

RisKontrol Newsletter -- May, 2008

ADMINISTRATIVE LAW

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Why is Administrative Law So Important To Security Management Professionals

In today's world almost all businesses, and even individuals, deal with administrative agencies in their day to day operations.

The big functions of Administrative Agencies are to:

- 1) Administrate the agency;
- 2) Make Rules;
- 3) Investigate Violations; and
- 4) Sanction Violations.

Here are just a few examples of administrative agencies:

Federal: Department of Homeland Security and its sub-agencies;
Immigration;
Customs;
Alcohol, Tobacco & Firearms;
Border Issues,
Transportation Security Administration
Etc.

Department of Energy;
Nuclear Energy;
Oil & Gas;
Etc.

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Department of Health & Human Services;

Medicare;

Medicaid;

Social Security;

And a Whole Range of Other Health and Social Programs

Securities & Exchange Commission;

Sarbanes-Oxley Act;

1933 & 1934 Securities Acts;

Insider Trading;

Market Regulation;

Etc.

Department of Labor;

Fair Labor Standards Act (Overtime Pay, etc.);

Nation Labor Relations Act;

Various Acts of Discrimination;

Employee Retirement Income Security Act (ERISA);

Family Medical Leave Act (FMLA);

Occupational Safety & Health Administration (OSHA);

Etc.

Food & Drug Administration;

Federal Food, Drug, and Cosmetic Act (FD&C Act);

Food Quality Protection Act of 1996;

Food Quality Protection Act of 1996 and

Dozens of other Laws Related to Food, Drugs and Cosmetics.

Federal Aviation Administration;

Federal Aviation Rules;

Air Safety Rules;

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Air Traffic Control;
Etc.

Department of Transportation;
Motor Carriers (Trucking);
Full Economy Measures;
Truck Drivers;
Airlines;
Vehicle Safety;
Highway Systems;
Rail Systems;
Etc.

Federal Trade Commission;
Fair Credit Reporting Act;
Fair Debt Collection Practices Act;
Consumer Protection;
Competition Jurisdiction;
Etc.

State: Professional Licensing & Regulation;
Driver's Licensing;
Vehicle Registration;
Business Licensing & Regulation;
Natural Resource Regulation;
Intra-State Motor Carriers Regulation;
Alcoholic Beverage Licensing & Regulation;
Education;
Environmental Quality;
Family & Protective Services;

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Law Enforcement Officer Standards & Education;
Parks & Wildlife;
Insurance Licensing & Regulation;
Real Estate Brokerage & Agent Licensing & Regulations; and
Literally Dozens, if not Hundreds More;

City/County: Certain Business Licensing & Regulation;
Fire Codes;
Building Codes;
Mosquito Control;
Zoning; and
Literally Dozens More.

As you can see just from the reading of the short list of administrative agencies and from personal life experience there are agencies that affect every facet of our personal and business lives. You have also probably noticed that many of these agencies overlap with each other's jurisdictions not only federal agency to federal agency, state agency to state agency, etc., but also federal to state, state to county, federal to city and so on.

As you can also see, or at least surmise, these agencies are what actually runs our governments on a day to day operation. As a general rule, almost without exception, all of these agencies are under the Executive Branch of the whatever government they are in, but yet they have some limited "legislative" powers and some limited "judicial" powers.

I think that most of us can readily see why they have executive powers to run the day to day business of the agency and even why they have investigative powers and some limited "judicial" powers, e.g., the ability to enforce certain laws, rules and regulations. The question often comes up though - "why do they have some limited "legislative" powers". Let's be honest, no matter what your political bend is I believe that we can almost all agree that our Congress and Legislatures write laws that are often overly broad, too general, unclear, ambiguous, and need the practical carrying out

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methodologies flashed out. Why does this happen? Well, for several reasons, among them being legislation is almost always the result of compromise -- both sides of the aisle want to claim victory. One side will say: "We got legislation about widgets passed" and the other side will say: "We stopped them from making widgets available to children", etc. Another reason is also a practical one - the Congress and Legislatures just simply can't spend the time working out every little bitty detail nor can they anticipate every contingency and going back to them to get directions would bring the business of governing to an absolute standstill.

You also need to understand that these agencies at the operational level are often full of career bureaucrats. While most of these people are good and decent hardworking and caring public servants, remember that many have never had any job, except with the government, they have no idea of the problems of business people (nor do a number of them care), many are not paid that well, many have no power in their lives except for that which comes through being a bureaucrat, most have civil service protection and almost impossible to fire, etc. Which leads us to the Number One Rule of Dealing With Administrative Agencies:

DO NOT DO ANYTHING TO GET THEM MAD AT YOU.

So, I'm just supposed to go along with everything they say?

No, the Number One Rule Of Not Breaking the Number One Rule of Dealing With Administrative Agencies is:

DO NOT LET IT GET PERSONAL.

Putting that another way that we often hear in church/synagogue/mosque and in the news media is: Attack the sin, not the sinner! Challenge the law, rule or regulation, try to convince them that a better interpretation might be XYZ instead of their ABC, etc. Don't get mad, angry, upset, rude, with the people from the agency -- they have a lot of power and will use it to make your life miserable if you attack them as individuals.

One of the best techniques I've seen is to take the partnership approach with them -- "We both have a job to do let's work together to reach compliance in a manner doesn't unduly burden my business", i.e., you help me and I'll help you. Another great technique is to be ahead of the agency by anticipating what they may want in terms of compliance with a rule or regulation. For example, with the Transportation Security

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Administration (TSA) we would study what rules were coming up for implementation and propose a solution before they could even ask -- the trick here is that you want to get your way of compliance to become their standard and if you get yours to them early enough, then you've done a great deal of their work for them so they may well adopt what you propose, in which case, you've gotten what you want and they've been saved a lot of work and look great at headquarters.

Sadly, while the vast majority of the employees of the administrative agencies are outstanding public servants, there are some folks with the agencies that are either just plain hardheaded, mean spirited, rude, hateful, stupid, non-caring, ego-maniacs, or all of the foregoing. **BUT**, don't you, who deals with them everyday, go on an attack -- let your home office, your in-house or outside legal counsel, etc. go on the attack. Our government is often fond of calling this type of methodology: "plausible deniability" or as I've heard a number of astute business people say: "blame it on the person that isn't there". This is not to say you should blame your own shortcomings on someone else; but used as a business strategy it is effective.

As you will remember from Contracts, you always want to be the Offeree, not the Offeror - just like car dealers like to posture themselves. It's always the guy in the back office that says "No" to your offer to buy, not the "caring salesman" who you are dealing with; so he can come back and say "let's put our heads together and see if we can come up with an offer that the boss will accept". Of course, we know, or at least should know, that this is just a game between the salesman and his boss in the back office. With my legal clients I tell them that during negotiations let me be the bad guy, the crazy man, etc. then they can come in and be the good guy. If the other side starts to walk out, my client can say that "My attorney got carried away, I didn't authorize him to say that", etc. -- in fact, they can even "replace me" if the situation requires it, but the threat is always there that if they don't play ball, my client will bring me back in.

Once you begin work for a company or organization you will need to determine which of these agencies affect you and then prioritize them as to which ones regulate your business the most, which ones have the greatest ongoing impact on you, which ones can hurt you the worst, etc. This is important because you need to pay close attention to what these agencies are up to and try to take advantages of what being ahead of the game can bring to you.

Now that we know why its important that we understand administrative law, some of the caveats and some techniques in playing the game, let's take a look at the law surrounding Administrative Agencies !

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THE FUNDAMENTALS OF ADMINISTRATIVE LAW

SEPARATION OF POWERS AND CONTROLS OVER AGENCIES

Separation Of Powers:

Administrative agencies are units of government created by statute to carry out specific tasks in implementing statutes. Most administrative agencies fall in the executive branch, but some important agencies are independent.

Delegation Of Legislative Power:

Theoretically, legislative power cannot be delegated, but practically, through the granting of broad rulemaking powers to administrative agencies, Congress and state legislatures do so delegate.

The delegation doctrine requires that:

- (i) The Congress and state legislatures at least decide the fundamental underlying policies; and
- (ii) The agency action fall within the scope of the delegated power.

Despite the delegation doctrine, Congress may delegate very broad rulemaking powers to federal agencies. State agencies apply the delegation doctrine more strictly.

Some court decisions allow procedural safeguards to substitute for discretion limiting standards. Other cases call on the courts to construe statutes delegating power narrowly, especially if the delegation is in an area that is constitutionally suspect.

Congress may delegate rulemaking power to federal judges where it is relevant to judicial functions and where there is no danger of undermining judicial integrity or enlarging judicial power.

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Actions Outside the Scope of Delegated Power

Courts have power to set aside particular rules or other agency action under the ultra vires doctrine (acting outside of authority) if the action is outside the scope of the delegated power.

Courts may avoid potential delegation problems by invalidating particular rules instead of the entire statute. Alternatively, a court may avoid substantive constitutional issues by narrowly construing the scope of a delegated power, especially in the area of civil liberties.

Delegation Of Adjudicative Power

Judicial power can be delegated to administrative agencies, but the standards to be applied in agency adjudications may not be unconstitutionally vague. Developing case law bars agencies from imposing criminal or civil sanctions on private parties under regulations that fail to give fair warning of the conduct prohibited.

Adjudication of Public and Private Rights

Congress can assign the adjudication of public rights (e.g., claims between private parties and the government) to administrative agencies, even where there would be a right to a jury trial if the right was adjudicated in court. However, the adjudication of private claims (i.e., claims between individuals) generally must be assigned to a court, except for claims involving a new statutory right or certain ancillary claims.

Some state courts permit agency adjudication of private rights where necessary to implement the regulatory scheme.

Agencies may enact regulations providing for criminal sanctions, but an agency may not prosecute or imprison for violation of those regulations. Agencies may, however, impose and assess civil penalties without the protections afforded under the criminal law, but several decisions deny agencies the power to impose punitive damages.

Controls Over Administrative Agencies

Congress and state legislatures often impose review provisions on administrative agency actions and of course, also control their purse strings. The Congressional Review Act is an example of the foregoing. Under this statute, all

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rules of general applicability must be submitted to Congress and to the General Accounting Office before they take effect. Congress can veto a rule by passing a joint resolution of disapproval that must be signed by the President or passed by a two-thirds majority over a presidential veto. A disapproved rule may not be reissued by an agency absent congressional legislation authorizing reissuance. The Act seeks to give Congress some constitutionally valid control over agency action. Most state decisions follow the ban on legislative vetoes.

Of course, the Executive Branch is not without control powers over agencies as it has everything from appointing the head of the agency, to use of the inspector general, to extensive power over the creation, reorganization, and abolition of executive agencies, as well as some budgetary powers.

THE CHOICE BETWEEN ADJUDICATION (Interpretative Rulemaking) AND RULEMAKING (Legislative Rulemaking) FOR PUBLIC POLICY MAKING

Choice Is Discretionary

Agencies generally have broad discretion as to how to implement a statutory scheme and have traditionally made law and policy through case-by case adjudication (which is retroactive as to the parties). Agencies are usually also empowered to determine law and policy through rulemaking, which normally has only prospective application.

Where serious adverse consequences occur because of the retroactivity of adjudication, the court may find that the agency abused its discretion.

For example, the National Labor Relations Board has frequently been criticized for its failure to make rules of general application and its formulation of policy on a case-by-case basis. In determining whether a new rule is unfairly retroactive, a court balances at least five factors:

- (i) Whether the case is one of first impression;
- (ii) Whether the new rule represents an abrupt departure from well-established practice;
- (iii) The extent of a party's reliance on prior law;
- (iv) The burden imposed by the retroactive order; and
- (v) The statutory interest in applying the new rule to the pending case.

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Responding to criticism, the NLRB adopted a rule limiting the agency's discretion in determining hospital bargaining units on a case-by-case basis. This rule was emphatically upheld by the Supreme Court.

Proper Subjects For Adjudication

These include problems that could not reasonably be foreseen by the agency, areas over which the agency has little experience, and problems requiring specialized solutions.

Required Rulemaking

Some federal decisions indicate that agencies must limit their power by adopting standards, either by rulemaking or case-by-case adjudication. Some states are more aggressive in requiring that agency policy be made by rulemaking rather than adjudication. The 1981 Model State APA strongly favors required rulemaking.

Prospective adjudication

The Supreme Court has prohibited the adoption of new policy in an adjudication that is prospective but not retroactive.

TRADITIONAL LEGISLATIVE RULEMAKING PROCEDURES

Types of Rules

Legislative rules are made pursuant to legislative delegation of rulemaking power and, if properly adopted and consistent with the statutory delegation, are as binding as a statute.

Non-legislative rules are rules that do not have binding legislative effect and include interpretive rules and policy statements.

Legislative Rulemaking Procedure

Procedural due process is inapplicable. However, under almost all, if not all, Administrative Procedures Acts, a process of notice and public comment is

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required for most legislative agency rules and is referred to as informal rulemaking. This is the most common means of rulemaking.

Occasionally, statutes require a hearing on the record for adopting rules and adjudicatory procedures must be used and this is known as formal rulemaking

Hybrid rulemaking results from specific procedures for specific agencies mandated by Congress but not required by the APA informal rulemaking provisions.

Rulemaking has many advantages over adjudication for formulating law and policy: rules are prospective and evenly applied to all rather than applied on a case-by-case basis; the public, rather than only the parties to a case, has an opportunity to comment; rulemaking is subject to fewer restrictions; and publication of proposed and final rules makes them more accessible.

Legislative rules are usually prospective while interpretive rules are often retroactive. Retroactive legislative rules are prohibited absent an express grant of congressional authority.

Because of the advantages of rulemaking, courts broadly interpret agency powers to make rules to authorize agencies to adopt binding legislative rules.

Legal Effect Of Rules

Generally, agencies must follow their own rules, that can usually only be changed prospectively.

Procedural Rules

An agency is bound by a procedural rule, even if it was not required to adopt it, until it is changed. The agency is not required to follow a regulation intended primarily for the agency's convenience rather than for the benefit of outsiders.

Legislative Rules

An agency is also bound by legislative rules until it changes them.

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Non-legislative Rules

It is not settled whether an agency can depart from its interpretive rules or policy statements whenever it wishes.

THE INFORMAL RULEMAKING PROCESS

THIS IS THE MOST IMPORTANT PART FOR MANAGERS TO KNOW !!!!!

This is where you, as a manager, working with others in your company and industry can have the most effect. Follow the proposed rules and make your comments in accordance with the APA. Get your trade associations lobbying the agency. Get the media involved if necessary to bring public attention to the proposed rule and how it will affect the public. This is YOUR chance to fight to either cause the rule to die or modify it where you can live with it -- because once the rule is in place you have to live with it or litigate over it.

Application of APA Rulemaking Provisions

These provisions are applicable only to matters defined by the APA (or state APA's, as applicable) as a rule, which is an agency statement of general or particular applicability and future effect regarding law or policy. ("Regulation" is synonymous with "rule.")

Single company affected

As long as a rule is stated in general terms and is not disguised adjudication, APA rulemaking procedures are applicable even though only a single company is affected.

Notice of Proposed Rulemaking

Prior to adoption of a rule, the agency must publish in the Federal Register (or state equivalent as to state rules) notice that includes the time, place, and nature of the proceeding, the legal authority therefor, and the terms or substance of the proposed rule. Publication is not necessary if all of the persons subject to the rule are personally served or have actual notice.

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Disclosure of Basic Data

The agency must also publish or make available critical data underlying the rule.

Public Participation

After notice, interested parties must be given an opportunity to participate through submission of written data, views, or arguments. This is called the Comment Period. Oral argument is usually not required but is usually allowed.

The public must be allowed a reasonable time to comment on a proposed rule.

Revisions to Rule

A final rule may differ considerably from the initially published proposed rule, but new notice and procedures are not required if the final rule is a logical outgrowth of the proposed rule. Note, however, that the mere fact that the changes were noted in comments filed by the public does not mean that the final rule is a logical outgrowth of the proposed rule.

Statement of Basis and Purpose

The agency must make a statement of the basis and purpose of the rule, which statement must include the factors considered and responses to significant, material public comments.

Publication

Both legislative and non legislative rules must be published in the Federal Register upon adoption. In the federal system they will eventually be moved into the Codified Federal Regulations (CFR). States also have their own versions of a "Register" and a "CFR", but usually call them by names different from those used in the federal system.

Delayed Effective Date

Absent an exception, final substantive, not procedural, rules must be published in the Federal Register not less than 30 days before the effective date. Note: In many Homeland Security and/or National Security matters this time frame is waived -- in fact, in some instances the rule can be put into immediate effect,

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even without a comment period, and then the comment period starts and all else goes forward much like normal.

Right to Petition

Interested persons must be given the right to petition for the issuance, amendment, or repeal of a rule.

Judicial Remedies

If a court finds that a rule was invalidly adopted, it has discretion to either vacate it, causing the agency to start over, or it may remand the rule, thus permitting the agency to remedy the problem and reissue the rule.

An agency's refusal to institute a rulemaking procedure after a person petitions for one is judicially reviewable.

Additional Procedures

Courts generally cannot impose additional procedures (*e.g.*, oral argument) on agencies.

Negotiated Rulemaking

As a means of alternative dispute resolution, *i.e.* other than adjudication and/or litigation, an agency head can propose a negotiated rulemaking, in which all affected interests meet with the agency to attempt to reach a consensus. The agreed-upon rule is then subject to the ordinary notice and comment procedures.

Procedure

A notice must be published in the Federal Register announcing the intent to use negotiated rulemaking and listing the proposed participants, agenda, timetable, etc. Additional persons can apply to participate, and the public has 30 days to file comments on the proposed procedure.

Judicial Review

Review of the procedure relating to establishing or terminating a negotiated rulemaking committee is not allowed, although the final rule may be reviewed.

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Exceptions To Informal Rulemaking Requirements

The federal APA and many state APAs contain many exceptions to the notice and comment requirements.

Categorical Exceptions

The Act does not apply to military or foreign affairs functions of the United States, to matters relating to agency management or personnel, or to public property, grants, loans, benefits, or contracts.

Procedure Exception

Agency procedural rules are exempted from notice and comment requirements and from the delayed effective date provision, but not from the right to petition requirement.

Good Cause Exception

Notice and comment is excused when an agency, for good cause, finds that the procedure is impracticable, unnecessary, or contrary to the public interest. Federal agencies may also dispense with the 30-day pre-effective provision for good cause. This exception is narrowly construed by courts.

Interpretive Rules

The notice and comment and delayed effective date provisions do not apply. In distinguishing legislative rules (which require notice and hearing) from interpretive rules, different courts focus on different elements such as agency intent, whether the rule actually interprets, and whether a rule results in new law.

However, an interpretative rule contrary to a prior interpretive rule is considered an amendment of the legislative rule the agency is interpreting and is thus invalid unless adopted with notice and comment.

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Policy Statements

An agency statement concerning discretion is exempt as a policy statement if it is tentative although the Supreme Court has suggested an exception may exist for rules regarding discretionary functions. (Most state exceptions are more limited.)

OBTAINING INFORMATION -- AGENCY INVESTIGATIVE PROCEDURES

Agency Acquisition Of Information

Methods of Obtaining Information

Information is usually disclosed voluntarily, but if it is not, the agency can compel disclosure by subpoena, required reports, physical inspections, and hearings.

Subpoena Power

If the agency's demand for information is resisted, the agency may seek judicial enforcement, which if ignored, may result in a finding of contempt.

Scope of power

Although the early cases limited the subpoena power, the modern view recognizes a much broader power.

Limitation

The agency must be engaged in a lawful inquiry, must state its purpose, and must comply with the Fourth Amendment "reasonableness" requirements (the subpoena must be specific, the subject matter must be relevant, and the inquiry must be authorized).

Burdensomeness of Subpoena

Generally, the fact that compliance with the subpoena will be expensive and burdensome is not a defense.

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Physical Inspections

Home inspections

Warrants are generally required but are easily obtained.

Business inspections

Generally, a warrant is required for inspection of a business, but there are exceptions involving "pervasively" regulated businesses (e.g., gun and liquor dealer searches, mine inspections, and auto junkyards). Again, warrants are easily obtained where needed.

Physical tests

Because of special risks to the public, federal regulations subjecting railway, truckers, airline, law enforcement, etc. employees after an accident or customs employees to blood, breath, or urine tests without a warrant are permissible.

ADJUDICATIONS - EITHER FOR RULEMAKING AND/OR ENFORCEMENT (SANCTIONS)

In Adjudications of either type it is almost universally wise to be represented by an Attorney who is familiar with Administrative Law. The downside is usually just too great to do otherwise. For that reason we are not going into adjudicatory matters any more than may have already been discussed hereinabove. Also, remember that an adjudication for rulemaking is almost always, if not always, also an enforcement proceeding.

That being said, there are some instances in which the proposed fine or other sanction in an enforcement action is so small that not economically practical to engage counsel. These are almost always situations where the agency proposes a sanction, much like a plea bargain is offered in criminal cases, and you can elect to accept or reject. Remember that you can attempt to negotiate on the sanction.

In most instances if you decide not to accept they will go on and assess the fine or sanction and then you have the burden to appeal it to whoever is authorized in the particular agency scheme to review the sanction, often the agency head. If you are still

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dissatisfied you can then normally appeal to hearing before an Administrative Law Judge. If you are still dissatisfied and there are appropriate grounds for further appeal, then you can appeal to a court.

FREEDOM OF INFORMATION ACT

Many times you will want to obtain information from a governmental body prior to institution of any lawsuit, etc. wherein you'd have subpoena and other discovery rights. This is done in the federal system through the Freedom of Information Act. The states have similar acts, but they are often called by other names, such as Public Information Acts, etc.

Here are some basics about the Freedom of Information Act.

The Freedom of Information Act is contained in APA section 552 and provides for the rights of private parties to obtain information in the possession of the government.

APA Provisions

Each agency must publish its procedures and general rules and interpretations and make available its opinions in cases. It must make available any other identifiable records on request.

Courts of competent jurisdiction may compel production of any requested record that the agency refuses to produce, if it is not excepted from the acts.

The court may examine requested documents *in camera* (without the lawyers or parties present) to determine whether they fall into one of the following exceptions to the Act.

- a. National security matters;
- b. Matters relating to an agency's internal practices;
- c. Matters exempted by statute;
- d. Commercial secrets;
- e. Inter- or intra-agency memoranda (documents "normally" privileged in civil litigation, such as predecisional memoranda);

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- f. Matters involving personal privacy (e.g., personnel files);
- g. Investigatory files compiled for law enforcement purposes (includes records compiled for other purposes but now used for law enforcement);
- h. Bank regulations; and
- i. Natural resources information.

Each such act will spell out how the request is to be made, to whom it must be served upon and what the time frames for response by the agency are.

There information contained herein is not legal advice - it is just a general discussion of the basics of Administrative Law and the Administrative Process. You should always consult an Attorney of your own choosing regarding the particulars of your situation. This article is only to provide you some basic information that will allow you to better discuss your particular needs with an Attorney licensed in your state and of your own choosing. This is a paper that I use in teaching Business Law at both the Undergraduate and Master's Levels.

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