501(c)(4) Organizations and Campaign Activity: Analysis Under Tax and Campaign Finance Laws

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Summary

During the 2008 election cycle, the campaign activities of § 501(c)(4) social welfare organizations were in the news as they reportedly spent millions of dollars in attempts to influence elections. These groups were active in all types of elections, from the presidential primaries, to congressional races, to elections for county board commissioners. Some of the groups were alleged to have violated both tax and campaign finance laws.

Section 501(c)(4) organizations are permitted to engage in campaign activity under the Internal Revenue Code so long as their primary activity is promoting social welfare. While they may participate in campaign activity under the Code, they must abide by applicable restrictions in the Federal Election Campaign Act (FECA). This report discusses the ability of these organizations to engage in campaign activity under the tax and campaign finance laws.

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Introduction

The non-profit social welfare organizations described in § 501(c)(4) of the Internal Revenue Code (I.R.C.)[1] qualify for tax-exempt status.[2] These organizations must be "primarily engaged in promoting in some way the common good and general welfare of the people of the community."[3]

During the 2008 election cycle, the campaign activities of § 501(c)(4) organizations were the focus of public attention. These groups reportedly spent millions of dollars[4] in attempting to influence federal, state, and local races.[5] Some of these groups were alleged to have violated the law.[6] Additionally, a recent ruling by a federal district court that held the IRS had improperly revoked the Democratic Leadership Council's § 501(c)(4) status brought further attention to the issue.[7] During the middle of the election cycle, a tax law specialist at the IRS reportedly indicated that the agency is planning to take a closer look at the campaign activities of § 501(c)(4) organizations.[8]

There is often confusion about the role that § 501(c)(4) groups can lawfully play in elections. It stems in part from the fact that they are treated differently under the tax laws than two other types of tax-exempt organizations—§ 501(c)(3) charitable organizations, which are strictly prohibited from engaging in any campaign activity,[9] and § 527 political organizations, which must file

[1] The Internal Revenue Code is in Title 26 of the United States Code.

[2] *See* I.R.C. § 501(a). I.R.C. § 501(c)(4) describes, among other entities, "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare" with "no part of the net earnings of such entity inure[ing] to the benefit of any private shareholder or individual."

[3] Treas. Reg. § 1.501(c)(4)-1(a)(2).

[4] The Campaign Finance Institute estimated that § 501(c) organizations, including § 501(c)(4) groups, would spend approximately $200 million attempting to influence federal elections in 2008, which the Institute described as "a big step up from the last two elections." Campaign Finance Institute, *Outside Soft Money Groups Approaching $400 Million in Targeted Spending in 2008 Election*, Oct. 31, 2008, available at http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=214.

[5] *See, e.g.*, Matthew Mosk and Chris Cillizza, *Group With Swift Boat Alumni Readies Ads Attacking Obama*, WASH. POST, Sept. 14, 2008 (reporting the plans of the American Issues Project to fund television ads opposing Barack Obama); Michael Riley, *Covert Ads Pour into State; Negative Political Spots Funded by Groups that Needn't Reveal Donors*, DENVER POST, Aug. 22, 2008 (reporting activity by § 501(c)(4) groups in the U.S. Senate race in Colorado); John Solomon and Matthew Mosk, *Nonprofits Become A Force in Primaries; Use for Donations Is Under Scrutiny*; WASH. POST, Dec. 5, 2007 (discussing the role of § 501(c)(4) groups in attempting to influence the Republican and Democratic presidential primaries); Nancy Loffholm, *Swing Counties Garfield Gusher of Negative Energy on W. Slope: Controversial Ads by Shadowy Drilling Interests Turn Politics in Garfield County on its Ear*, Denver Post, Oct. 30, 2008 (reporting on the activities of several outside groups, including a § 501(c)(4) organization, in a race for county board commissioners).

[6] *See, e.g.*, Letter from Robert F. Bauer, General Counsel, Obama for America to John C. Keeney, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, dated Aug. 21, 2008, available at http://www.politico.com/static/PPM106_keeney.html (alleging that the American Issues Project, a group that ran ads against then-candidate Barack Obama, was violating the tax laws because it did not qualify for § 501(c)(4) status due to its substantial campaign activities and the campaign finance laws after it failed to register as a political committee).

[7] Democratic Leadership Council v. United States, 542 F. Supp. 2d 63 (D.D.C. 2008).

[8] *See* Diane Freda, *IRS Considering Project to Examine Political Activity of 501(c)(4) Groups*, BNA DAILY TAX REPORT, May 13, 2008.

[9] For more information on the § 501(c)(3) prohibition, *see* CRS Report R40141, *501(c)(3) Organizations and Campaign Activity: Analysis Under Tax and Campaign Finance Laws*, by Erika Lunder and L. Paige Whitaker.

periodic, detailed reports regarding their contributors and expenditures. This report examines the ability of § 501(c)(4) organizations to participate in campaign activity under both the tax and campaign finance laws.

Tax Law

The tax laws do not prohibit § 501(c)(4) social welfare organizations from engaging in campaign activity.[10] However, a Treasury regulation states that "[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office."[11] Therefore, because an organization's primary activity must be promoting social welfare, campaign activity (and any other activities that do not further an exempt purpose) cannot be the organization's primary activity.[12]

The tax code and regulations do not provide much insight into what constitutes campaign activity. Nearly identical campaign intervention language is found in I.R.C.§ 501(c)(3),[13] and guidance interpreting that language is helpful in the § 501(c)(4) context. However, in both cases, there is still a grey area where it can be difficult to determine whether a political activity has crossed the line into campaign intervention. This is because there are many political activities (e.g., issue advocacy, distributing voter guides, and conducting get-out-the-vote drives) that are not considered to be campaign intervention so long as they do not show a bias towards or against a candidate. The line between campaign activity and these other political activities can be faint since biases can be subtle. Whether an activity is campaign intervention will depend on the facts and circumstances of each case.

The tax code and regulations also do not address how to determine whether a § 501(c)(4) organization's campaign activity is its primary activity.[14] There are two basic issues: (1) what is the threshold for determining whether an activity is the organization's primary activity and (2) how are the organization's activities to be measured. With respect to the first issue, some have suggested that primary simply means more than 50%,[15] while others have called for a more stringent standard.[16] The second issue raises the question of what factors should be included in

[10] *Compare* I.R.C. § 501(c)(4) (containing no statement prohibiting the campaign activities of the organizations described therein), *with* I.R.C. § 501(c)(3) (prohibiting the charitable organizations described therein from "participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.").

[11] Treas. Reg. § 1.501(c)(4)-1(a)(2).

[12] *See* Rev. Rul. 81-95, 1981-1 C.B. 332 (ruling that lawful participation in campaign activity would not affect the § 501(c)(4) status of an organization whose primary activity was promoting social welfare); Rev. Rul. 67-368; 1967-2 C.B. 194 (ruling that an organization whose primary activity was rating candidates using non-partisan criteria did not qualify for § 501(c)(4) status).

[13] *See* I.R.C. § 501(c)(3) (prohibiting the charitable organizations described therein from "participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.").

[14] Because of these ambiguities, the argument has been made that the campaign intervention standard for § 501(c)(4) organizations is unconstitutionally vague. *See Comments of the Individual Members of the ABA Exempt Organizations Committee's Task Force on Section 501(c)(4) and Politics* (May 25, 2004), at 35-37 [hereinafter *Task Force Comments*], available at http://www.abanet.org/tax/pubpolicy/2004/040525exo.pdf.

[15] *See id.* at 39 ("Many practitioners believe that 'less than primary' means less than 50% of an organization's expenditures in a year.").

[16] *See id.* at 44-51 (proposing a bright-line safe harbor so that an organization would not lose its § 501(c)(4) status due (continued...)

the analysis. For example, campaign activity could be measured solely by expenditures[17] and other quantitative factors (e.g., the number of volunteer hours spent on campaign activity), or an attempt could be made to examine the organization's campaigning in the broad context of its purpose and activities (e.g., by looking at the importance of campaigning to the organization's tax-exempt purpose).[18]

Serving Partisan Interests

Because an organization must be "primarily engaged in promoting in some way the common good and general welfare of the people of the community," it cannot qualify for § 501(c)(4) status if it primarily serves a private benefit. Thus, an organization that primarily benefits partisan interests could jeopardize its § 501(c)(4) status. This was the issue in a recent, highly publicized case, *Democratic Leadership Council v. United States*, although the court did not ultimately decide the case on its merits.[19] The case dealt with the IRS's retroactive revocation of the DLC's § 501(c)(4) status after the agency determined that the group had impermissibly benefitted private interests, specifically Democratic elected officials. The court ruled that the revocation was improper based on its determination that a Treasury regulation only permitted retroactive revocation under certain circumstances (e.g., if the organization had omitted a material fact on its application for tax-exempt status), none of which were present in the case. The court did not determine whether the DLC qualified for § 501(c)(4) status and noted that the IRS was not barred from prospectively revoking a group's tax-exempt status. The government recently dropped its appeal of the decision.[20]

Tax on Political Expenditures

Even though § 501(c)(4) organizations may engage in campaign activity, they are subject to tax if they make an expenditure for a § 527 "exempt function."[21] "Exempt function" is defined as "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors.... "[22] The organization is taxed at the highest corporate rate on the lesser of its net investment income or its total amount of "exempt function"

(...continued)

to excessive political activities so long as its political activity expenditures did not exceed 40% of its total program expenditures; in the absence of a safe harbor, the commentators suggested using the 40% rule to create a rebuttable presumption that an organization qualified for § 501(c)(4) status and was not a § 527 political organization); Miriam Galston, *Vision Service Plan v. U.S.: Implications for Campaign Activities of 501(c)(4)s*, 53 EXEMPT ORG. TAX REV. 165 (2006) (advocating for a standard that requires a § 501(c)(4) organization's campaign activity, along with any other non-exempt purpose activities, be insubstantial).

[17] *See Task Force Comments, supra* note 14, at 43-51 (suggesting that political expenditures be the sole measure).

[18] *See, e.g.*, Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 855-56 (10th Cir. 1972)(rejecting a bright-line expenditure test for determining whether a § 501(c)(3) organization's lobbying was "no substantial part" of its activities and instead examining the extent of its lobbying in relation to its "objectives and circumstances").

[19] 542 F. Supp. 2d 63 (D.D.C. 2008).

[20] *See* Democratic Leadership Council Inc. v. United States, No. 08-5193 (D.C. Cir. Dec. 16, 2008) (order dismissing appeal).

[21] I.R.C. § 527(f).

[22] I.R.C. § 527(e)(2).

expenditures.[23] Whether an expenditure is for a § 527 exempt function depends on the facts and circumstances of each case.

Section 501(c)(4) organizations may lawfully avoid the tax by setting up a separate segregated fund under § 527(f)(3) (e.g., a political action committee or PAC) to conduct the taxable political activities. Thus, the tax laws encourage § 501(c)(4) organizations to set up these funds to conduct their campaign activities. The fund will be treated as a separate § 527 political organization and be subject to applicable tax and campaign finance laws.[24]

Gift Tax

It is not entirely clear whether contributions to § 501(c)(4) organizations are subject to the federal gift tax, which is imposed on an individual's lifetime gifts of property.[25] If the tax does apply, it could provide a disincentive for individuals to make donations to these organizations in excess of the annual exclusion amount (which is $13,000 per donee for 2009).[26]

There is no statutory provision that exempts contributions to § 501(c)(4) organizations from the gift tax.[27] The IRS takes the position that donations to § 501(c)(4) organizations are subject to the gift tax,[28] although it not clear the extent to which the agency enforces it.[29] Courts have upheld the imposition of the gift tax on donations to social welfare organizations.[30] It has been suggested that applying the gift tax to donations made to advocacy organizations could violate the donor's First Amendment rights and raise equal protection concerns due to the favorable treatment afforded donations made to other types of tax-exempt organizations.[31]

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[23] I.R.C. § 527(f).

[24] For information on § 527 organizations, *see* CRS Report RS22895, *527 Groups and Campaign Activity: Analysis Under Campaign Finance and Tax Laws*, by L. Paige Whitaker and Erika Lunder.

[25] I.R.C. § 2501. Donors are permitted to give up to $1,000,000 in tax-free gifts during their lifetime, although this may have estate tax consequences. For more information on the gift tax, *see* CRS Report 95-416, *Federal Estate, Gift, and Generation-Skipping Taxes: A Description of Current Law*, by John R. Luckey.

[26] I.R.C. § 2503(b). The statutory exclusion amount is $10,000, adjusted for inflation. For 2009, the amount is $13,000. *See* Rev. Proc. 2008-66, 2008-45 I.R.B. 1107.

[27] There are provisions addressing the gift tax treatment of donations to other types of tax-exempt organizations. *See* I.R.C. § 2501(a)(4) (excluding donations to § 527 political organizations from the gift tax); I.R.C. § 2522 (providing a deduction from taxable gifts for qualifying donations to charitable organizations, fraternal societies, and veterans organizations).

[28] *See* Rev. Rul. 82-216, 1982-2 C.B. 220 ("The Service continues to maintain that gratuitous transfers to persons other than [§ 527 political organizations] are subject to the gift tax absent any specific statute to the contrary, even though the transfers may be motivated by a desire to advance the donor's own social, political or charitable goals.").

[29] *See Task Force Comments*, *supra* note 14, at 13. ("There have been no public indications of IRS enforcement of gift tax on donations to § 501(c)(4) entities for at least a decade, even in the obvious cases where individual donors have made very large, publicly disclosed contributions to § 501(c)(4) organizations, such as ballot measure committees.").

[30] *See* Estate of Blaine v. Comm'r, 22 T.C. 1195 (1954) (holding that contributions to a social welfare organization did not qualify for a gift tax deduction because the organization was not exclusively organized and operated for an educational purpose); Dupont v. United States, 97 F. Supp. 944 (D. Del. 1951) (holding that a donation to the National Economic Council was a gift for purposes of the gift tax); Faulkner v. Comm'r, 41 B.T.A. 875 (1940) (holding that a contribution to the Birth Control League of Massachusetts did not qualify for the gift tax deduction available to charitable organizations).

[31] *See* Barbara K. Rhomberg, *Constitutional Issues Cloud the Gift Taxation of Section 501(c)(4) Contributions*, 15 TAX'N EXEMPTS 164 (2004).

Reporting Requirements

Tax-exempt organizations, including § 501(c)(4) organizations, are generally required to file an annual information return (Form 990) with the IRS.[32] Historically, organizations have not been required to provide meaningful information regarding their campaign activities on the form. However, the IRS recently made significant revisions to the form in order to encourage tax compliance, accountability, and transparency.[33] One of the changes is that filing organizations are now required to report information regarding their political activities on the new Schedule C.[34]

Specifically, § 501(c)(4) organizations filing the Form 990 must (1) describe their direct and indirect political campaign activities; (2) report the amount spent conducting campaign activities and the number of volunteer hours used to conduct those activities; (3) report the amount directly spent for § 527 exempt function activities; (4) report the amount of funds contributed to other organizations for § 527 exempt function activities; (5) report whether a Form 1120-POL (the tax return filed by organizations owing the § 527 tax) was filed for the year; and (6) report the name, address, and employer identification number of every § 527 political organization to which a payment was made and the amount of such payments, and indicate whether the amounts were paid from internal funds or were contributions received and directly transferred to a separate political organization.[35]

The Form 990 redesign did not change the reporting requirements regarding contributors. Section 501(c)(4) organizations will continue to report the names and addresses of donors who contributed at least $5,000 during the year on the Schedule B of the Form 990. These are all contributors, not just those who gave money for the organization's political activities.

In general, the organization and the IRS must make the Form 990 publically available.[36] However, any identifying information of the contributors listed on Schedule B is not subject to disclosure.

If the organization has established a separate segregated fund under § 527(f)(3), then that entity is subject to separate reporting requirements. It will generally be required to periodically disclose detailed information on its contributors (including their identities) and expenditures to either the Federal Election Commission or the Internal Revenue Service,[37] depending on whether it is a

[32] *See* I.R.C. § 6033.

[33] The redesigned Form 990 and instructions are available on the IRS website at http://www.irs.gov/charities/article/0,,id=185561,00.html. Small organizations file using the Form 990-EZ.

[34] The Schedule C is available at http://www.irs.gov/pub/irs-pdf/f990sc.pdf.

[35] The schedule also has a place for § 501(c)(4) organizations to report information regarding member dues and lobbying and political expenditures. Prior to the Form 990 redesign, this information was reported on the form itself. It is reported because an organization's lobbying and political activities may affect the deductibility of member dues. *See* I.R.C. § 162(e)(3). In general, the organization must either notify its members of the amount that is nondeductible or pay a tax on its expenditures. *See* I.R.C. § 6033(e).

[36] I.R.C. § 6104(b) and (d).

[37] For more information on these reporting requirements, *see* CRS Report RS20918, *527 Organizations and Campaign Activity: Timing of Reporting Requirements under Tax and Campaign Finance Laws*, by Erika Lunder and L. Paige Whitaker ; and CRS Report RS21716, *Political Organizations Under Section 527 of the Internal Revenue Code*, by Erika Lunder.

political committee for purposes of the Federal Election Campaign Act (discussed in the "Campaign Finance" section, below).[38] These reports must be publicly disclosed.

Campaign Finance Law

The Federal Election Campaign Act (FECA),[39] which regulates the raising and spending of campaign funds, is separate and distinct from the tax code. FECA prohibits corporations from using treasury funds to make contributions and expenditures in connection with federal elections,[40] but does not prohibit unincorporated organizations from making such contributions and expenditures. FECA also requires regular filing of disclosure reports by candidate and political committees of contributions[41] and expenditures, and by persons[42] making independent expenditures[43] that aggregate more than $250 in a calendar year.[44] Under FECA, the term "political committee" is defined to include any committee, club, association, or other group of persons that receives contributions or makes expenditures aggregating in excess of $1,000 during a calendar year.[45]

As a result of a 2002 amendment to FECA,[46] corporations—including tax-exempt corporations—are further prohibited from funding "electioneering communications," which are defined as broadcast communications made within 60 days of a general election or 30 days of a primary that "refer" to a federal office candidate.[47] Federal Election Commission (FEC) regulations provide an exception to this prohibition for "qualified nonprofit corporations."[48] A "qualified nonprofit corporation" is a § 501(c)(4) corporation meeting the following criteria: (1) its only express purpose is the promotion of political ideas;[49] (2) it cannot engage in business activities; (3) it has no shareholders or other persons with an ownership interest or claim on the organization's assets

[38] There has been significant controversy over the extent to which some § 527 political organizations are political committees for purposes of FECA. For more information, *see* CRS Report RS22895, *527 Groups and Campaign Activity: Analysis Under Campaign Finance and Tax Laws*, by L. Paige Whitaker and Erika Lunder.

[39] 2 U.S.C. § 431 *et seq*.

[40] 2 U.S.C. § 441b(a). FECA provides three exemptions to this prohibition: corporations may make expenditures (1) to communicate with stockholders and executive or administrative personnel and their families; (2) to engage in nonpartisan voter registration or get-out-the-vote campaigns aimed at stockholders and executive or administrative personnel and their families; and (3) to establish, administer, and solicit contributions to a separate segregated fund for political purposes (also known as a political action committee or PAC). 2 U.S.C. § 441b(b)(2).

[41] FECA generally defines "contribution" to include anything of value. 2 U.S.C. § 431(8)(A),(B).

[42] FECA defines "person" to include an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but does not include the federal government. 2 U.S.C. § 431(11).

[43] FECA defines "independent expenditure" to mean an expenditure by a person that expressly advocates for the election or defeat of a clearly identified candidate and that is not made in cooperation with or at the suggestion of such candidate. 2 U.S.C. § 431(17).

[44] 2 U.S.C. § 434 (a), (c).

[45] 2 U.S.C. § 431(4)(A).

[46] P.L. 107-155, the "Bipartisan Campaign Reform Act of 2002" (BCRA).

[47] *See* 2 U.S.C. §§ 441b(b)(2), 434(f)(3)(A).

[48] 11 C.F.R. § 114.10(d)(2).

[49] As discussed above in the "Tax Law" section, the primary activity of a § 501(c)(4) organization must be the promotion of social welfare and cannot be campaign activity. Thus, an organization whose sole express purpose is the promotion of political ideas must be careful to ensure that such promotion encompasses more than campaign-related activity in order to meet the tax code's "promotion of social welfare" requirement.

or who receive any benefit from the corporation that is a disincentive for them to disassociate themselves from the corporation's position on a political issue; and (4) it was not established by and does not accept donations from business corporations.[50] The FEC regulatory criteria for "qualified nonprofit corporations" is based on the U.S. Supreme Court ruling in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*,[51] holding that the FECA prohibition on corporations using their corporate treasury funds to make contributions and expenditures in connection with federal elections could not constitutionally be applied to certain non-profit corporations. According to the *MCFL* Court, certain nonprofit, nonstock corporations are permitted to spend treasury funds to make contributions and expenditures in connection with federal elections if (1) the corporation is formed for the purpose of promoting political ideas and does not engage in business activities; (2) the corporation has no shareholders or other affiliates with an economic incentive to remain associated with the corporation when they disagree with its political activities; and (3) the corporation is not established by a business corporation and does not accept contributions from business corporations.[52]

Also of relevance to tax-exempt corporations, in *McConnell v. FEC*,[53] the Supreme Court upheld the constitutionality of FECA's prohibition on corporate treasury funds being spent for electioneering communications. More recently, however, the Court in *Wisconsin Right to Life, Inc. v. FEC (WRTL II)*[54] found that this prohibition was unconstitutional as applied to ads that Wisconsin Right to Life, Inc., sought to run. While not expressly overruling its holding in *McConnell v. FEC*, which had upheld the provision against a First Amendment facial challenge, the Court limited the law's application. Specifically, it ruled that advertisements that may reasonably be interpreted as something other than an appeal to vote for or against a specific candidate cannot be regulated.

Conclusion

The tax-exempt social welfare organizations described in I.R.C.§ 501(c)(4) may engage in campaign activity under the tax laws so long as it is not their primary activity. While they are permitted to engage in such activity and maintain their tax-exempt status, these organizations are subject to tax if they make certain political expenditures.

Section 501(c)(4) organizations must also abide by federal campaign finance law. If a § 501(c)(4) organization is incorporated—unless it meets the FECA regulatory definition of a "qualified nonprofit corporation"—it would be prohibited from using its treasury funds to make contributions and expenditures in federal election. Section 501(c)(4) organizations would also be prohibited from running "electioneering communications," a prohibition that the Supreme Court has ruled does not apply to advertisements that may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate. If the organization is unincorporated

[50] 11 C.F.R. § 114.10(c).

[51] 479 U.S. 238 (1986).

[52] *Id*. at 264.

[53] 540 U.S. 93, 191-94 (2003). For further discussion regarding this decision, *see* CRS Report RL32245, *Campaign Finance Law: A Legal Analysis of the Supreme Court Ruling in McConnell v. FEC*, by L. Paige Whitaker.

[54] 127 U.S. 2652 (2007). For further discussion regarding this decision, *see* CRS Report RS22687, *The Constitutionality of Regulating Political Advertisements: An Analysis of Federal Election Commission v. Wisconsin Right to Life, Inc.*, by L. Paige Whitaker.

and meets the FECA definition of a "political committee" or makes independent expenditures aggregating more than $250 in a calendar year, FECA reporting and disclosure requirements would apply.

Section 501(c)(4) organizations are permitted to establish a separate segregated fund (e.g., a PAC). It is treated as a separate entity and must abide by the tax and campaign finance laws, which include reporting and disclosure requirements.

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