

## COVID-19: UPDATED NURSING AND LONG-TERM CARE FACILITIES – CORONAVIRUS (COVID-19) CONSIDERATIONS

Date: 26 March 2020

### U.S. Health Care Alert

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Nursing homes and other long-term care facilities (hereinafter, "LTC Facilities") are among the health care providers whose patient populations are particularly vulnerable to the ongoing spread of COVID-19. We have recently seen, and the Centers for Disease Control and Prevention ("CDC") has confirmed, the fragile patient population(s) treated at nursing homes are "at the highest risk of being affected by COVID-19" due to the setting and types of residents served — older adults often with underlying chronic medical conditions. [1] The long-term and residential nature of patient stays at LTC Facilities adds to the vulnerability of these patient care settings.

According to CDC statistics, "over 4 million Americans are admitted to or reside in nursing homes and skilled nursing facilities each year and near one million persons reside in assisted living facilities." According to the World Health Organization report, the fatality rate for COVID-19 patients older than 80 in China was 21.9 percent, while patients of all ages with no underlying chronic condition had a fatality rate of 1.4 percent. [2] The United States has already seen significant consequences from COVID-19 in the nursing home setting. Life Care Center in the State of Washington is a prime example of the spreading of the virus in the nursing home context. [3] On Friday, March 13, 2020, 60 of 180 employees were out with symptoms of COVID-19. Further, residents dwindled from 120 to 44, with dozens in the hospital. Of the 120 patients at Life Care Center on February 19, 2020, 63 have tested positive for COVID-19, although many had already been transferred to local hospitals.

In light of the recently announced federal emergency declaration [4] and reports of several LTC Facilities around the country managing cases of residents/patients infected by COVID-19, [5] this alert is meant to focus on certain COVID-19 issues of particular note for LTC Facilities, although this is not meant to be an exhaustive list. Of note, the materials discussed herein focus on federal guidance applicable to LTC Facilities; however, LTC Facilities should also consider state and local law and guidance as well as the requirements of accrediting bodies. Finally, LTC Facilities should take note of publications and guidance from industry organizations and associations that may inform LTC Facilities as to best practices in response to COVID-19.

### CMS NURSING FACILITY COVID-19 GUIDANCE

As recently as March 23, 2020, CMS announced the findings of the inspections of Life Care Center in Washington State and identified a new targeted plan for facility inspections in response to COVID-19. [6] On March 16, 2020, CMS and Washington Health Services State Survey Agency concluded an inspection of Life Care Center. There were three "immediate jeopardy" situations according to the CMS release. "[S]pecifically, the facility's failure to rapidly identify and manage ill residents, notify the Washington Department of Health about the increasing rate of

respiratory infections among residents, and failure to possess a sufficient back up plan following the absence of the facility's primary clinician, who fell ill." As noted above, this is not the only nursing home that has felt the impact of COVID-19. According to the CMS release, 147 nursing homes across 27 states have at least one resident with COVID-19 based on CDC data shared with CMS. In light of this information, CDC and CMS are collaborating about locations where there are active cases and identifying locations that may be likely for future cases and target the inspections accordingly. Building on the March 4, 2020 guidance identified below, only certain inspections will be conducted, which include: complaint inspections, targeted infection control inspections, and self-assessments. CMS Administrator Seema Verma stated, "Today, we are issuing a call to action to nursing homes, hospitals and the entire health care system: Don't wait to be inspected. Starting today you can – and should – use CMS's self assessment tool to ensure you're prepared to prevent to spread of Coronavirus." The CMS press release can be found at the following link:

CMS Announces Findings at Kirkland Nursing Home and New Targeted Plan for Healthcare Facility Inspections in light of COVID-19

On March 13, 2020, the Centers for Medicare & Medicaid Services ("CMS") issued revised guidance for LTC Facilities specific to COVID-19, which is intended to help LTC Facilities improve their infection control and prevention practices and provide additional guidance related to facilities' visitation policies. [7]

The below provides a summary of CMS's guidance; however, LTC Facilities should review CMS's guidance, in full, at the following link:

Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in nursing homes (REVISED), QSO-20-14-NH (March 13, 2020)

## **Infection Control, Prevention, and Screening**

First, CMS provided guidance related to LTC Facilities' screening and treatment of suspected and confirmed COVID-19. CMS directed LTC Facilities to contact their local health department if they have questions or suspect a resident has COVID-19. CMS deferred to the CDC guidance stating, "[P]rompt detection, triage and isolation of potentially infectious residents are essential to prevent unnecessary exposures among residents, healthcare personnel, and visitors at the facility." CMS further advised LTC Facilities to vigilantly identify any possibly infected individuals and consider increasing the frequency of monitoring patients for potential symptoms of respiratory infections. Separately, on March 4, 2020, CMS announced that until further notice state survey agencies and accrediting organizations are to focus their facility inspections exclusively on issues related to infection control and other serious health and safety threats. [8] This guidance can be found at:

Suspension of Survey Activities, QSO-20-12-All (March 4, 2020)

Additionally, on March 11, 2020, CMS provided further guidance to state surveyors, health care facilities, patients and caregivers, and accrediting organizations in the form of an FAQ. [9] Specifically, CMS advised LTC Facilities focus efforts on infection disease protocols, including preparing for treating patients with COVID-19, and recommends LTC Facilities monitor closely CMS and CDC publications related to triage of presumptive or confirmed cases of COVID-19 and shortfalls in personal protective equipment. This guidance can be found at:

## Frequently Asked Questions for State Survey Agency and Accrediting Organization Coronavirus Disease 2019 (COVID-19) Survey Suspension

### Visitation Restrictions

Second, CMS addressed how to limit transmission of COVID-19 in LTC Facilities by managing visitation. Specifically and emphatically, CMS states, "Facilities should **restrict** visitation of all visitors and non-essential health care personnel ("HCP"), except for certain compassionate care situations, such as an end-of-life situation." In end-of-life situations, visitors should be limited to a specific room. LTC Facilities are expected to convey these restrictions to potential visitors and advise they defer visitation until further notice. CMS also noted that if a state were to further limit visitation to apply even in end-of-life situations, a LTC Facilities' compliance with the state requirement would not result in a citation for noncompliance with CMS's visitation requirements.

If visitation is to occur, LTC Facilities should require visitors to wash their hands and wear personal protective equipment, such as face masks. Any potential visitor, including clergy and bereavement counselors, should be screened for fever or respiratory symptoms. If a visitor presents with said symptoms of COVID-19, they are not to be permitted into the facility at any time, even in end-of-life situations. Decisions about visitation in compassionate care situations are to be made on a case-by-case basis. Lastly, CMS directs LTC Facilities to:

Advise visitors, and any individuals who entered the facility (e.g., hospice staff), to monitor for signs and symptoms of respiratory infection for at least 14 days after exiting the facility. If symptoms occur, advise them to self-isolate at home, contact their healthcare provider, and immediately notify the facility of the date they were in the facility, the individuals they were in contact with, and the locations within the facility they visited.

CMS identified a number of exceptions to the above visitation restrictions:

- *Health care workers:* This applies to other health care workers, such as hospice workers, Emergency Medical Services ("EMS") personnel, or dialysis technicians that provide care to residents. They should be permitted to come into the facility as long as they meet the CDC guidelines for health care workers.
- *Surveyors:* CMS and state survey agencies are constantly evaluating their surveyors to ensure they do not pose a transmission risk when entering a facility. For example, surveyors may have been in a facility with COVID-19 cases in the previous 14 days, but because they were wearing personal protective equipment effectively per CDC guidelines, they pose a low risk to transmission in the next facility and must be allowed to enter. However, there are circumstances under which surveyors should still not enter, such as if they have a fever.

CMS also advises the screening applicable to visitors be applied to facility staff as well; health care providers with signs and symptoms of respiratory infection should not report to work, and if they develop said signs and symptoms at work, such staff should immediately stop work, put on a face mask, and self-isolate at home. CMS suggests that LTC Facilities specifically identify staff that work at multiple facilities and make sure that such staff

are actively screened, as they pose a potentially high risk to patients. CMS also advised LTC Facilities, as it relates to vendors, stating:

[R]eview and revise how they interact vendors and receiving supplies, agency staff, EMS personnel and equipment, transportation providers (e.g., when taking residents to offsite appointments, etc.), and other non-health care providers (e.g., food delivery, etc.), and take necessary actions to prevent any potential transmission. For example, do not have supply vendors transport supplies inside the facility. Have them dropped off at a dedicated location (e.g., loading dock). Facilities can allow entry of these visitors if needed, as long as they are following the appropriate CDC guidelines for Transmission-Based Precautions.

## Additional Guidance

In addition to the above, CMS provided guidance related to the following topics:

- Cancellation of communal dining and all group activities, such as internal and external group activities.
- Reminding residents to practice social distancing and perform frequent hand hygiene.
- Transferring facility residents/patients with confirmed infections to hospitals and/or accepting residents/patients with confirmed infections from hospitals.
- Maintenance of appropriate supply levels and citations for deficiencies.

Facilities should take advantage of other CMS and CDC resources, which are discussed and linked below.

## CDC GUIDANCE

The CDC provided, and continues to update, resources related to COVID-19 specific to LTC Facilities, including a preparedness checklist, guidance on infection prevention and control, and additional guidance for LTC Facilities when there are, and are not, COVID-19 cases in their community. What follows is a high-level summary of CDC guidance; however, LTC Facilities should review the guidance related to long-term care facilities on the CDC's website at the following link:

Preparing for COVID-19: Long-term Care Facilities, Nursing Homes

### COVID-19 Preparedness Checklist

The CDC suggests LTC Facilities take the following into consideration to improve preparedness for responding to COVID-19 and in developing their COVID-19 response plan:

- Rapid identification and management of ill residents.
- Considerations for visitors and consultant staff.
- Supplies and resources.
- Sick leave policies and other occupational health considerations.

- Education and training.
- Surge capacity for staffing, equipment and supplies, and postmortem care.

The CDC also provided a checklist identifying key areas LTC Facilities should consider and allowing LTC Facilities to self-assess the strengths and weaknesses of preparedness efforts. [10] Said checklist is available at the following link:

Coronavirus Disease 2019 (COVID-19) Preparedness Checklist for Nursing Homes and other Long-Term Care Settings

## Infection Prevention and Control

The CDC's guidance related to infection prevention and control mirrors the guidance provided by CMS; specifically, the CDC recommends LTC Facilities:

- Restrict all visitation except for certain compassionate care situations, such as end-of-life situations.
- Restrict all volunteers and nonessential HCP (e.g., barbers).
- Cancel all group activities and communal dining.
- Implement active screening of residents and HCP for fever and respiratory symptoms.

The CDC further stated, "[N]ursing homes should assume [COVID-19] could already be in their community" and should implement the above recommended precautions.

## VA GUIDANCE

On March 10, 2020, the U.S. Department of Veterans Affairs ("VA") announced safeguards to protect nursing home and spinal cord injury patients highlighting the VA's 134 nursing homes around the country. [11] Three main points were identified that are applicable to VA nursing homes:

1. All VA nursing homes will adopt a "No Visitor Stance," meaning no outside visitors will be permitted to see residents. The exception is when veterans are in the last stage of life in the hospice units. In this case, the visitors will be limited to a particular room.
2. All VA nursing homes will suspend new admissions. VA nursing homes will continue to welcome resident transfers from VA facilities once medical personnel have determined patients are not at risk for infection from COVID-19 or transmitting COVID-19.
3. Nursing home staff will be actively screened daily and dedicated to working at Community Living Centers.

## OFFICE FOR CIVIL RIGHTS-HIPAA CONCERNS

COVID-19 presents additional challenges to LTC Facilities with respect to disclosure of protected health information related to COVID-19 patients under the Health Insurance Portability and Accountability Act ("HIPAA"). In February 2020, the Office for Civil Rights published a bulletin entitled "HIPAA Privacy and Novel Coronavirus," which provides guidance as to "the ways that patient information may be shared under the HIPAA Privacy Rule in

an outbreak of infectious disease or other emergency situation, and to serve as a reminder that the protections of the Privacy Rule are not set aside during an emergency." [12] Additionally, we would direct you to K&L Gates' health care practice group's Triage podcast "COVID-19 - HIPAA Concerns in the Context of Novel Coronavirus" for a discussion of HIPAA and COVID-19.

BULLETIN: HIPAA Privacy and Novel Coronavirus

K&L Gates Triage: COVID-19 - HIPAA Concerns in the Context of Novel Coronavirus

## **EMERGENCY DECLARATIONS: STATE AND FEDERAL**

On March 13, 2020, President Donald Trump declared a nationwide emergency. [13] This declaration increases federal support to the Department of Health & Human Services in its role as the lead federal agency in the ongoing COVID-19 pandemic response. As a result of the declaration, the Federal Emergency Management Agency ("FEMA") will reimburse eligible emergency protective measures taken to respond to COVID-19 at the direction or guidance of public health officials. FEMA assistance will not duplicate assistance from other federal agencies and will be provided at a 75 percent cost share. In response to the emergency declaration, CMS has taken proactive steps through 1135 waivers to expand efforts against COVID-19. [14] A broad 1135 waiver should be issued imminently; [15] a draft of the form of the broad waiver can be found at the following link:

Waiver or Modification of Requirements Under Section 1135 of the Social Security Act

Further, CMS also announced blanket 1135 waivers on certain specific topics on March 13, 2020, which include, but are not limited to:

- Skilled Nursing Facilities
  - CMS is waiving the requirement for a three-day prior hospitalization for coverage of a skilled nursing facility ("SNF") stay, providing temporary emergency coverage of SNF services for those people who need to be transferred as a result of the effect of a disaster or emergency. In addition, for certain beneficiaries who recently exhausted their SNF benefits, it authorizes renewed SNF coverage without first having to start a new benefit period.
  - Second, CMS is waiving 42 C.F.R. 483.20 to provide relief to SNFs on the time-frame requirements for Minimum Data Set assessments and transmission.
- Supporting Care for Patients in Long-Term Care Acute Hospitals (each, an "LTCH")
  - Allows LTCHs to exclude patient stays where an LTCH admits or discharges patients in order to meet the demands of an emergency from the 25-day average length of stay requirement that allows these facilities to be paid as LTCHs.

Said blanket waivers are available at the following link:

COVID-19 Emergency Declaration Health Care Providers Fact Sheet

Lastly, upon issuance of the broad form waiver, individual waivers may also be requested under 1135 through the CMS regional office. [16] For instance, as of March 25, 2020, CMS had approved Medicaid waivers for 28 states addressing a number of areas, including nursing homes. [17]

Additionally, some locales have also declared a state of emergency. Such a declaration may further allow access to additional resources or authorize governmental actions in a more expeditious manner that may alter the processes by which a facility would ordinarily operate with regard to investigation, enforcement, or other regulatory matters. For these reasons, it is important to closely monitor your state and local health authorities, as well as federal agencies and declarations, directives, or other executive orders. K&L Gates is also in a position to assist with monitoring these declarations and how they may impact your efforts to provide health care services.

## CONCLUSION

LTC Facilities should take note of the ample guidance provided by the various organizations, such as CMS and the CDC. Below are links to a number of those documents. This guidance can assist LTC Facilities in making informed, strategic decisions related to the very real threat faced by facilities and their patients. While these documents can serve as guideposts in formulating a response to COVID-19, LTC Facilities may wish to engage inside and/or outside counsel to ensure their response is tailored to their needs and the patient population they service. To that end, K&L Gates LLP has created a HUB webpage to generally address the legal implications of the COVID-19 outbreak on businesses. K&L Gates is well positioned to provide guidance to LTC Facilities on the many health care-related concerns raised by the COVID-19 outbreak as well as other matters that may arise in the current climate.

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## CITING REFERENCES AND ADDITIONAL RESOURCES:

- K&L Gates HUB:
  - Responding to COVID-19.
  - K&L Gates Triage: COVID-19 - HIPAA Concerns in the Context of Novel Coronavirus.
- CMS COVID-19 Specific Guidance:
  - Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in nursing homes (REVISED), QSO-20-14-NH (March 13, 2020)
- Additional CMS Resources:
  - COVID-19 FAQs.
  - Long Term Care (LTC) Infection Control Worksheet.
  - CMS Announces Findings at Kirkland Nursing Home and New Targeted Plan for Healthcare Facility Inspections in light of COVID-19

- Civil Money Penalty Reinvestment Program—Head to Toe Infection Prevention Toolkit.
- Infection Control and Prevention regulations and guidance: 42 CFR 483.80, Appendix PP of the State Operations Manual—see F-tag 880.
- Suspension of Survey Activities, QSO-20-12-All (March 4, 2020).
- Frequently Asked Questions for State Survey Agency and Accrediting Organization Coronavirus Disease 2019 (COVID-19) Survey Suspension.
- State Operations Manual Appendix Z - Emergency Preparedness for All Provider and Certified Supplier Types Interpretive Guidance.
- CDC Guidance:
  - Preparing for COVID-19: Long-term Care Facilities, Nursing Homes.
  - Coronavirus Disease 2019 (COVID-19) Preparedness Checklist for Nursing Homes and other Long-Term Care Settings.
  - Coronavirus Disease 2019 (COVID-19) Updates.
  - Nursing Homes and Assisted Living (Long-term Care Facilities).
  - Healthcare Infection Prevention and Control FAQs for COVID-19.
  - Interim Guidance for Healthcare Facilities: Preparing for Community Transmission of COVID-19 in the United States.
- VA Guidance
  - VA Announces Safeguards to Protect Nursing Home and Spinal Cord Injury Patients.
- The Office of Civil Rights:
  - BULLETIN: HIPAA Privacy and Novel Coronavirus.
- 1135 Waivers
  - Waiver or Modification of Requirements Under Section 1135 of the Social Security Act (March 13, 2020).
  - Additional Emergency and Disaster-Related Policies and Procedures That May Be Implemented Only With a § 1135 Waiver (March 15, 2019).
  - Medicare Fee-for-Service (FFS) Response to the Public Health Emergency on the Coronavirus.
- Emergency Preparedness Plan
  - 81 Fed. Reg. 63860 (Sept. 16, 2016).
  - Emergency Preparedness- Updates to Appendix Z of the State Operations Manual (SOM), QSO19-06-ALL (February 1, 2019).



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## NOTES:

- [1] CTRS. FOR DISEASE CONTROL AND PREVENTION, Preparing for COVID-19: Long-term Care Facilities, Nursing Homes, <https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/prevent-spread-in-long-term-care-facilities.html>.
- [2] World Health Org., Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19) (Feb. 16–24, 2020), <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf>.
- [3] Press Briefing, Life Care Ctr. of Kirkland, Update from Life Care Center of Kirkland (Mar. 13, 2020), <https://lcca.com/downloads/kirkland/Kirkland-Update-03132020.pdf>.
- [4] DEP'T OF HOMELAND SECURITY, FED. EMERGENCY MGMT. AGENCY, President Donald J. Trump Directs FEMA Support Under Emergency Declaration for COVID-19, HQ-20-017 (Mar. 13, 2020), <https://www.fema.gov/news-release/2020/03/13/president-donald-j-trump-directs-fema-support-under-emergency-declaration>.
- [5] Madeline Holcombe, Washington governor orders nursing homes to limit visitors as the coronavirus outbreak spreads across 11 facilities, CNN (Mar. 11, 2020), <https://www.cnn.com/2020/03/11/health/coronavirus-washington-nursing-home-outbreaks/index.html>; WBRZ Staff, Officials: 12 coronavirus cases, one death reported at New Orleans retirement home, WBRZ (Mar. 16, 2020), <https://www.wbrz.com/news/three-of-louisiana-s-13-coronavirus-patients-are-residents-of-same-new-orleans-nursing-home/>.
- [6] DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR MEDICARE & MEDICAID SERVS., Press Release, CMS Announces Findings at Kirkland Nursing Home and New Targeted Plan for Healthcare Facility Inspections in light of COVID-19 (March 23, 2020).
- [7] DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR MEDICARE & MEDICAID SERVS., CTR. FOR CLINICAL STANDARDS AND QUALITY/QUALITY, SAFETY & OVERSIGHT GROUP, Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in nursing homes (REVISED), QSO-20-14-NH (Mar. 13, 2020).
- [8] DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR MEDICARE & MEDICAID SERVS., CTR. FOR CLINICAL STANDARDS AND QUALITY/QUALITY, SAFETY & OVERSIGHT GROUP, Suspension of Survey Activities, QSO-20-12-All (Mar. 4, 2020).
- [9] DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR MEDICARE & MEDICAID SERVS., CTR. FOR CLINICAL STANDARDS AND QUALITY/QUALITY, SAFETY & OVERSIGHT GROUP, Frequently Asked Questions for State Survey Agency and Accrediting Organization Coronavirus Disease 2019 (COVID-19) Survey Suspension (Mar. 11, 2020).
- [10] CTRS. FOR DISEASE CONTROL AND PREVENTION, Coronavirus Disease 2019 (COVID-19) Preparedness Checklist for Nursing Homes and other Long-Term Care Settings, [https://www.cdc.gov/coronavirus/2019-ncov/downloads/novel-coronavirus-2019-Nursing-Homes-Preparedness-Checklist\\_3\\_13.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/novel-coronavirus-2019-Nursing-Homes-Preparedness-Checklist_3_13.pdf).
- [11] News Release, U.S. Dep't of Veterans Aff., Off. of Pub. Aff. Media Relation, VA announces safeguards to

protect nursing home and spinal cord injury patients (Mar. 10, 2020),  
<https://www.va.gov/opa/pressrel/includes/viewPDF.cfm?id=5400>.

[12] DEP'T OF HEALTH & HUMAN SERVS., OFF. FOR C.R., BULLETIN: HIPAA Privacy and Novel Coronavirus (Feb. 2020).

[13] DEP'T OF HOMELAND SECURITY, FED. EMERGENCY MGMT. AGENCY, COVID-19 Emergency Declaration, HQ-20-017-Fact Sheet (Mar. 13, 2020), <https://www.fema.gov/news-release/2020/03/13/covid-19-emergency-declaration>.

[14] Press Release, Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., CMS Takes Action Nationwide to Aggressively Respond to Coronavirus National Emergency (Mar. 13, 2020), <https://www.cms.gov/newsroom/press-releases/cms-takes-action-nationwide-aggressively-respond-coronavirus-national-emergency>.

[15] DEP'T OF HEALTH & HUMAN SERVS., OFF. OF THE ASSISTANT SECRETARY FOR PREPAREDNESS AND RESPONSE, Waiver or Modification of Requirements Under Section 1135 of the Social Security Act (Mar. 13, 2020), <https://www.phe.gov/emergency/news/healthactions/section1135/Pages/covid19-13March20.aspx>.

[16] DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR MEDICARE & MEDICAID SERVS., Additional Emergency and Disaster-Related Policies and Procedures That May Be Implemented Only With a § 1135 Waiver (Mar. 15, 2019), <https://www.cms.gov/About-CMS/Agency-Information/Emergency/downloads/MedicareFFS-EmergencyQsAs1135Waiver.pdf>.

[17] DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR MEDICARE & MEDICAID SERVS., Medicaid.gov, Federal Disaster Resources, <https://www.medicaid.gov/state-resource-center/disaster-response-toolkit/federal-disaster-resources/index.html> (last visited on March 25, 2020) (State for which waivers have been granted include: Florida, Washington, Illinois, Louisiana, Mississippi, North Carolina, Virginia, Arizona, New Jersey, New Mexico, New Hampshire, California, Alabama, Oklahoma, South Dakota, Oregon, Missouri, Kentucky, Kansas, Rhode Island, Indiana, and Iowa).

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