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https://www.sec.gov/rules/submitcomments.htm
File S7-10-22
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090
Attn: Elliott Staffin, Special Counsel
Division of Corporation Finance

RE: The Enhancement and Standardization of Climate-Related Disclosures for Investors: Proposed Rule; 87 Fed. Reg. 21344 (Apr. 11, 2022).

Dear Sir or Madam:

Introduction & Executive Summary **–** The Flexible Packaging Association (FPA) appreciates this opportunity to submit comments on the April 11, 2022, Notice of Proposed Rulemaking ("NPRM" or "Notice") to amend the SEC's 2010 Climate Guidelines.[1, 2] This rulemaking, if finalized, would require publicly-traded entities to include a significant amount of information related to a registrant's climate-related risks that are reasonably likely to have a material impact on its business, results of operations, or financial conditions. FPA's members include public companies (i.e., "registrants") as well as many privately-held entities, *all* of whom will be directly affected if the proposed rule is adopted, because of their role in a registrant's "value chain.[3]" FPA asserts that the Commission should withdraw the proposal related to submission of information on Scope 3 emissions because the SEC entirely failed to consider an important aspect that this portion of the proposed rule would have on small business registrants and privately held companies. This issue and several other concerns that FPA members have about the NPRM are discussed below.

The Flexible Packaging Association - The FPA was established in 1950 and is a national trade association comprised of manufacturers and suppliers of flexible packaging. The industry produces packaging for food, healthcare, and industrial products using coating and lamination of paper, film, foil, or any combination of these materials to manufacture bags, pouches, labels, liners, wraps, rollstock, and tamper-evident packaging for food and medicine. Flexible packaging, a $34.8 billion industry, employs roughly 79,000 people

[1] 2010 75 FR 6290 (Feb. 8, 2010).
[2] FPA also submitted comments on the Thirteen Questions (See*https://www.sec.gov/comments/climate-disclosure/cll12.htm:* Ram Singhal, Vice President Technology & Environmental Strategy, Flexible Packaging Association.
[3] Proposed Item 1500(t) states that "'value chain' would mean the upstream and downstream activities related to a registrant's operations."

in the United States and is the second largest and fastest growing segment of the U.S. packaging market.

DISCUSSION OF FPA'S CONCERNS

Background – FPA's members use catalytic and thermal oxidizers for the destruction of VOC emissions that are captured from enclosed buildings that house presses and laminators and, in some cases, parts washers and solvent recycling equipment. These federally-mandated VOC pollution controls release carbon dioxide (CO_2) into the atmosphere. All but one of FPA member's plants purchase electricity off the power grid, typically through purchase-sale agreements between a facility and the local power provider. Most, if not all, flexible packagers use common carriers for the delivery of feedstock to their facilities and product to customers, and none operate incinerators for the destruction of waste. All scraps and solid waste go to local landfills and/or are recycled onsite or offsite. Some sites do generate hazardous waste which goes to regulated facilities for management.

FPA members are not subject to the EPA Mandatory Greenhouse Gas (GHGs) Reporting Program (EPA GHGRP), pursuant to regulations at 40 C.F.R. Part 98. Therefore, GHG emissions data are not collected for individual plants unless the company belongs to an organization such as the Climate Disclosure Project, which may make such information public to the marketplace for publicly traded companies, but not for privately-held companies.

Despite being the fastest growing segment of the U.S. packaging industry, flexible packaging plants are small. For the most part, they are owned and operated by privately-held companies, who, ironically, would be subject to the proposed rule because they are part of the value chain of publicly-registered companies that would be directly subject to this rule if it is adopted. A few FPA members would be classified by the SEC as smaller reporting company[ies] (''SRC'').[4] While the proposed actions will have a significant cost impact on FPA's members that are registered entities if the proposal is adopted, because they will be required to assess and report expanded risk management and financial information (the veracity of which will be attested to by independent licensed third parties), FPA's privately-held members who manage and report climate information to registrants *also* will be immensely burdened, even though the Commission has not discussed the impacts of this rulemaking on them. We address this overarching burden in more specificity below as it relates to particular elements of the proposed regulation in the April 11, 2022, Notice of Proposed Rulemaking ("NPRM" or "Notice").

1. **The SEC should adopt for purposes of this rulemaking a narrower definition of "materiality" to curb ambiguity about the type of information that a reasonable investor would react to if it were omitted.**

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[4] The Commission's rules define a smaller reporting company to mean an issuer that is not an investment company, an asset-backed issuer, or a majority-owned subsidiary of a parent that is not a smaller reporting company and that: (1) Had a public float of less than $250 million; or (2) had annual revenues of less than $100 million and either: (i) No public float; or (ii) a public float of less than $700 million. *See* 17 CFR 229.10(f)(1), 230.405, and 17 CFR 240.12b–2. See 87 Fed. Reg. at 21346, FN 143.

Proposed Item 1502(a) would require a public company to disclose *"any climate-related risks reasonably likely to have a material impact"* on the company's business or consolidated financial statements in the short, medium, and long term. *Id.* at 21467*(emphasis added).* The NPRM states that "materiality" would be determined consistently with current MD&A requirements and explains that materiality is usually conceptualized as a percent or dollar amount (e.g., $100 million) by a company in relationship to the valuation of the registrant. *Id.* at 21,352. However, the Notice also explains that the regulatory definition of "material," 17 CFR 240.12b–2 "derives from U.S. Supreme Court decisions in *Basic Inc.* v. *Levinson,* 485 U.S. 224, 231, 232, and 240 (1988) (*holding that information is material if there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote or make an investment decision*) and *TSC Industries, Inc.* v. *Northway, Inc.,* 426 U. S. 438, 449 (1977) to further explain that an omitted fact is material if there is ''a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.''). *Id.* at 21,351, FN 209.

In the context of *this* rulemaking, and "climate-related" reporting, FPA respectfully suggests, for several reasons, that it may be more reasonable for the SEC to adopt a narrower standard of "materiality," based on a material omission in the "eyes of the investor," than the one it employs in other SEC reporting requirements. First, we believe that no investor puts the *same* value on climate sustainability when they invest, and few investors put a value on climate and sustainability above the company's monetary return on their investment, if any at all. (We accept that this could be said about many SEC disclosures, but as deliberations of the United Nations IPCC recently bore out, experts do not agree about much of anything related to climate during this historical moment.) This suggests that the likelihood that a reasonable investor would consider the information in question important in deciding how to vote or make an investment decision is based less on financial returns and more on an emotional response.

Second, even if an investor places a value on climate, they are far more likely *not* to invest in certain sectors of the economy at all (*e.g.*, a public energy company), rather than try to assess one public energy company's risk management against another company based on the requirements in the SEC's proposed rule (its Board's membership, company specifics regarding the management of climate risk, attestation to the accuracy of the information in a registration statement or annual report, etc.). (The exception is fund investors who are investing to drive the Board's or obtain leverage in proxy battles, who will fly-speck omissions for political and/or legal advantage.)

Unlike other issues that the Commission confronts regularly, climate is an evolving area of social responsibility that is reasonably unpredictable, despite the growing majority consensus that climate change is occurring and doing so more rapidly than anyone expected. Thus, attempting to standardize "materiality" at this time," appears to be a potential regulatory and legal snake-pit. In part, this is because we are bombarded currently by scientific information about climate change, and climate regulations are politically fraught. However, this is in no way an argument not to regulate. Instead, FPA asserts that it is an impossible task for a federal regulator to try to imagine and anticipate

all the facts -which if omitted would have a substantial likelihood of being viewed by the reasonable investor as having significantly altered the 'total mix' of information available.

A recent Columbia Business School study that compared the climate disclosures of major U.S. oil and gas companies concluded that there was a complete lack of comparability of the reports that were examined.[5] FPA recognizes that the instant rulemaking is intended in part to solve that problem, but trying to balance the concept that a reasonable investor needs information about climate risks—and monetized risks to the extent that is possible—suggests that the Commission, at the very least, should identify a rationale in its final action to explain why *TSC Industries, Inc.* v. *Northway, Inc.* should not be applied strictly to climate disclosures, and that instead, the Commission expects that compliance will be based on registrants completeness and good faith in disclosing information required by the regulation.[6]

FPA appreciates that the Commission must be cognizant of the Supreme Court's interpretation of the term "materiality." However, again, we submit that this regulation needs to lean into the factual and financial basis of material disclosures and curtail its own speculation about whether an investor would react negatively if an *omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available.* By leaning into the completeness of factual company information on climate risks, instead of an investor's potential reaction if the information is missing, the SEC rulemaking would (1) move the country forward on the disclosure of climate risks; (2) avoid application of a confusing legal standard in the face of scientific uncertainty to the extent possible; and, (3) possibly forestall investor lawsuits. Regarding the inevitable regulatory challenges that the SEC will face to this rule, it is well- served by already having compiled a rulemaking record of decisions that is replete with its own application *TSC Industries, Inc.* v. *Northway, Inc.,* concerning whether and how a reasonable investor would view each element of disclosure of climate risk that the Commission considered including or omitting.

Therefore, FPA suggests that it would be reasonable for the SEC to conclude as a logical outgrowth of this rulemaking that "materiality" has a different meaning in the context of a climate-related disclosure than how a reasonable investor would "receive" the inclusion or omission of climate-related information. In our view, attempting to decide during this

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[5] Columbia | SIPA Center on Global Energy Policy | Five Key Climate Metrics for the Oil and Gas Sector's Next Five Years (Last viewed on June 4, 2022)

[6] Although the Commission disputes the need to accommodate other definitions of "materiality," see *id. at 21444/col. 2,* climate experts also have asserted that other international bodies' definitions of "materiality" by adopting a two-pronged definition. For instance, **Eelco van der Enden, CEO of GRI**, suggests that, to meet the expectations of stakeholders, companies need to disclose sustainability information that relates to both financial value creation *and* their impacts on the environment and society. He asserts that "taken together, these two approaches are the basis for double materiality**:** It stands to reason that investor-focused sustainability reporting through the financial materiality lens alone will not allow for companies to be held accountable for their impacts on the environment and people. To suggest otherwise sows confusion and underlines why we need to be clear about the differences and synergies between the various initiatives; in particular, the approaches to materiality and the audiences they serve.t GRI, we view the ISSB's sustainability-related disclosure plans and Europe's incoming Corporate Sustainability Reporting Directive as complementary rather than competing. Alongside GRI's widely-adopted standards for sustainability impacts, there are strong opportunities for alignment between all three. *See The GRI Perspective* - **The materiality madness: why definitions matter** (*Feb. 22, 2022).*

rulemaking whether requiring certain information be publicly produced or analyzed to reduce the likelihood that a reasonable investor might view its omission as having significantly altered the 'total mix' of information available is fraught because it is nearly impossible, in turn rendering the rulemaking vulnerable to assertions that it is arbitrary and capricious.

2. **Item 1502 is generally acceptable, but FPA suggests that Item 1502(f) should be deleted from the final rule.**

   (a) FPA requirements in the proposed rule for a registrant to describe the proposed rule's short-term, mid-term, long-term climate risks, and/or physical and transitional climate risks are reasonable.

Item 1502(b) requires the registrant to "describe" in its registration and annual reports short-term, mid-term, long-term climate warming risks to the registrant's business operations (including the types and locations of its operations); products and services; suppliers and other parties in its value chain; activities to mitigate or adapt to climate-related risk, (e.g., adoption of new technologies/processes) expenditures for R&D, and any other significant changes and impacts. Item 1502(c) requires the registrant to discuss how these "actual and potential" impacts are considered as part of the registrant's business strategy, financial planning, and capital allocation, including how transitional climate risks from future federal and/or local regulations could affect the company's financials and how resources are being used by the company to mitigate these climate risks to the registrant's assets. FPA agrees that sharing this information and the company's assessment of climate-warming risks with the public is reasonable, although it will be resource-intensive to collect and interpret.

   (b) The SEC should *not* adopt a regulatory requirement for a public company's risk scenarios to be calibrated to global temperature increases.

Item 1502(f) also would require certain registrants to provide to the SEC and investors an analysis of scenarios that forecast the "resilience" of the company's business strategy in light of climate-related risks and impacts. While other commenters will no doubt focus on where this analysis is provided in the disclosure, FPA questions the SEC's wisdom in recommending temperature criteria as benchmarks to use in the registrant's scenario analysis at all.

The proposed rule defines "scenario analysis" as a process for identifying and assessing a potential range of outcomes of various possible future scenarios, in describing how climate-related risks "may impact a registrant's operations, business strategy, and consolidated financial statements." The definition in Item 1500(o), states "scenario analysis means a process for identifying and assessing a potential range of outcomes … under future climate scenarios, such as those that assume global temperature increases of 3 ^{0}C., 2 ^{0}C., and 1.5 ^{0}C. above pre-industrial levels. 87 Fed. Reg. at 21356-358. FPA urges the SEC to delete references to specific temperatures from this regulation, even if they were intended as a suggestion, or to replace them with other "benchmarks" such as short-term, long-term,

and/or transitional benefits and costs or even, "worse case, better case, and even "black swan scenarios" related to possible climate transition pathways," as one commenter suggested. *Id.* at 21,346-7.

Using degrees of temperature as the basis of scenario analysis is problematic. FPA members understand this because they use them for various environmental regulatory reasons to predict the range of impacts that increasing emissions from new or expanded plants will have to obtain Clean Air Act permits. These temperature benchmarks are random. Even the global temperature changes utilized by the United Nations' Intergovernmental Panel on Climate Change, which reflect an international scientific body's geopolitical "consensus" of data generated by fifty or more climate models (to gauge how the earth's atmosphere might warm based on how it has reacted thus far to increases in levels of CO2 emissions known to have been emitted into the atmosphere) are random because using modeling atmospheric chemistry to predict temperature increases depends on the accuracy of decades-old historical measurements of CO2 in the atmosphere (itself a supposition) and the validity of other geophysical, meteorological, and physical inputs, and finally the algorithms that a model currently applies to that data. Thus, international climate modelers in March 2022 warned in NATURE that the IPCC temperature criteria may project climate warming that is larger than supported by other evidence.[7] And warnings will change as researchers' understanding of atmospheric chemistry improves, so too will the models, and the consensus on temperature increases will change tying predicted ecosystem, health, and socio-economic impacts to these incremental temperature increases. Locking specific temperature increases into a regulatory requirement for an analysis is, therefore, short-sighted, even if the SEC only intended them to be a suggestion.

Several material factors also suggest that would be a bad idea. First, such an approach requires atmospheric modeling. Modeling is prohibitively expensive for many companies, especially as an annual or semiannual undertaking. Full atmospheric modeling using reasonably available databases is a major component of the budget for obtaining a Clean Air Act permit to build a new plant or expand an existing one and is central to FPA members' decision on whether to undertake either activity. Modeling involves a highly technical scientific analysis performed by a small cohort of atmospheric chemists and computer time that can take a week for a single run—even in this modern era. Second, most atmospheric models are proprietary. Linking temperature changes to financial impacts on specific industries, we imagine, would be even more complicated than the analyses that FPA members employ for CAA compliance or that the States must utilize for analysis of pollution transport between states and regions of this country. More importantly, perhaps, for the SEC and the public, modeling gives a "veneer" of authenticity to an analysis that at its core is research. Its potential to mislead investors, even if couched by the appropriate caveats is significant. On the other hand, the application of the appropriate caveats further potentially diminishes the information being provided.

[7] Climate simulations: recognize the 'hot model' problem (nature.com).

3. **FPA submits that the Commission should not mandate the collection and submission of Scope 3 emissions at this time because of the burden it places on companies in a registrant's supply chain that the SEC nominally has excluded from reporting Scope 3 emissions and suppliers and consumers over whom the SEC has no jurisdiction.**

FPA agrees generally with the factual predicate outlined in this rulemaking that the bulk of global warming emissions would be characterized as Scope 3 GHGs, which are emitted by upstream suppliers and downstream consumers (and also include product disposal) in the life cycle of a product or service. FPA also believes that there are valid concerns that commenters have raised already with the Commission that are related to the reliability of calculating Scope 3 emissions. We are particularly concerned about these apprehensions based on (1) the limited availability of industry-specific emission factors outside the energy and fuel industries and the prohibitive expense of developing site-specific emission factors; (2) our familiarity with, and use of, EPA's GHG Emission Factors cited by the Commission, many of which were specifically intended for rulemaking use and not for site-specific calculations (which the EPA explicitly cautions against[8]); and (3) the potential for double-counting Scope 3 emissions in cradle-to-grave accounting that still needs to be sorted out. These issues by themselves support removing the Scope 3 emissions requirements from a final rule at this time, even for large registrants.

(a) The FPA is far more concerned about the direct and costly impacts that SEC's proposed rule would have on suppliers of materials and goods to regulated public companies, which the rulemaking fails to consider.

As discussed earlier, FPA's members are converters in a customer's "value chain,[9]" of coatings, inks, presses, laminators, and pollution control equipment that are used to manufacture flexible packaging for customers. Thus, in the parlance of this rulemaking, FPA's members are "upstream" suppliers in a larger company's "value chain." See Proposed Item 1504 (c). As discussed above, most of FPA's members are privately-owned companies, which are not publicly traded, and hence, they are nominally not required to disclose anything under the proposed rule because they are not regulated by the SEC. Our membership also includes roughly a dozen public companies that are classified by the SEC

[8] For instance, EPA's factors are limited for the most part to emissions from electric utilities and fuels for limited categories of mobile sources, and they represent emission "averages before Scope 3 emissions are required to be reported by this regulation"—which EPA uses for rulemaking purposes and caution the use of for specific facilities.

[9] Proposed Item 1501(t) ("*Value chain* means the upstream and downstream activities related to a registrant's operations. Upstream activities in connection with a value chain may include activities by a party other than the registrant that relate to the initial stages of a registrant's production of a good or service (*e.g.,* materials sourcing, materials processing, and supplier activities). D downstream activities in connection with a value chain may include activities by a party other than the registrant that relate to processing materials into a finished product and delivering it or providing a service to the end user (*e.g.,* transportation and distribution, processing of sold products, use of sold products, end of life treatment of sold products, and investments)).

as "Small Reporting Companies" or "SRCs." Both would be required to provide such information to their customers who are registrants, although inexplicably, the proposed rule would exclude SRCs from disclosing Scope 3 emissions.

(b) <u>The Proposed Rule, if finalized, would not "exempt" SRCs or any privately-held companies from the requirement to disclose Scope 3 emissions.</u>

At Proposed Item 1504 (c)(3), the Commission would explicitly exclude from reporting Scope 3 emissions. The NPRM explains that *the Commission* "believe[s] hat exempting SRCs from the proposed Scope 3 emissions disclosure requirement would be appropriate in light of the proportionately higher costs they could incur, compared to non- SRCs, to engage in the data gathering, verification, and other actions associated with Scope 3 emissions reporting, many of which may have fixed cost components." See 87 Fed Reg. at 21,391.

Nonetheless, the practical reality of this regulation, if it is adopted, will be that it will impose significant resource burdens and costs on SRCs, which the SEC nominally has proposed to exempt from "data gathering, verification, and other actions associated with Scope 3 emissions reporting." *Id.* Likewise, if the proposed rule is adopted, it also will impose significant resource burdens and costs on privately-held entities, which are not required to report Scope 1 and Scope 2 climate emissions because they are not regulated by the Commission. It is clear that the only way that customers can acquire information about Scope 3 emissions from suppliers in their value chains is to demand it from these suppliers. This fact is acknowledged plainly by the proposed rule, which if adopted, would require the entity that is required to disclose its scope 3 emissions to identify the data sources it used to calculate its Scope 3 emissions, including whether <u>"the emissions reported by parties in the registrant's value chain</u>" were verified by the registrant or a third party. See proposed Item 1504 (c)(2)(i) (*emphasis supplied*).[10] Even if the proposed regulatory language did not contain this requirement, the failure to recognize the burdens of collecting Scope 3 emissions data will fall on suppliers because of the leverage their customers have on them, which is unreasonable.

Just as the SEC commiserates in the Notice with registrants who will be required to disclose Scope 3 emissions about the cost of doing so and the reliability of such information, those considerations apply equally—and, FPA argues, with more force—to privately held companies and SRCs that will need to provide this information to *all* their customers that will be required to disclose their Scope 3 emissions if this rulemaking is finalized. While it is fair to assume that the imposition of these requirements on suppliers who are not covered by the rule will be proportionately immense, we do not know beyond hypothetical estimates because the Commission did not examine the burdens associated with "*data gathering, verification, and other actions associated with Scope 3 emissions reporting*"imposed on unregulated entities that are suppliers, much less the ancillary impacts of sharing this data on competition within this industry and with other industries or on whether such disclosures would affect proprietary business information, or impose potential legal exposure to unregulated or excluded suppliers[11] has not been considered.

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[10] FPA view conditional safe harbor for the Scope 3 emissions that public entities are required to report is immaterial to the burden on unregulated suppliers that the proposed regulatory scheme would create.

[11] It the current requirement for reporting Scope 3 emissions applicable to large and medium sized public companies remains in the final regulation, the SEC should amend the final regulation to provide an unconditional "safe harbor"

(c) The SEC's failure to consider the obvious burdens on unregulated entities that would be created by requiring registrants to report Scope 3 emissions would render the proposed Climate Disclosure rule arbitrary and capricious if it is finalized in its current form.

The SEC's failure to consider reasonably foreseeable impacts of this regulation on unregulated business entities (and on SRCs that the Commission intended to exempt) would render this rulemaking invalid, pursuant to the U.S. Supreme Court's decision in *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (*State Farm)*. In that case, the Court confronted the Record of Decision to support the National Highway Traffic Safety Administration regulation revoking a 1982 motor vehicle safety requirement for airbags in passenger cars. In defense of the insurance industry's challenge to its regulatory decision based on the arbitrary and capricious standard in the Administrative Procedures Act, the agency argued that the action was within the agency's discretion and therefore was not arbitrary and capricious. The Supreme Court disagreed and held —

> [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." * * * Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors that Congress has not intended it to consider, *entirely failed to consider an important aspect of the problem*, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43 (*internal citations omitted*).

In the instant rulemaking, the SEC failed entirely to consider the sizeable impacts of requiring large and medium companies to report Scope 3 GHG emissions on entities that are not regulated by the Commission. Inexplicably, it did weigh the very same impacts on SRCs, and proposed to exclude SRCs from reporting Scope 3 emissions—only to impose those very burdens *if* an SRC is a supplier. These costs to gather and provide Scope 3 emissions data is, in the context of the *State Farm* decision, an important aspect of climate reporting, which is acknowledged throughout the Notice of Proposed Rulemaking. There is no dispute that Scope 3 emissions likely dwarf Scope 1 and 2 emissions in sheer volume. It also is somewhat implausible that the proposal would impose regulatory burdens on SRCs, subject to the SEC's jurisdiction because the regulatory language clearly proposes to exempt them.

As was true in *State Farm*, there are several remedies available to the SEC to correct the omission. The Commission can undertake further rulemaking in the form of a supplemental rule, or it can ignore the issue and attempt to diffuse it by finalizing the rulemaking as is. The FPA submits that the Commission should take the third route, and withdraw the

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to small reporting companies and privately-held entities that provide good-faith estimates of GHGs to their customers

proposed regulatory requirements for reporting *any* Scope 3 emissions as part of the instant rulemaking.

Conclusion

If you have questions or would like additional information, please contact me. Our members feel that the Commission may benefit from further conversation at a future time, and we would be very happy to host such a meeting, possibly at a member's manufacturing site, which might bring our comments into a sharper focus.

The FPA appreciates this opportunity to provide comments on the April 11, 20222, Notice.

Respectfully submitted,

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