



PHILLIPS KAISER



THE CORPORATE GOVERNANCE  
LEGAL CHECKLIST

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# THE CORPORATE GOVERNANCE LEGAL CHECKLIST



*Companies, both private and public, doing business in the U.S. must navigate a sea of regulatory and legal requirements that affect almost every aspect of their business.*

GREGORY L. PHILLIPS, FOUNDING PARTNER - PHILLIPS KAISER

A focused, in-depth review of a company's corporate governance policies and practices provides a cost-effective way for businesses, regardless of size, to identify areas of regulatory non-compliance or other potential problems, to devise a realistic plan for achieving compliance, and to establish a set of best practices to prevent future problems.

Below are a number of checklists that can provide some insight for businesses to identify areas of actual and potential vulnerability.



## PRIVATE COMPANY GOVERNANCE

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### Corporate Formalities

- The company should maintain a minute book with records of all meetings of directors and stockholders, including written consents.
- The Board of Directors should authorize all material transactions, especially all transactions with “insiders” of the company.
- Subsidiary minute books should be properly maintained.
- The corporate governance and organizational documents should provide for Director and Officer indemnities.
- If the company is a corporation, the company should hold annual stockholder meetings to elect the Board of Directors. Even if the company is a limited liability corporation but has a Board of Directors, it is good practice for the members to annually elect the Board of Directors.
- The company should consider Directors and Officers (D&O) insurance policies.



## PRIVATE COMPANY GOVERNANCE

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### Doing Business

- The company should have a standard Non-Disclosure agreement in place with all current and potential business partners.
- The company should have standard contract forms customized to meet its business objectives and to limit the company's risk and liability as well as standard contracts with its employees and contractors to cover terms such as confidentiality and assignment of inventions for employees and subcontractors.
- The company should have proper physical and technology safeguards and appropriate website and social media policies to protect the company's intellectual property and assets.
- Any purchase order terms should be properly updated.
- All contract terms with third parties should have dispute resolutions favorable to the company.
- Proper agreements with subsidiaries should be in place (e.g., inter-company agreements and transfer pricing agreements).
- The company should be in good standing in the jurisdiction of its incorporation.
- The company should be registered and in good standing in every jurisdiction in which it has a significant business presence as required.



## PRIVATE COMPANY GOVERNANCE

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### Equity Issuances

- All issuances of equity securities must be conducted in compliance with applicable securities laws.
- Adequate agreements should be in place among equity holders relating to transfer restrictions and other matters, and that reflect the company's business strategy and should be signed by all holders of the company's equity securities.
- The Certificate of Formation/ Incorporation for a corporation must provide for a sufficient number of authorized shares, and, in some jurisdictions, shouldn't authorize too many shares which can lead to excessive franchise taxes in such jurisdictions.
- The company should have current contact information of all of its equity securities holders.



## PRIVATE COMPANY GOVERNANCE

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### Exit Strategy

- The Company's third party agreements (customers and vendors) should permit a sale of the company without third-party consent.
- The company should have copies of all options, warrants, convertible securities or other contingent obligations to issue securities reflected on the company's capitalization table.
- The company should be in compliance with all debt and equity financing covenants.
- The company should have copies of all fully executed contracts.
- The company should have an accurate capitalization table showing all authorized, issued and outstanding equity securities of the company, including all options, warrants and convertible notes.
- The company should implement a contracts management system in organized files to properly administer all contract terms to which it is obligated.
- The company should maintain an updated equity record book with copies of any issued equity certificates.



# MAKING DIVERSITY HAPPEN

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## PUBLIC COMPANY GOVERNANCE

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### Board of Directors

- All independent directors must meet certain criteria and a thorough review of their relationships must be completed to ensure no conflicts.
- The Board should require all Board committees and committee members to meet any applicable requirements.
- The Board should permeate a top ethical standard in all company matters.
- The Board should hold appropriate executive sessions.
- Shareholders and the Board should have a clear and appropriate line of communications.
- The Board should perform effective self-evaluations.
- The Board should have an appropriate risk management process.
- The Board should be adequately protected by the company through indemnification and insurance in carrying out its duties and responsibilities.
- The Board should have effective Board meeting mechanics in areas such as notice, delivery of materials and minutes.
- Succession planning for the Board should be in place.
- A good process for educating and updating the Board on the company's business should be in place.



## PUBLIC COMPANY GOVERNANCE

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### Audit Committee

- A good process for educating and updating the Board on the company's business should be in place.
- The committee should have an audit committee financial expert.
- The committee should have a compliant charter and it should be followed.
- Tax services should be provided by an outside auditor independent of the company.
- The committee should have monitoring of required "whistleblower" procedures.
- The committee should have a policy regarding the hiring of current and former employees of the outside auditor of the company.
- Any non-audit fees should be appropriately pre-approved.
- The committee should have appropriate executive sessions.



## PUBLIC COMPANY GOVERNANCE

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### Compensation Committee

- The committee should be performing all required duties and oversight.
- The committee should use peer group data as needed.
- The committee should have a compliant charter and it should be followed.
- The committee should have a process to mitigate compensation risk.
- The committee should develop a compensation philosophy for the company.
- The committee should ensure that all company equity plans and amendments have requisite approvals.
- The committee should have a process for designing, determining and analyzing executive compensation.
- The committee should ensure that any equity grants are properly and timely documented.
- Consultants should be used as needed and as appropriate.
- The committee must ensure that any controversial practices are properly documented and approved such as perks, severance pay, etc.



## PUBLIC COMPANY GOVERNANCE

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### Nominating Committee

- The committee should be performing all required duties and oversight.
- The committee should ensure that the company has clear policies and procedures for shareholders wishing to make recommendations or form director nominations.
- The committee should have a compliant charter and it should be followed.
- The committee needs to ensure that the Board has adopted and kept updated governance guidelines.
- The committee should ensure that any directors are qualified to serve on the Board.
- The committee should ensure to develop a process for nominating potential directors.



## PUBLIC COMPANY GOVERNANCE

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### Approval of Related Parties Transactions

- The company should have an adequate process and policy on related party transactions.
- The process and policy should be consistent with the company's code of ethics and committee charters.

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### Prohibited Loans

- The company needs adequate policies and procedures for any loans to and from directors or officers of the company.

### Insider Trading

- An effective policy should be in place to prevent insider trading.

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### Code of Ethics

- The company needs a compliant code of ethics.
- Company offices, directors and employees should be educated on the company's code of ethics.
- Effective mechanisms should be in place to deal with complaints under, or violations of, the code of ethics.



## PUBLIC COMPANY GOVERNANCE

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### Social Media and the Company's Web Site

- The company's website and social media presence should have required governance and SEC documents.
- The company should be compliant with proxy rules regarding posting of annual meetings and shareholder materials online.
- The company's social media presence and website content should not expose the company to greater than normal risk.

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### Disclosure Controls and Procedures

- The company should have adequate disclosure controls and procedures.
- The company should be compliant with SEC rules and guidance for its financial reporting disclosures.
- A disclosure committee should be in place.



## PUBLIC COMPANY GOVERNANCE

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### Review of 10-K, 10-Qs, and 8-Ks

- All company forms must comply with all applicable laws and SEC rules.
- All certifications must be carefully reviewed.
- Risk factors must be complete and
- compliant.
- All exhibits must be accurate and up-to-date.
- All filings must be made timely.

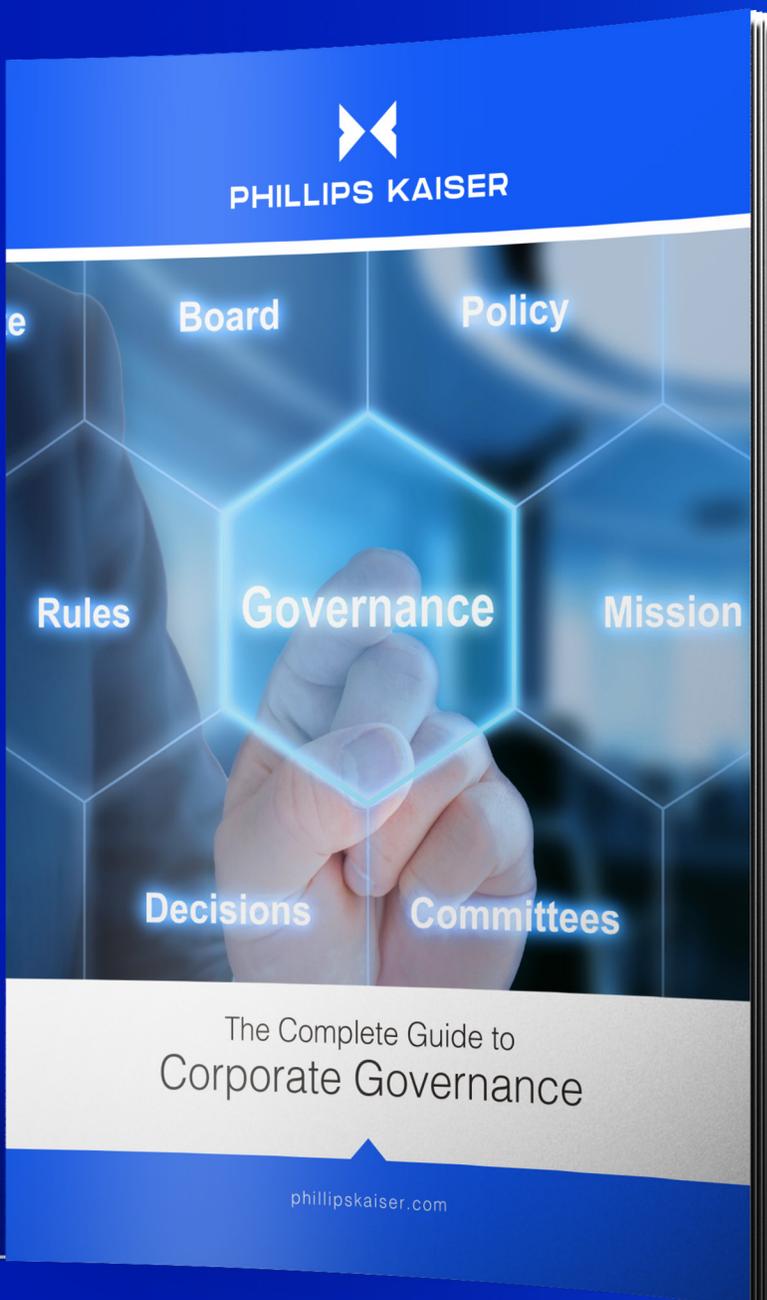
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### Earnings Release Procedures and Analyst Presentations

- Earnings calls and releases must be sufficiently accessible to by the public.
- Call scripts should be carefully reviewed.
- Form 8-Ks should be filed timely and compliant.
- The company should monitor analysts and public comments about the company.
- Company analyst presentations should be fully compliant with SEC rules and regulations, and consistent with company policies.
- Any forward-looking statements should be compliant.



# WHAT IS CORPORATE GOVERNANCE?



Like our government, corporations are directed and controlled by a system of internal rules, regulations, and practices.

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## PARENT/SUBSIDIARY RELATIONSHIP GOVERNANCE

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- There should be a clear structure of how parent and subsidiary entities effectively relate to each other in terms of structure, purpose, governance, authority, and liability.
- The parent's objectives for the subsidiaries should serve as the corporate mechanism through which the mission and agenda of the subsidiaries are achieved.
- Inter-company agreements should be in place between parents and subsidiaries for both governance and operational services to be performed by the parent on behalf of the subsidiaries.
- Policies and procedures should be in place for the coordination of competitive activities between a parent and subsidiaries to ensure that they do not run afoul of antitrust laws or other activities deemed unlawful.
- The composition, functions, and responsibilities of the subsidiary board should be clearly defined, especially for operational subsidiaries.
- The subsidiary board should directly be responsible for the subsidiaries actions assigned to it under the subsidiary by-laws regulatory laws and any local/state laws.
- There should be a clear written governance and management articulation of the division of responsibility between the parent board and management and that of the subsidiaries for oversight and decision-making responsibilities.
- Infrastructure liability policies and procedures should be put in place to identify the liabilities to be incurred by one legal entity for another (e.g., written debt guarantees and similar obligations).

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**Note:** *The above is not all-inclusive and if you have any questions regarding your obligations under the law or about best practices, please consult an attorney. Further, the information and materials contained herein are provided for general information purposes only and are not intended to constitute legal or other advice or opinions on any specific matters and are not intended to replace the advice of a qualified attorney or any other professional advisor. There is no guarantee as to the accuracy of any information provided, and should not be relied upon for any purpose other than for general information purposes only.*





## ABOUT THE AUTHORS

### Gregory L. Phillips - Founding Partner

**Gregory L. Phillips is the co-founding partner of Phillips Kaiser, a law firm of Houston business attorneys, and co-founder of The Legacy Project, a project dedicated to increasing diversity in the legal field.**

Greg first met Craig Kaiser at the large Houston-based firm Bracewell, where Greg clerked after his first year of law school and began his career as an attorney.

He then moved to Compaq Computer Corporation to work for Craig and then later as Craig's peer as an Associate General Counsel. At Compaq, Greg was able to flex his entrepreneurial skills, thriving in an environment where he had a lot of responsibility as well as freedom. Compaq is where Greg says he learned to be a business lawyer.

Greg went on to work for Enron right before its bankruptcy in 2001 and then stayed on as Assistant General Counsel for the Enron Bankruptcy Estate, where he managed a team in the dissolution of more than 3,000 Enron subsidiaries worldwide.

Most recently, he and Craig co-founded Phillips Kaiser, a firm of Houston business attorneys, where they provide general counsel services, and other legal services, to small, medium, and large businesses.

While Greg has stayed in the big city, he values his country roots and what they taught him. They've made him the lawyer he is today. As he says, "The way I was raised, relationships matter, the way you treat people matters, integrity matters. This is the way I practice law."

Greg's latest legal venture is a way to replicate his own journey from humble roots to success in the business and legal field. The Legacy Project, which he co-founded with Craig in 2020, is a developmental program within Phillips Kaiser dedicated to growing diverse leaders in the legal field. When Craig approached Greg with the idea, Greg was immediately on board.

Crediting his professor who encouraged him to apply to law school as well as mentors at IBM and Bracewell, Greg says, "Because people invested in me, that allowed me to blossom and pull out talents in myself that I didn't know I had."

He hopes The Legacy Project will do the same for others, providing an opportunity for those who don't have ready access to it to uncover their talents and become leaders in the field and in their communities.





## ABOUT THE AUTHORS

### Craig M. Kaiser - Founding Partner

**Craig Kaiser is the co-founding partner of Phillips Kaiser, a Houston-based law firm of business attorneys, and co-founder of The Legacy Project, a project dedicated to increasing diversity in the legal field.**

Craig began his law career over 30 years ago after graduating from Baylor University's School of Law. After working as a commercial litigator for the large Houston-based firm Bracewell, he joined Compaq Computer Corporation as Associate General Counsel.

At Compaq, Craig was able to interact with clients on a more personal level, sitting with client groups at their meetings, problem-solving together, and understanding the value he could add as a trusted legal voice in helping clients think through and meet their objectives. He learned that good legal advice starts with listening, which results in practical and well thought out solutions.

After 13 years at Compaq, Craig joined Greg in starting a firm that provided outsourced general counsel to small, medium, and large businesses. They led this firm together for 15 years, growing it to 26 lawyers across four cities, working with some of the biggest organizations in the state and country, including Shell, Hewlett Packard, and CITGO Petroleum. Along the way, they reimagined the legal service for small and medium-sized companies.

Most recently, Craig and Greg co-founded Phillips Kaiser, a law firm comprised of

Houston business attorneys. With their combined experience, they provide general counsel services to companies who wouldn't otherwise have access to in-house counsel. Craig's services run the gamut of business-related legal issues. He advises on overall business strategy, contracts, employment matters, commercial negotiations, and the range of legal matters that business owners face.

Craig's aim is for his clients to view him as a trusted voice they can depend on for all of their business and legal matters.

In addition to his outstanding legal work for the business community in Houston and beyond, Craig co-founded The Legacy Project with Greg in 2020. The Legacy Project is a developmental program within their firm dedicated to growing diverse leaders in the legal field. "There has never been a more urgent time in our country for a program like this." Craig sees The Legacy Project to be what Phillips Kaiser will be known for, for years to come.

In his words, "A career in law has afforded me a wonderful opportunity to see the world and work with all kinds of people to meet interesting and important objectives. The Legacy Project is an opportunity to open the door wider for others, as well as to leave a positive and lasting mark on our industry and our community."





**PHILLIPS KAISER**

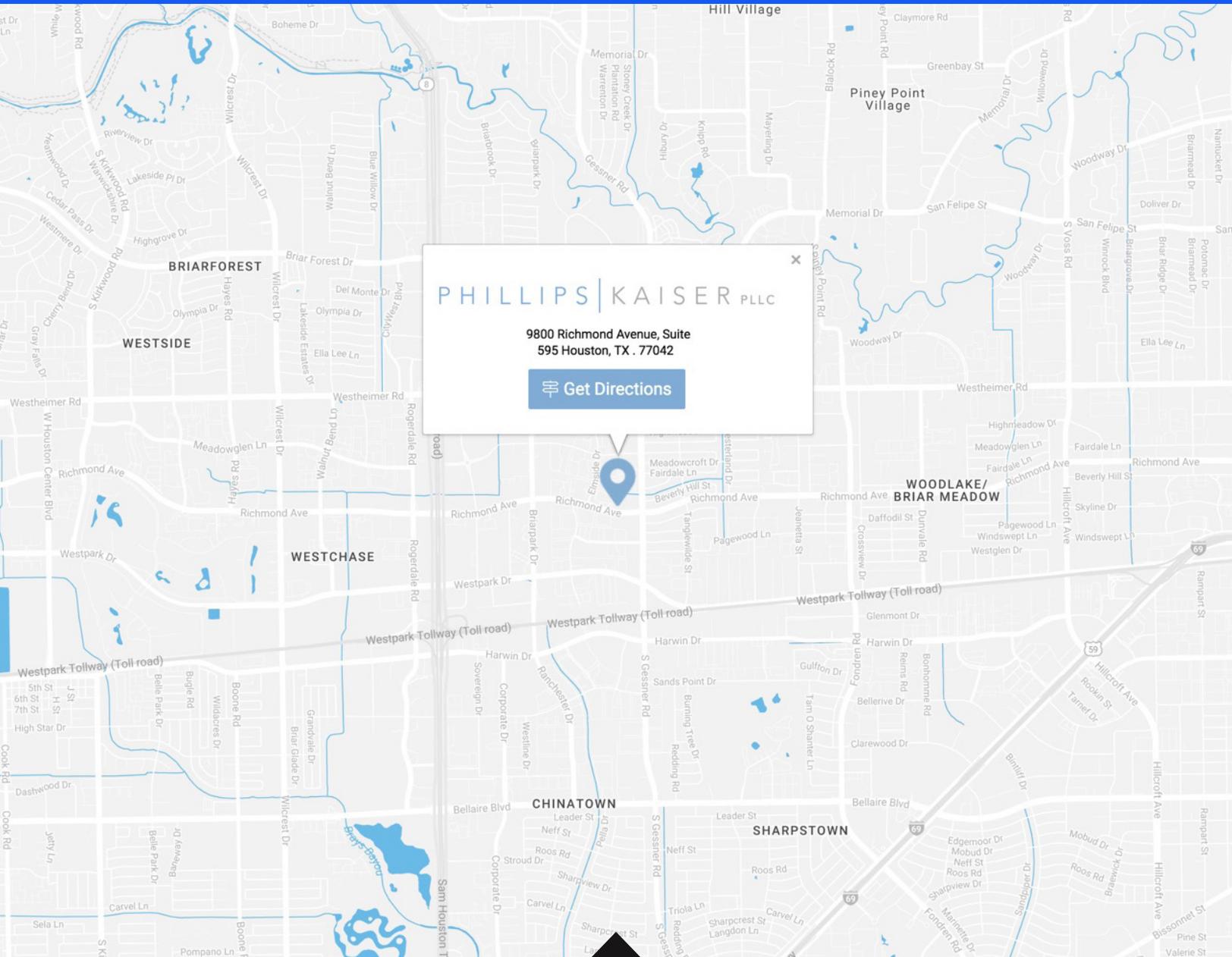
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