executive Officer

Chief Financial Officer

For Additional Information

This client alert can be found, together with other recent Chadbourne & Parke LLP client alerts, at http://www.chadbourne.com/publications/sub_Publications.html. If you have any questions regarding the Sarbanes-Oxley Act of 2002, please contact any of the following:

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