
THE CORPORATE GOVERNANCE REVIEW

EDITOR
WILLEM J L CALKOEN

LAW BUSINESS RESEARCH

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THE CORPORATE GOVERNANCE REVIEW

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SWEDEN

*Hans Petersson and Emma Sandberg Thomsen**

I OVERVIEW OF GOVERNANCE REGIME

i Introduction

In this article we will provide an overview of the governance regime for public limited liability companies admitted to trading on a regulated market in Sweden. At present, the only regulated markets where a company can have its shares admitted to trading in Sweden are NASDAQ OMX Stockholm ('NASDAQ OMX Stockholm') and NGM Equity ('NGM').

As a starting point, the Swedish model of corporate governance is fundamentally the same as in most industrial countries. However, there are specific features that mirror a market in which a few major shareholders often assume a particular responsibility for a company and that the essence of Swedish corporate governance is that the ultimate power should rest with the shareholders.

ii Regulation

Corporate governance for Swedish listed companies consists of a combination of legislation, corporate documents, regulations, statements and generally accepted practices.

The main source of corporate legislation is the Swedish Companies Act ('the Companies Act'). Other regulatory sources governing corporate governance include the Swedish Corporate Governance Code ('the Code'), the rules of each regulated market, such as NASDAQ OMX Stockholm's rule book for issuers, as well as statements by the Swedish Securities Council on what constitutes good practice on the Swedish securities market. A number of additional acts also apply such as the Annual Accounts Act, the Swedish Securities Market Act, the Act on Notification Obligations for Certain Holdings

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of Financial Instruments, the Trading in Financial Instruments Act and the Market Abuse Act.

The Companies Act contains general provisions regarding the governance of a company, specifying the corporate bodies, the tasks of each body and the responsibilities of the individuals acting for the company (i.e., matters that in many other jurisdictions are regulated through corporate governance codes). Recently the Companies Act was amended to implement the Shareholders' Rights Directive (2007/36/EC).

The Code is issued by the Swedish Corporate Governance Board. The Code is considered to be a part of good practice on the securities market and as such, all companies admitted to trading on a regulated market are bound to apply the Code. Its provisions are not mandatory but applies on a comply or explain basis. The current Code came into force on 1 February 2010.

The Swedish Securities Council is a private body comprised of representatives of the business community that oversees compliance with good practice on the Swedish securities market and offers guidance on specific corporate governance issues. The Swedish Securities Council has been mandated to fulfil their duties under Swedish law, the Code and the rules of each regulated market. All listed companies are bound to follow good practice on the securities market and the Swedish Securities Council interprets and issues statements about the meaning of this concept.

iii Enforcement

A resolution adopted by the general meeting conflicting with the Swedish Companies Act, the company's articles of association or the applicable annual reports legislation may be challenged in court and should the challenge be successful, the resolution may be annulled or amended by the court.

The relevant regulated market may according to their rule books penalise companies breaching law, other regulations, the rules of the regulated market, the Code or good market practice on the securities market. The regulated market can resolve upon imposing warnings, fines, or if the violation is serious, to delist the company's shares from the regulated market upon such violation.

The Swedish Securities Council may issue statements regarding a company's compliance with good practices on the Swedish stock market upon petition or on its own initiative.

All companies applying the Code must each year publish a corporate governance report, which shall include information on the company's compliance with the Code, and to the extent the company has chosen not to comply with a certain rule, explain the reasons for each case of non-compliance and what solution has been adopted instead. The report shall be a part of the company's annual accounts or may be issued separately but in such cases it shall still be subject to review by the company's auditor. Furthermore the report shall be published on the company's website.

Ultimately, the judgement on a company's compliance with the corporate governance rules in the Code will be made by the stakeholders in the capital market. A company that deviates from good market practice on the securities market will draw attention from the business press and it may cause the company bad will.

II CORPORATE LEADERSHIP

i Governance structure

The Swedish corporate governance model is based on a hierarchical governance structure where each body can issue directives to a subordinated body and to a certain extent take over the subordinated body's decision-making authority. The different bodies are the shareholders' meeting, the board of directors and the managing director.

The shareholders' meeting is the highest decision-making body of the company and this also reflects the shareholders' strong position in Swedish corporate governance. In Swedish listed companies there are traditionally one or several majority owners, a fact that has influenced Swedish corporate governance.

Sweden has a one-tier board structure. Swedish law does not include provisions for a separate controlling body or supervisory board. The board of directors is responsible for the company's organisation and the management of the company's affairs. A limited number of issues are according to the Swedish Companies Act reserved to be exclusively dealt with by the board, but other than that, the shareholders, through the shareholders' meeting, can resolve on any company matter, including issuing instructions to the board. However, such powers are rarely used in listed companies.

Swedish boards are almost always non-executive. Instead, the executive power rests with the managing director, who is appointed by the board.

ii Board structure and practices

Election of board members

A nomination committee is established by the shareholders' meeting (directly or indirectly). The tasks of the nomination committee is to propose board members and their remuneration as well as auditors and their remuneration. The Code stipulates that the nomination committee shall have at least three members and the committee primarily consists of representatives of major shareholders. Furthermore, the Code stipulates rules on how the nomination committee shall proceed with the work to propose the board members. The names of the members of the nomination committee shall be published on the company's website at least six months before the annual general meeting together with information on how the shareholders can reach the nomination committee.

The board members are elected at the annual general meeting. The Code stipulates that the board members shall be elected for one year at a time – until the next annual general meeting. The minimum requirement for public companies is three board members, although the board of a listed company typically is larger.

As stated earlier, Swedish boards are usually non-executive and there are rules aiming to enhance the board's independence. Only one person of the company's management may be a board member (a possibility that is used in about half of the listed companies, usually by appointing the managing director as a board member) and the majority of the board members must be independent from the company and its management. Other requirements on the board include that at least half of the members must be resident within the EEA and furthermore that at least two of the independent board members must also be independent from the company's major shareholders. The majority shareholders often have the possibility to control or at least have a great

influence over the board especially since the majority shareholder most likely also have a representative appointed in the nomination committee.

At least one member of the board (more specifically the audit committee of the board) must have experience of accounting and auditing. The Code also sets out that the board is to have a composition appropriate to the company's operations, phase of development and other relevant circumstances.

There are no legal requirements for diversity, although there is a continuous debate on how to reach a more equal gender distribution on the boards of Swedish companies. The Swedish Government is hesitant to put forward any proposals on the matter. According to the Code, a company shall strive for equal gender distribution on the board. At present, approximately 26 per cent of the total number of board members in the companies listed on NASDAQ OMX Stockholm large cap are women.

Responsibilities of the board

The board is headed by a chairman, who shall be appointed by the shareholders' meeting to comply with the Code. The managing director, if a board member, may not be elected chairman. The chairman of the board is responsible for organising and managing the work of the board, ensuring that the board is regularly updated and developing the board members' knowledge of the company and its operations and ensuring that the board fulfils its obligations under Swedish law. More specific duties are also defined in law, for example that the chairman must ensure that board meetings are held when necessary. Pursuant to the Code, the chairman is responsible for contacts with the shareholders regarding ownership issues and communicates shareholders' views to the board.

The board has a wide discretion to regulate its own affairs, typically through the rules of procedure that the board is required to adopt each year. The board has the discretion to decide the appropriate method for calling board meetings. However, it is a requirement under the Companies Act that board resolutions must generally only be taken where the board members have received sufficient information to allow them to make an informed decision about the relevant resolution and all board members (where possible) have been given the opportunity to participate in the meeting. The Companies Act does not impose any minimum number of board meetings to be held each year but instead the board's rules of procedure must set out the frequency of board meetings and it is the chairman's responsibility to ensure that board meetings are held when necessary. In addition, each board member and the managing director can request a board meeting to be held.

The company is represented by the board in its entirety and, in relation to the day-to-day management of the company, by its managing director. Documents that shall be signed by the board must be signed by not less than one-half of the total number of board members. However, the board may authorise a board member, the managing director or any other person to individually or jointly represent the company as a signatory. Usually, in addition to the board members, a number of members of the management are appointed as special company signatories to be able to, two jointly, sign for the company. It should be noted that a person appointed by the board as a signatory by no means are authorised to take any decisions on behalf of the company, but are merely authorised to implement and sign for resolutions taken.

The board members hold fiduciary positions in relation to the company and must therefore exercise due care and act in what they consider to be the interest of the company. They are required to comply with the Companies Act and other applicable rules and regulations and with the company's articles of association. Furthermore, the board must not take actions that would harm the company. Under the Companies Act, the board must not take actions that are likely to result in an undue advantage to a shareholder or any other person, to the disadvantage of the company or another shareholder.

The Companies Act set out a number of situations where a board member or the managing director are subject to conflict of interest due to a personal interest in the matter. Very briefly, the Companies Act does not permit a board member or the managing director to participate or resolve on matters regarding such person entering into contracts with the company or in situations where they have a personal interest in a contract that the company is entering into.

If a board member or the managing director intentionally or negligently causes the company damage, he or she may be liable for damages. Board members and the managing director may also be liable to third parties, including individual shareholders, creditors and employees, if the relevant board member or the managing director intentionally or negligently breaches the Companies Act, certain other regulations or the articles of association.

Employee representation on the board

Employees of companies with on average at least 25 employees during the past financial year are entitled to appoint two board members and two alternate board members. Employees of companies with on average at least 1,000 employees during the past financial year may appoint three board members and three alternates if the relevant company has different lines of business. The number of employee directors may not exceed the total number of non-employee directors. The employee directors are appointed by the local unions that are bound by a collective bargaining agreement with the relevant company. Employee directors generally have the same powers and duties as non-employee directors, subject to certain additional conflict of interest rules.

Remuneration of the board members

According to the Companies Act, the shareholders' meeting shall determine the remuneration of each member of the board and shall also establish guidelines for remuneration to the executive management. According to the Code, it is the responsibility of the nomination committee to give a proposal on remuneration of each board member and also the auditors. Normally, remuneration of board members consists of a fixed annual fee. Under the Code, non-executive members of the board are not allowed to participate in incentive programmes designed for the executive management or other employees and remuneration of board members may not include share options.

Board committees

A listed company must have an audit committee and a remuneration committee. Members of the audit committee may not be employed by the company and at least one member must be independent in relation to the company and its management as well as to major shareholders and have experience in accounting or auditing. Members

of the remuneration committee must be independent in relation to the company and its management. However, the board in its entirety may perform the tasks of the remuneration committee and the audit committee as long as the requirements of independence and experience are fulfilled.

Board responsibilities in takeovers

Takeovers are governed by the Swedish Takeover Act (implementing the Takeover Directive (2004/25/EC)) and the rule book of the relevant regulated market. Sweden has for a long time adhered to the principle of board neutrality in the face of a takeover bid. Under the Takeover Act, once the target board or the managing director of the target has good reason to assume that an offer is about to be made (or an offer has already been made), the target must not take any action that would be liable to frustrate the making or the successful outcome of the offer, unless the action is approved by the general meeting of the target. What constitutes 'frustrating actions' is not defined in detail but the overriding consideration is whether the action would be likely to frustrate the making or completion of the bid. The Swedish Securities Council has stated that an action will not qualify as a frustrating action unless it is relatively far-reaching and of material significance, and furthermore that it would generally be open to the target board to argue against accepting the offer; to seek a white knight and explore other alternatives; and to announce financial information and forecasts not previously disclosed. The target is not under any obligation to take actions facilitating the bidder's offer or its efforts to obtain regulatory approvals.

iii Executive management

General

The executive power rests with the managing director, who is appointed by the board. The managing director is responsible for attending to the day-to-day management of the company. The board will define the authority of the managing director in written instructions. The managing director will normally appoint the other senior managers that forms the executive management for a listed company.

Remuneration of the executive management

Based on the guidelines from the shareholders' meeting, the board shall resolve on remuneration to the executive management including the managing director. The remuneration committee of the board is responsible for preparing the board's decision on issues concerning principles for remuneration, remunerations and other terms of employment for the executive management as well as for monitoring and evaluating such programmes and guidelines.

Remuneration to the executive management can consist of a fixed salary, a variable remuneration, share- and share price-related incentive programmes, pensions, and other financial benefits. The Code stipulates that variable remuneration shall be linked to predetermined and measurable performance criteria. The Code stipulates that any compensation for executives in connection with termination of employment, such as salary during the notice period and severance pay, may not exceed an amount equivalent to the individual's fixed salary for two years. The adoption of management

and employee incentive schemes based on shares or share related instruments generally requires shareholder approval by not less than 90 per cent of both the votes and of the shares represented at the relevant shareholder meeting.

III DISCLOSURE

i General

The foundation of corporate governance is transparency and disclosure, allowing shareholders access to relevant information so that they can assess whether or not they are being satisfied with the way that their company's affairs are being conducted. The board of directors is responsible for disclosure and transparency. In order to properly discharge this responsibility and to be able to satisfy the company's continuous disclosure obligations, it is common practice for the board to adopt a continuous disclosure policy that sets out the relevant company's procedures to ensure compliance with its disclosure obligations.

Disclosure requirements are found throughout the corporate governance regime, for example in the Companies Act, the Annual Accounts Act, the Code and the rule books of the regulated markets.

ii Internal control and financial reporting

It is the responsibility of the board's audit committee to monitor the efficiency of the company's internal control, internal audit and risk management. Pursuant to the Code, the board is required to establish an appropriate system to monitor the company's compliance with laws and regulations. The corporate governance report must contain information regarding the most important elements of the company's system for internal control and risk management in connection with financial reporting and a description of the systems for internal control of the company's financial reporting.

iii The Corporate Governance Report

The board shall according to the Annual Accounts Act each year publish a corporate governance report that shall be included in the annual accounts or issued separately. All listed companies are also required by the Code to have a section of its website devoted to corporate governance matters, where *inter alia* the corporate governance report shall be published.

The corporate governance report shall set out information on, *inter alia*:

- a* which principles for corporate governance have been applied, beyond those which follow from law or other statutory instruments and where information regarding these principles is available;
- b* the most important elements of the company's system for internal control and risk management in conjunction with the financial reporting;
- c* direct or indirect shareholding in the company, which represents at least 10 per cent of the voting interests for all shares in the company;
- d* any authorisation granted by the general meeting to the board to resolve that the company shall issue new shares or acquire treasury shares;

- e* the composition of the company's nomination committee. If any member of the committee has been appointed by a particular owner, the name of such owner shall also stated;
- f* certain information regarding the board members;
- g* the division of work among members of the board and how the work of the board was conducted during the most recent financial year, including the number of board meetings held and each member's attendance at board meetings;
- h* the composition, tasks and decision-making authority of any board committees, and each member's attendance at the respective committee's meetings;
- i* certain information regarding the managing director (age, work experience, significant professional commitments etc.); and
- j* any infringement of the stock exchange rules applicable to the company, or any breach of good practice on the securities market reported by the relevant exchange's disciplinary committee or the Swedish Securities Council during the most recent financial year.

The corporate governance report shall also include information on what requirements of the Code from which the company deviates, the reasons for each case of deviation and what solution has been adopted instead.

iv The auditor

In a listed company the auditor may only be appointed for a maximum period of seven consecutive years.

The company's statutory external auditor is appointed by the general meeting and is obliged to report to the shareholders. The external auditor's work may not be governed or influenced by the board or the management. In addition to the examination of the company's annual report and accounts, the auditor will review and form an opinion on the management by the board and the managing director. The auditor is obliged to report any acts or omissions by any board member or the managing director, which may result in liability for damages.

The audit committee, being a board committee, is the main contact with the auditors and must, without impacting on the responsibility and tasks of the board, stay informed of the audit of the annual report and the group accounts, review and monitor the impartiality and independence of the auditor, and provide assistance in connection with the preparation of proposals regarding the appointment of an auditor for the company.

IV CORPORATE RESPONSIBILITY

The financial crises made the necessity of risk awareness clear. Although Swedish companies in general did quite well throughout the crises, this was not true for certain financial institutions. The Swedish Financial Supervisory Authority ('the SFSA') is now more closely monitoring financial institutions and their handling of risks.

According to the Companies Act, the board is responsible for the organisation and management of the company's affairs and shall regularly assess the company's and

the group's financial position. Furthermore, the board shall ensure that the company's organisation is structured in such a manner that accounting, management of funds and the company's finances in general are monitored in a satisfactory manner. The responsibility lies with the board as a group and where certain duties are delegated to one or more members or to other persons, the board shall act with care and regularly monitor that the delegation can be maintained.

On risk management, the Code further specifies the responsibilities of the board of directors as follows:

- a* ensuring that there is an effective system for follow-up and control of the company's operations;
- b* ensuring that there is a satisfactory process for monitoring the company's compliance with laws and other regulations relevant to the company's operations;
- c* defining necessary guidelines to govern the company's ethical conduct; and
- d* ensuring that the company's external communications are characterised by openness, and that they are accurate, reliable and relevant.

During 2010, HQ Bank AB ('HQ Bank'), a wholly-owned subsidiary of HQ AB (publ) ('HQ') had its licence revoked by the SFSA who also applied for a compulsory liquidation of the company. The resolution was passed due to deficiencies in the company's trading department. A number of shareholders and the present board in HQ are now investigating the possibility to claim damages from former board members.

Under the Code, the board of directors is expected to ensure that appropriate ethical guidelines concerning the company's business are adopted. In practice, many of the major stock-market companies have been both acting and reporting on corporate social responsibility issues for some time. However, there has been an increased focus on such issues and also on the company's adherence to adopted ethical guidelines over the last few years.

V SHAREHOLDERS

i Shareholder rights and powers

Traditionally, shareholders hold a strong position in Swedish companies. This is confirmed in the Companies Act according to which the shareholders' meeting is the highest decision-making body of the company. At the shareholders' meeting the shareholders participate in the supervision and control of the company. The shareholders' meeting approves the company's annual accounts, including any distribution of profits, election and dismissal of individual directors of the board. There are a number of issues where a resolution must be passed by the shareholders' meeting such as *inter alia* amendments of the company's articles of association and changes of the company's share capital, mergers and de-mergers of the company. Some decisions may also be taken by the board only if authorised by the shareholders' meeting, for example, issues of new shares, convertibles or warrants and buy-back of own shares.

A company may have shares with multiple voting rights. According to the Companies Act, the difference in votes can be 1:10. However, if the company before the

entering into force of the present Companies Act already had larger differences in voting ratio, it can keep such differences and also issue new shares with such differences.

To balance the power of major shareholders, the Companies Act provides for protection of minority shareholders. As a starting point, a company is under a strict obligation to treat all shareholders equally. All shares provide equal rights, unless the articles of association allow shares with different rights. In addition, there are a number of matters where stronger majority requirements than simple majority (which is the general rule at the shareholders' meeting) is required for the shareholders' meeting to adopt a proposal. Shareholders holding one-tenth of the shares may, *inter alia*, demand that a shareholders' meeting be convened, resolve on distribution of dividends of up to one-half of the profits in the company, and resolve to appoint a special examiner or minority auditor.

Should a shareholder wish to take action against a corporate decision, there are different alternatives available (or a combination thereof). A resolution adopted by the general meeting conflicting with the Swedish Companies Act, the company's articles of association or the applicable annual reports legislation may be challenged in court by a shareholder and should the challenge be successful, the resolution may be annulled or amended by the court. It is very unusual for challenges of resolutions in listed companies. Furthermore, the relevant regulated market may according to their rule books penalise companies breaching law, other regulations, the rules of the regulated market and good market practice on the securities market if reported by a shareholder (or if otherwise drawn to the attention of the regulated market). A shareholder may also petition the Swedish Securities Council, who may issue statements regarding a company's compliance with good practices on the Swedish stock market.

ii Shareholders' duties and responsibilities

Shareholders do not have any statutory fiduciary duties under Swedish law and therefore no general obligation to act in the best interest of the company. Nevertheless, under Swedish law, a shareholder can be subject to claims in relation to damage caused to the company, a shareholder or a third party, as a consequence of participating, intentionally or through gross negligence, in any violation of the Swedish Companies Act, the company's articles of association or the applicable annual reports legislation. Also, a shareholder may not vote in respect of legal proceedings against him or her, or his or her discharge from liability for damages or other obligations towards the company.

There are no particular duties resting with controlling shareholders or institutional investors from a corporate governance perspective, but controlling shareholders nevertheless often take an active role in the corporate governance of the company.

As regards institutional investors, there are no guidelines issued in general but it can be noted that the Swedish Investment Fund Association has issued 'Guidelines for Investment Fund Managers as Shareholders' to be applied by its members. It follows from the recommendations that each member should issue an ownership policy that shall be public. There are also other investors, such as the Swedish pension funds, that have issued ownership policies.

iii Shareholder activism

With one or a few majority owners in most of the Swedish listed companies, there are few examples where shareholders other than the majority owners have tried to influence the companies in which they own shares. During the last decade, this has to a certain extent changed, probably following the influence from the US and the UK, but also due to the internationalisation of the financial market. However, there are no rules or guidelines with respect to shareholder activism. Examples of shareholder activism include investors acquiring enough shares to be elected to the nomination committee and thus being in a position to influence the election of the board and management.

Historically, shareholders have only had the possibility to attend the shareholders' meeting in person or by proxy. With the Shareholders' Rights Directive now being implemented into the Companies Act, new possibilities have arisen for *inter alia* postal voting. It remains to be seen whether this will change the landscape for shareholder activism in Sweden.

A shareholder may bring proceedings against the company in order to set aside or amend a resolution in the event a resolution of a shareholder's meeting has not been adopted in due order or otherwise contravenes the Companies Act, the applicable annual reports legislation or the articles of association. For listed companies, it is very unusual that such proceedings are brought.

iv Contact with shareholders

According to the Companies Act, the board must convene the annual general meeting by publishing a notice no earlier than six weeks and no later than four weeks before the general meeting. The notice must contain a proposed agenda and the general meeting may not pass a resolution on an item not set out in the notice. The main contents of any item on which a proposal has been submitted by the board must also be included in the notice. Other proposals (e.g., by a nomination committee or individual shareholders) must also be set out in the notice to the extent they are known by the company in time for inclusion in the notice.

Disclosure requirements can be found in the different sources of corporate governance regulation. The Companies Act stipulates for information to be provided in relation to shareholders' meetings, while the rule books of the regulated markets call for disclosure of 'price sensitive' information. According to the rule books of the regulated markets, it is possible to in special cases, and very restrictively, disclose information selectively. Examples that are mentioned are information to major shareholder or contemplated shareholders in conjunction with an analysis prior to a planned new share issue and in relation to negotiations regarding takeover bids. The company must inform the recipient that the information received is confidential and that the recipient has become an 'insider' by virtue of the receipt of the information and therefore is prohibited from exploiting the information for his, her or another's profit.

Pursuant to the Code, the chairman is responsible for contacts with the shareholders regarding ownership issues and communicates shareholders' views to the board. In relation to this it should be noted that the chairman of course cannot give an individual shareholder information that would be considered insider information.

VI OUTLOOK

The financial crises brought the legislators' attention to corporate governance issues and there are initiatives being taken on EU as well as national level. In Sweden, the focus has been on the financial sector with for example the SFSA having issued rules on remuneration to management and employees in the financial sector. Furthermore, SFSA, who shall approve board members of financial institutions, have in the aftermath of the withdrawn permit for HQ Bank, refused to accept a former board member from HQ to take up a similar function in another financial institution (the decision have been appealed to the court).

On an EU level, corporate governance is of course on the agenda, and initiatives have been taken for further regulation. The Swedish Corporate Governance Board has issued a statement recommending the Swedish government and other actors to defend the Swedish model with self-governance.

Also on an EU level, the issue on gender equality on boards has been brought up. The Swedish government has so far been negative to legislation in that respect but if legislation is passed by the EU, Sweden will of course have to implement such rules.

Finally, the financial crises have drawn the attention to the competence of the boards, especially in the financial sector. It has become clear that too many bank boards lacked directors with real expertise in banking, or understanding of risk. With a more complex financial market, the competence requirements have become higher and higher. This is likely to even further enhance the importance of the work in the nomination committees.

Appendix 1

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Hans Petersson is a partner in the public M&A and ECM practice group based in the Malmö office and a member of the board of Mannheimer Swartling. He has extensive experience of and regularly advises on securities and company law, and works regularly on corporate governance issues for listed companies. Hans Petersson specialises in public company transactions, including public and private M&A, IPOs and capital market transactions such as stock exchange listings and the raising of capital. He graduated with a law degree from the University of Lund in 1992. After service in the Swedish courts, he joined Mannheimer Swartling in 1994 and became a partner in 2001.

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