GIR INSIGHT

AMERICAS INVESTIGATIONS REVIEW 2020

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Contents

Cross-border overviews

Enforcer overviews

Country chapters

Preface

Welcome to the *Americas Investigations Review 2020*, a *Global Investigations Review* special report. *Global Investigations Review* is the online home for all those who specialise in investigating and resolving suspected corporate wrongdoing, telling them all they need to know about everything that matters.

Throughout the year, the *GIR* editorial team delivers daily news, surveys and features; organises the liveliest events ('GIR Live'); and provides our readers with innovative tools and know-how products. In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments than our journalistic output is able.

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If you have any suggestions for future editions, or want to take part in this annual project, we would love to hear from you.

Please write to insight@globalarbitrationreview.com.

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Extraterritoriality and US Corporate Enforcement

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The past decade has witnessed an increase in the enforcement of US laws against corporate conduct that largely takes place overseas. These 'so-called cross-border prosecutions,' as the Second Circuit remarked in 2017, 'have become more common.'[1] Although it is not clear what accounts for this trend, the Department of Justice (DOJ) has both acknowledged it and suggested that it reflects the 'global expansion of US and foreign companies and the growing interdependency of our economy and those of nations around the world.'[2]

Cross-border prosecutions can create tension between the interests of US law enforcement and the presumption that, without an express extraterritorial reach, US laws apply to domestic, not foreign, conduct. It is a 'longstanding principle of American law' that in the absence of a clear intent to the contrary, the legislation of Congress 'is meant to apply only within the territorial jurisdiction of the United States.'[3] The presumption against extraterritoriality is critical to protecting against 'unintended clashes between our laws and those of other nations which

1 *United States v Conti*, 864 F3d 63, 89 (2d Cir 2017).

2 Leslie R Caldwell, Assistant Attorney General for the Criminal Division, US Department of Justice, Remarks at the Securities Enforcement Forum West Conference (12 May 2016), https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-securities-enforcement. See also Dan Kahn, Chief, Foreign Corrupt Practices Act Unit, Fraud Section, Criminal Division, 'Responding to the Upward Trend of Multijurisdictional Cases: Problems and Solutions', 66 *Department of Justice Journal of Federal Law and Practice* No. 5, 2018, p 125 ('As the economy has become increasingly global, and as more companies continue to expand their footprint across borders, white collar crime likewise has become more frequently multinational.').

3 *Morrison v Nat'l Austl Bank Ltd*, 561 US 247, 255 (2010). See also *RJR Nabisco Inc v European Cmty*, 136 S Ct 2090, 2100, 195 L Ed. 2d 476, 491-92 (2016) ('It is a basic premise of our legal system that, in general, 'United States law governs domestically but does not rule the world.'') (quoting *Microsoft Corp v AT&T Corp*, 550 US 437, 454 (2007)).

could result in international discord.'[4] Given the importance of this interest, 'Congress must give an affirmative suggestion' of extraterritorial application 'in the statutory text.'[5] 'When a statute gives no clear indication of an extraterritorial application, it has none.'[6]

The extraterritoriality analysis framework

The Supreme Court in *RJR Nabisco* outlined a two-step framework to guide lower courts' extraterritoriality analysis. It first asks 'whether the statute gives a clear, affirmative indication that it applies extraterritorially,' thus rebutting the presumption against extraterritoriality.[7] If the answer is 'no', the second step seeks to 'determine whether the case involves a domestic application of the statute.'[8] This determination is reached 'by looking to the statute's 'focus.'[9] Thus:

> [i]*f the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.*[10]

Recognising the 'commonsense notion that Congress generally legislates with domestic concerns in mind,'[11] courts have shown a readiness to scrutinise the applicable statutory scheme and have dismissed prosecutions where the conduct was beyond the statute's reach.

In *United States v Sidorenko*, for example, the district court considered a challenge to the extraterritoriality of the wire fraud and domestic bribery statutes.[12] The three defendants in that case were foreign nationals residing outside the United States. One was employed by the International Civil Aviation Organization (ICAO), a United Nations specialised agency headquartered in Canada that, during the relevant time period, received contributions from the United States (a member of ICAO) in excess of US$10,000 per year. The other two defendants were alleged to have given money and other things of value to the ICAO employee in exchange for using his position at ICAO to benefit their organisation (a Ukrainian conglomerate

4 *Kiobel v Royal Dutch Petro Co*, 569 US 108 (2013) (quoting *EEOC v Arabian American Oil Co* (*Aramco*), 499 US 244, 248 (1991)).

5 *Small v United States*, 544 US 385, 388-89 (2005).

6 *Morrison*, 561 US at 255 ('[U]nless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.') (quoting Aramco, 499 US at 248). See also *RJR Nabisco*, 136 S Ct at 2100, 195 L Ed. at 492 ('The question is not whether we think "Congress would have wanted" a statute to apply to foreign conduct "if it had thought of the situation before the court," but whether Congress has affirmatively and unmistakably instructed that the statute will do so.') (citations omitted).

7 *RJR Nabisco*, 136 S Ct at 2101, 195 L Ed. at 493.

8 Id.

9 Id.

10 Id.

11 *Smith v United States*, 507 US 197, 204 No. 5 (1993).

12 *United States v Sidorenko*, 102 F Supp 3d 1124 (ND Ca 2015).

of companies) as well as them personally. The only nexus to the United States was the partial funding received by the ICAO from the United States. The court dismissed the indictment on grounds that the statutes charged did not apply extraterritorially. While acknowledging that the United States had 'some interest in eradicating bribery, mismanagement and petty thuggery the world over,' the court described the government's approach as creating a limitless policing of 'foreign individuals, in foreign government or in foreign organisations,' so long as they 'receive[d] at least $10,000 of [US] federal funding.'[13]

More recently, the Second Circuit in *United States v Hoskins* affirmed the dismissal of an FCPA bribery conspiracy charge against Hoskins, a non-US citizen employed by and assigned to work at non-US subsidiaries of a French company, on extraterritoriality grounds. According to the government, several defendants, including Hoskins, were 'part of a scheme to bribe officials in Indonesia so that their company could secure a $118 million contract from the Indonesian government.'[14] The scheme centred on the French company's American subsidiary, and, while Hoskins had 'repeatedly e-mailed and called . . . US-based conspirators' regarding the scheme "while they were in the United States,"' Hoskins himself never travelled to the US when 'the bribery scheme was ongoing.'[15]

Hoskins successfully moved the lower court to dismiss the FCPA conspiracy count on the basis that the statute 'prescribes liability only for narrowly-circumscribed groups of people' and that 'the government could not circumvent those limitations by charging him with conspiring to violate the FCPA, or aiding and abetting a violation of it, if he did not fit into one of the statute's categories of defendants.'[16] Considering the issue on appeal, the Second Circuit observed that the clearly delineated extraterritorial application of the FCPA's anti-bribery provisions – as reflected in the text, structure and legislative history of the statute – did not extend to an individual such as Hoskins: a 'foreign national who never set foot in the United States or worked for an American company during the alleged [bribery] scheme.'[17] It thus affirmed the district court's dismissal, noting that 'when a statute includes some extraterritorial application, that application is limited by the statute's terms.'[18]

Fifth Amendment due process rights and extraterritoriality

In connection with the extraterritoriality analysis, courts also consider a defendant's constitutional right to due process. Under the approach taken by the Second and Ninth Circuits, due process requires that there be a 'sufficient nexus between the defendant and the United

13 Id at 1132.

14 *United States v Hoskins*, 902 F3d 69, 72 (2d Cir 2018).

15 Id.

16 Id at 73.

17 Id at 76.

18 Id at 96 (citing *RJR Nabisco*). The Second Circuit allowed the government's case to proceed to the extent that it was based on a theory that Hoskins acted as an 'agent' of the US subsidiary, a domestic concern, pursuant to 15 USC Section 78dd-2. See Id at 97-98.

States', so that application of the statute 'would not be arbitrary or fundamentally unfair.'[19] 'While the extraterritoriality inquiry addresses the reach of a statute, the nexus analysis considers the validity of the court's exercise of jurisdiction over the particular defendant.'[20] 'For non-citizens acting entirely abroad, a sufficient' – though not necessary – nexus has been held to exist 'when the aim of that activity is to cause harm inside the United States or to US citizens or interests.'[21]

Typically, the due process analysis follows the determination that a statute either applies extraterritorially or has no extraterritorial reach but has a permissible 'domestic' application in the case at hand.[22] For example, after determining that the wire fraud statute charged in the case had no extraterritorial reach but nevertheless involved a permissible domestic application,[23] the district court in *United States v Hayes* concluded that the criminal complaint alleged a nexus between the defendant and the United States 'sufficient to satisfy due process concerns.'[24] To this end, the court observed that the complaint detailed a conspiracy to 'manipulate the LIBOR for Yen to benefit [one defendant] at the expense of his counterparties, at least one of whom was in the United States', and indicated that a second defendant was aware that 'the Yen LIBOR was published in the United States, and . . . that such trades would likely have counterparties in the United States.'[25] The court also noted that the defendants had not made a showing that a prosecution under US law would be 'arbitrary or fundamentally unfair.'[26]

The court in *United States v Sidorenko* likewise found that the statutes at issue there did not apply extraterritorially. Without addressing whether they involved a permissible domestic application, however, the court concluded that enforcing them would violate the defendants' due process rights because of an insufficient nexus between the defendants and the United

19 *United States v Yousef*, 327 F3d 56, 111 (2d Cir 2003); see also *United States v Davis*, 905 F2d 245, 248-49 (9th Cir 1990). The First and Seventh Circuits have instead analysed due process under principles of international law. See, eg, *In re Hijazi*, 589 F3d 401, 412 (7th Cir 2009) (looking to the Restatement (Third) of Foreign Relations Law to assess adequacy of maintaining criminal proceeding against a defendant located abroad); *United States v Cardales*, 168 F3d 548, 553 (1st Cir 1999) (rejecting nexus test in favour of 'principles of international law' to analyse due process). Restatement (Third) of Foreign Relations Law provides at Section 402 that, subject to reasonableness and other requirements in Section 403, a state can prescribe law with respect to '(1) (a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory; (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and (3) certain conduct outside its territory by [non-nationals] that is directed against the security of the state or against a limited class of other state interests.'

20 *United States v Hayes*, 99 F Supp. 3d 409, 422 (SDNY 2015).

21 *United States v Al Kassar*, 660 F3d 108, 118 (2d Cir 2011).

22 See *United States v Epskamp*, 832 F3d 154, 168 (2d Cir 2016) (quoting *United States v Ali*, 718 F3d 929, 944 No. 7 (DC Cir 2013)).

23 *Hayes*, 99 F Supp 3d at 421 (finding permissible domestic application where '[t]he culpable conduct' had 'occurred in the United States,' ie, the 'co-conspirators purportedly caused the manipulated LIBOR to be published to servers in the United States and used United States wires to memorialize trades affected by that rate'). See also *United States v Gasperini*, 2017 US Dist LEXIS 84116, at *16 (EDNY 1 June 2017) (describing different ways courts 'discern the 'focus' of the wire fraud statute') (collecting cases).

24 *Hayes*, 99 F Supp 3d at 422.

25 Id at 422.

26 Id at 425.

States. As the court noted, the three defendants neither 'lived in, worked in, nor directed' any of their 'alleged conduct at the United States,' and two of them 'did not even work for ICAO',[27] the organisation that received money from the United States.

Due process considerations apply to civil as well as criminal enforcement matters. In *SEC v Straub*, for example, three individuals were civilly charged with violating both the anti-bribery and the accounting provisions of the FCPA.[28] All three, citizens and residents of Hungary, were officers of a company in Hungary that was publicly listed on a US exchange.[29] It was thus an 'issuer' subject to the FCPA. The three defendants did not raise a challenge based on extraterritoriality (as they plainly came within the statutes' reach).[30] They argued, however, that the court's assertion of jurisdiction over them violated their constitutional right to due process.[31]

The court described '[t]he due process test for personal jurisdiction' as having 'two related components: the 'minimum contacts inquiry' and the 'reasonableness inquiry'.[32] It first determined that the defendants had the requisite minimum contacts with the US (in fact, they conceded it).[33] To determine whether the reasonableness test had been met (ie, 'whether the assertion of personal jurisdiction would comport with fair play and substantial justice'), the court considered the defendants' US contacts in light of other relevant factors, including:

- 'the burden that the exercise of jurisdiction' would impose on the defendants;
- 'the interests of the forum state in adjudicating the case'; and
- 'the plaintiff's interest in obtaining convenient and effective relief.'[34]

The court noted that one 'who purposefully has directed his activities' towards the United States, as the defendants had done, 'must present a compelling case' in order to 'defeat jurisdiction'.[35] This stringent standard, together with the 'strong federal interest' in enforcing the securities laws and the absence of any compelling countervailing factors led the *Straub* court to conclude that the defendants had failed to present the 'rare' case where the reasonableness analysis would render the assertion of personal jurisdiction unconstitutional.[36]

27 *Sidorenko*, 102 F Supp 3d at 1132–33.

28 See *SEC v Straub*, No. 11 Civ 9645 (RJS), 2016 US Dist. LEXIS 136841 (SDNY 30 September 2016).

29 Id at *3.

30 See 15 USC. Section 78dd-1(a) (prohibitions in the statute apply to issuers, as well as their directors, officers and employees).

31 See *Straub*, 2016 US Dist. LEXIS 136841, at *20.

32 Id at *19 (citations omitted).

33 Id at *20.

34 Id at *25-26 (quoting *Licci ex rel Licci v Lebanese Canadian Bank, SAL*, 732 F3d 161, 170 (2d Cir 2013) (quoting *Burger King Corp v Rudzewicz*, 471 US 462, 476 (1985)).

35 Id at *27 (quoting *Burger King*, 471 US at 477).

36 Id at *29-33.

Extraterritoriality and the enforcement of the FCPA Books and Records Provision

As the cases described above illustrate, challenges based on extraterritoriality and related questions of due process are typically raised by individuals, as opposed to companies. Even these individual challenges have been quite limited in number, a fact that may reflect a broader reality recognised by the Second Circuit in *United States v Conti*: there simply are not as many corporate enforcement actions against non-US individuals as there are against non-US companies.[37] It is by now a truism that enforcement actions against companies are largely resolved out of court and, as a consequence, there is no appreciable opportunity for judicial review of unsettled legal questions that may arise.

One area of increasing enforcement against non-US companies involves the accounting provisions of the FCPA, which govern the books and records and internal controls of issuers.[38] According to one commentator, approximately half of FCPA corporate enforcement resolutions in the past decade have been based exclusively on the accounting provisions.[39] While this may be due to evidentiary challenges or extraterritoriality limitations inherent in the FCPA's anti-bribery provisions, the trend has evolved 'to a place where enforcement of the accounting provisions in the absence of any bribery, or threat of bribery, has taken center stage.'[40] These 'no bribery' FCPA enforcement matters, as they are colloquially known, are, like most corporate cases, settled without ever reaching a courtroom. They also involve few, if any, actions against individuals. Enforcement of the FCPA's books and records provision has thus given rise to a number of legal questions that remain unaddressed by the courts.

One such question is whether and to what extent the books and records component of the accounting provisions applies to the conduct of non-US persons that takes place outside of the United States and, more particularly, within a non-US subsidiary of an issuer. The books and records component requires issuers to 'make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.'[41] It further states that 'no person shall . . . knowingly falsify any [such] book, record or account,'[42] and provides for criminal liability for such knowing falsification.[43]

The government has for years pursued corporate FCPA resolutions on books and records grounds, based on conduct that took place entirely within a foreign corporate subsidiary and outside the United States. These cases have tended to involve allegedly improper payments made

37 *Conti*, 864 F3d at 89 No. 112 (2d Cir 2017) (contrasting the 'rise in non-prosecution agreements and deferred-prosecution agreements between the US and foreign entities for misconduct occurring abroad,' and contrasting it with the 'rise in individual prosecutions of foreign defendants,' which 'may not be as evident').

38 See 15 USC section 78m.

39 Karen E Woody, 'No Smoke and No Fire: The Rise of Internal Controls Absent Anti-Bribery Violations in FCPA Enforcement', 38 *Cardozo L Rev* 1727, 1733 (June 2017).

40 Id.

41 15 USC section 78m(b)(2)(A).

42 15 USC section 78m(b)(5)

43 See 15 USC section 78m(b)(4) ('No criminal liability shall be imposed for failing to comply with the requirements of' section 78m(b)(2) 'except as provided in' section 78m(b)(5)).

by non-US personnel that were in some manner improperly recorded in the foreign subsidiary's books, which were then consolidated with those of the US parent.[44] Increasingly, these enforcement actions have also relied on a 'causation' theory of liability. The causation theory appears to be based on SEC Rule 13b2-1, which provides that 'no person shall, directly or indirectly, falsify or cause to be falsified, any book, record, or account,' or, in criminal matters, on 18 USC section 2(b), which states that '[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.'[45] Liability under this theory extends to a foreign entity because it 'caused' inaccuracies in the US parent's books and records.[46]

The enforcement approach described above was illustrated in a recent DOJ resolution involving a guilty plea by a Brazilian subsidiary of Walmart Inc (Walmart Brazil) to a single count charging a books and records violation. The criminal information alleged that Walmart Brazil indirectly hired a third-party intermediary despite red flags indicating that the intermediary was a government employee and used the intermediary to obtain licences and permits in connection with the construction of two stores in Brazil.[47] The payments to the intermediary, totalling approximately US$527,000, were falsely recorded in Walmart Brazil's books as payments to construction companies.[48] These books were then consolidated into Walmart Inc's financial records. Thus, according to the information, Walmart Brazil knowingly and wilfully 'caused' Walmart Inc 'to maintain certain records, which did not, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of Walmart'.[49] No bribery was alleged and, as of the date the corporate resolution was announced, no individuals involved in the conduct had been charged.

44 See, eg, *In the Matter of Polycom* (December 2018); *United States v Panasonic Avionics Corporation*, 18-cr-00118 (RBW) (DDC 30 April 2018); *In the Matter of Orthofix International NV* (January 2017); *In the Matter of Key Energy Services, Inc* (August 2016); *United States v Latam Airlines Group, SA*, 16 Cr 60195 (DTKJ) (SD Fla July 2016); *In re BK Medical ApS* (June 2016).

45 17 CFR section 240.13b2-1 (emphasis added); 18 USC section 2(b) (emphasis added).

46 Pursuing a causation theory of liability may still require determining the extraterritorial reach of the books and records statute. See *Hoskins*, 902 F3d at 97 ('The government may not expand the extraterritorial reach of [a statute] by recourse to the conspiracy and complicity statutes.'); *Ali*, 718 F3d at 938 (the 'extraterritorial reach of an ancillary offence,' such as aiding and abetting or conspiracy, is 'coterminous with that of the underlying criminal statute'); *United States v Perlaza*, 439 F3d 1149 (9th Cir 2006) (secondary theories of liability do not 'vitiate the need to consider the underlying bases for jurisdiction'). But see *United States v Firtash*, No. 13 CR 515 (RRP), 2019 US Dist LEXIS 104585, *31-*41 (ND Ill. June 21, 2019) (interpreting Seventh Circuit precedent to conflict with *Hoskins* and require a conclusion that aiding and abetting can be charged without regard to extraterritoriality of underlying statute).

47 See *United States v Walmart Brasilia Sarl*, No. 19-cr-00192 (EDVA 20 June 2019).

48 Id.

49 Id.

The text of the FCPA's anti-bribery provisions defines with 'surgical precision' the extraterritorial conduct that comes within the statute's reach.[50] By contrast, neither the language nor the legislative history of the FCPA addresses the extraterritorial scope of the statute's accounting provisions.[51] This silence itself may raise a question about their reach.[52]

Given this silence, courts faced with a challenge would likely need to ascertain the extraterritoriality of the books and records component of the accounting provisions by analysing, under the *Morrison/RJR Nabisco* framework, the extent to which Congress intended it to apply to the overseas conduct of foreign individuals and entities. If the presumption against extraterritoriality cannot be rebutted, courts would need to ask whether conduct at a foreign subsidiary that touched on the United States solely through a post hoc consolidation of the subsidiary's books with the parent's would suffice for a domestic application of the statute. Courts would perhaps also need to assess whether pursuing a foreign subsidiary on a 'causation' theory of liability would be appropriate if the underlying statute lacked extraterritorial reach. Lastly, and depending on the conclusion with respect to extraterritoriality, a judicial analysis would likely consider whether subjecting a non-US person or subsidiary to a books and records prosecution in the United States based on overseas conduct would comport with constitutional due process rights.

Conclusion

As corporate cross-border enforcement actions continue to proliferate, greater clarity on open legal questions would serve to avoid the risk of over-reach and over-enforcement. Such clarity could perhaps be achieved if corporate enforcement actions more consistently began with a focus by law enforcement on the conduct of individuals, which necessarily forms the basis for any potential corporate liability. A natural consequence of focusing first on individual conduct would be increased legal challenges to address open interpretive issues such as those identified above in connection with the FCPA's accounting provisions. Judicial guidance would help ensure that enforcement of these provisions is undertaken in a manner that is consistent with Congressional intent and the Fifth Amendment's guarantee of due process and that reflects the proper exercise of US authority in an increasingly global economy. As the Second Circuit seemed to caution in *United States v Hoskins*, the FCPA should not be transformed 'into a law that purports to rule the world.'[53]

50 *Hoskins*, 902 F3d at 84. The legislative history further demonstrates that Congress intended to be explicit and precise in defining the extraterritorial reach of the FCPA. See *Hoskins*, 902 F3d at 89 (noting that '[t]he Conference Report emphasised that the statute drew deliberate lines regarding the liability of foreign persons, both corporate and natural').

51 See 15 USC sections 78m(b)(2) and 78m(b)(5).

52 See *Russello v United States*, 464 US 16, 23 (1983) ('Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.').

53 *Hoskins*, 902 F3d at 92.

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Virginia Chavez Romano's practice focuses on conducting internal investigations and representing companies and individuals before US federal and state enforcement agencies.

Having spent 14 years in various prosecutorial roles, Virginia offers clients a unique perspective in navigating government investigations and enforcement proceedings, particularly those involving multiple agencies and jurisdictions.

From 2002 to 2012, Virginia was an assistant United States attorney for the Southern District of New York, where she served as lead prosecutor in dozens of investigations and prosecutions, including many that involved international money laundering and complex financial crimes, and was a member of the Securities and Commodities Fraud Task Force.

From 2012 to 2014, Virginia served as deputy attorney general for the Economic Justice Division of the NY State Attorney General's Office, where she led high-profile civil securities fraud investigations and litigations. In 2014, Virginia joined the US Department of Justice in Washington, DC, serving as associate deputy attorney general and the executive director of President Obama's Financial Fraud Enforcement Task Force. During her time there, Virginia worked on a number of department-wide initiatives relating to corporate matters, including the department's September 2015 Policy on Individual Accountability in Corporate Wrongdoing (the Yates Memo).

Since joining White & Case in 2016, Virginia has concentrated on representing individual and corporate clients in connection with investigations brought by the Department of Justice, the Securities and Exchange Commission, the New York Attorney General's Office and the New York Department of Financial Services.

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