

Foreign Investment in the U.S. Renewable Energy Sector

December 11, 2024

Presenters



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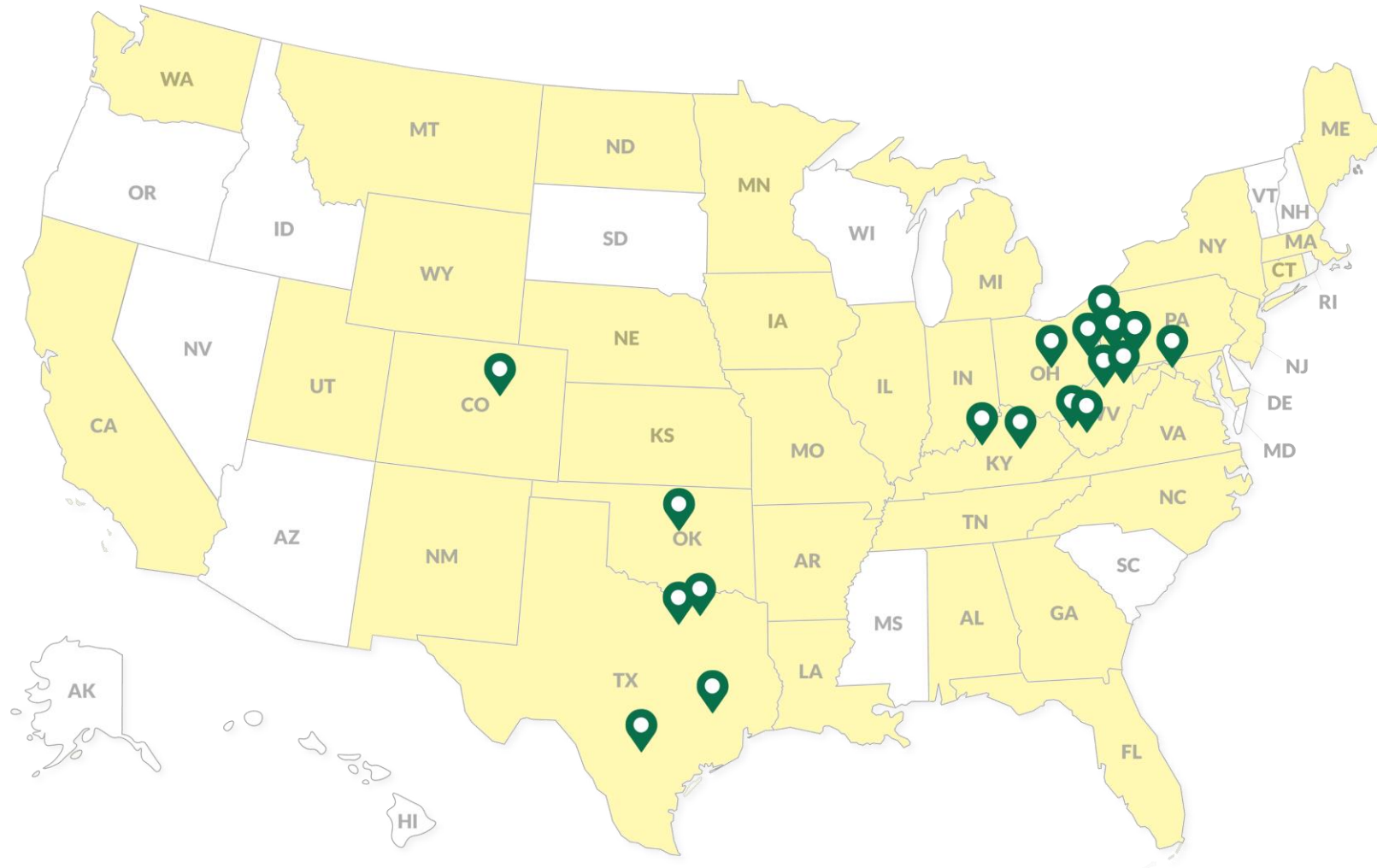
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Office Locations

- Bridgeport, WV
- Charleston, WV
- Collin County, TX
- Columbus, OH
- Dallas, TX
- Denver, CO
- Huntington, WV
- Lexington, KY
- Louisville, KY
- Martinsburg, WV
- Meadville, PA
- Morgantown, WV
- Oklahoma City, OK
- Pittsburgh, PA
- San Antonio, TX
- Southpointe, PA
- The Woodlands, TX
- Wheeling, WV

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Agenda

- Committee on Foreign Investment in the United States (CFIUS)
- Agricultural Foreign Investment Disclosure Act (AFIDA)
- State restrictions on foreign investment in real estate
- Corporate Transparency Act (CTA)



***CFIUS:
The Committee on Foreign
Investment in the United
States***

Committee on Foreign Investment in the United States (CFIUS)

An executive branch committee with the authority to review foreign investments in the U.S. and block them on national security grounds

- 1975 by President Gerald Ford's Executive Order 11858, pursuant to Section 721 of the Defense Production Act
- Formalized by the Foreign Investment and National Security Act of 2007
- Given additional authority by the Foreign Investment Risk Review and Modernization Act of 2018

CFIUS: Members

- Department of the Treasury (chair)
- Department of Justice
- Department of Homeland Security
- Department of Commerce
- Department of Defense
- Department of State
- Department of Energy
- Office of the U.S. Trade Representative
- Office of Science & Technology Policy
- Department of Agriculture
- Others as appropriate for the transaction

CFIUS: How It Works

- Allows the President to block a transaction on National Security grounds
- A transaction is relevant when a foreign company or individual seeks to purchase a U.S. company – will want to check all parties against various U.S. government lists
- Parties can submit to CFIUS or CFIUS can take notice of a transaction
- After consultation with CFIUS parties can attempt to mitigate CFIUS concerns
- If the parties are unable to mitigate the concerns, the transaction may be blocked
- The President under CFIUS has the power to unwind a previously completed transaction and force the sale to a non-foreign entity
- After a transaction has been reviewed and approved by CFIUS, it is in a safe harbor

Unocal and Ralls

- Unocal
 - In 2005, China National Offshore Oil Corporation (CNOOC) tried to purchase Unocal and faced significant political adversity. The bid was ultimately withdrawn, and the company was purchased by Chevron.
- Ralls Corp. v. Comm. on Foreign Inv. in the United States, 758 F.3d 296 (D.C. Cir. 2014)
 - 2014 case involving the purchase of land near a naval facility in Oregon by a U.S. company owned by Chinese nationals that was blocked by CFIUS

Foreign Investment Risk Review and Modernization Act (FIRRMA)

- Extends to transactions with minority foreign ownership
- Formalizes the process more – now two ways to submit a transaction to CFIUS
- Particular concern for sensitive activities: critical technologies (weapons, emerging and foundational technologies covered under portions of the Export Administration Regulations); critical infrastructure (see 31 C.F.R. Pt 800, App A); or the maintenance or collection of sensitive personal data of US citizens that may be exploited in a manner that threatens national security (known as a “TID” business)
- Excepts transactions involving Australia, Canada, New Zealand, and the UK

FIRREA Real Estate Restrictions

- Applies to all real estate transactions whether or not they would be otherwise subject to CFIUS. Is any of the property located within or near: an airport, seaport; military or other governmental installation; or other critical infrastructure (power plants, pipelines, etc.)?
- Creates two lists of U.S. government installations: a 1-mile list and a 99-mile list. Transactions within those distances of U.S. government installations will be subject to CFIUS
 - CFIUS has a GIS tool: <https://mtgis-portal.geo.census.gov/arcgis/apps/webappviewer/index.html?id=0bb1d5751d76498181b4b531987ce263>

FIRREA Real Estate Restrictions

- If the property is located in proximity to a government installation or critical infrastructure, what property rights are being acquired? Fee ownership, lease, easement/right of way, option, etc. Will you have three of the four below rights, whether or not the rights are exclusive?
 - To physically access the real estate
 - To exclude others from physically accessing the real estate
 - To improve or develop the real estate
 - To attach fixed or immovable structures or objects to the real estate

2024 Updates

- Added government installations to both the 1-mile and 99-mile lists
- Updated penalties: maximum penalty per violation in certain instances from the greater of \$250,000 or the value of the transaction, to \$5 million or the value of the transaction



AFIDA:
***Agricultural Foreign
Investment Disclosure Act***

Agricultural Foreign Investment Disclosure Act (AFIDA) of 1978

- 7 U.S.C. § 3501 et seq.
- It's a reporting statute and does not specifically bar foreign ownership of agricultural land
- Requires any foreign person acquiring a direct or indirect interest in agricultural land to file with the U.S. Department of Agriculture (USDA)
- Allows for a fine of up to 25% of the value of a foreign person's interest in land for failing to report or submitting false, incomplete, or misleading reports, plus additional penalties for late reporting

Agricultural Land

- Includes lands used for crops, ranching/grazing, and timber, specifically, “land totaling 10 or more acres in the aggregate that is used for forestry production or land currently used, or used within the past 5 years, for farming, ranching, or timber production.” 7 C.F.R. § 781.2(b).
- As of 2022, foreign persons reported holding an interest in 3.4% of all privately held U.S. agricultural land and nearly 2% of all land within the U.S. China has less than 1% of this foreign held land. Largest owners are Canada (1/3 of foreign agricultural land), the Netherlands, Italy, UK, and Germany.

Interests

- Interests include fee ownership and leaseholds of longer than 10 years; some investment interests are excluded
- Direct interest – a person has title to or a leasehold interest in land
- Indirect interest – a person has an ownership interest in a business that had title to or a leasehold interest in land

Foreign Person

- A Non-U.S. citizen, national, or permanent resident

Or

- A Non-U.S. entity includes foreign governments and businesses organized under the laws of a foreign government or whose primary place of operations is outside of the U.S.
 - Also includes U.S. entities where a foreign entity has “a significant interest or substantial control” over the domestic entity. 7 U.S.C. § 3508(3)(C).

What Gets Filed?

This form is available electronically.

AMENDED

Form Approved –OMB No. 0560-0097

FSA-153
(10-13-10)

U.S. DEPARTMENT OF AGRICULTURE
Farm Service Agency

1. TYPE ACTIVITY (See Instructions on Page 2) (check one)

- A. Land Holding B. Land Acquisition C. Land Disposition
D. Land Use Change to Agriculture E. Land Use Change to Non-Agriculture

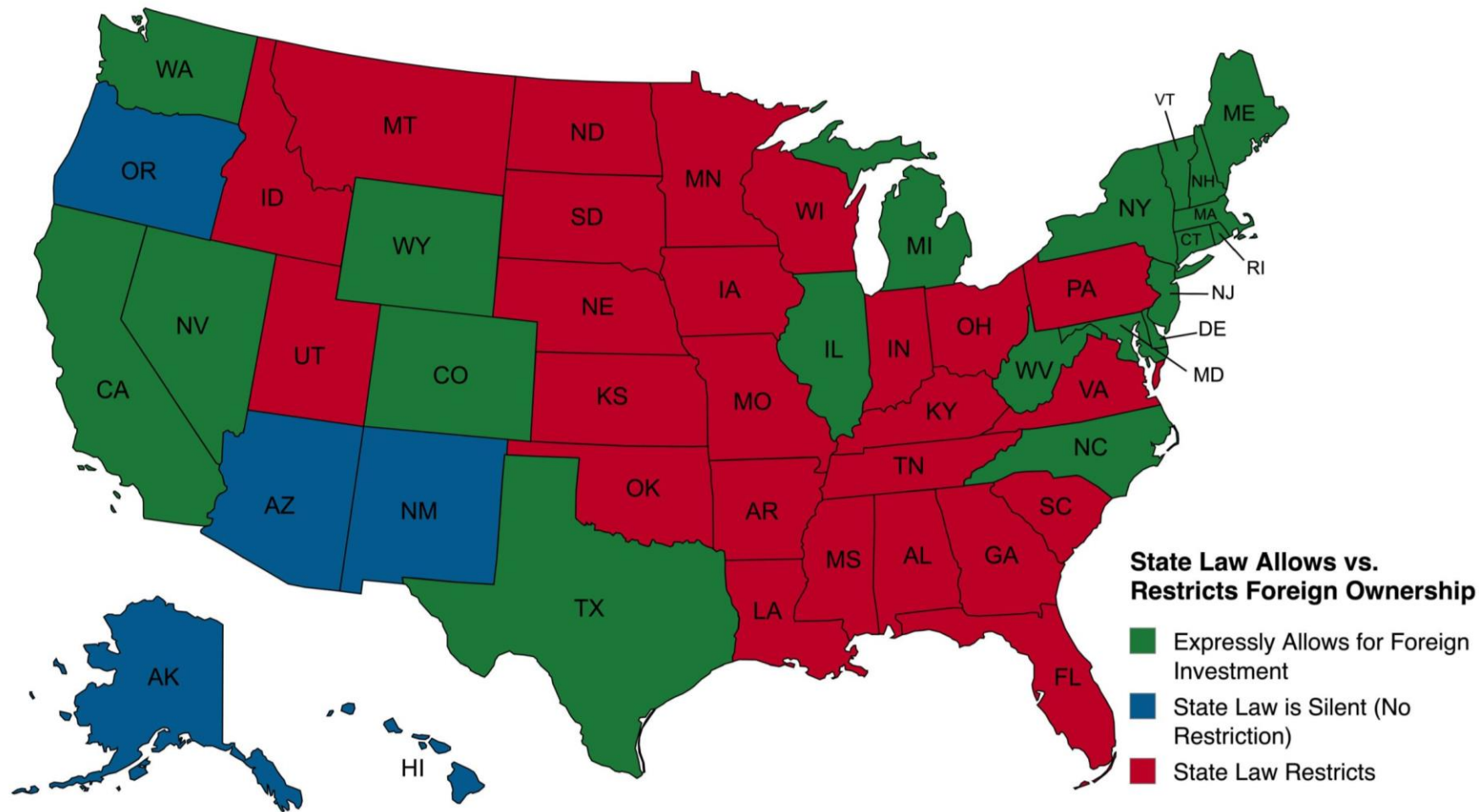
AGRICULTURAL FOREIGN INVESTMENT DISCLOSURE ACT REPORT

Note: Read Instructions on Page 2 Before Filing in Any Data Below. (If Additional Space is Needed, Add information in Item 6, Page 2, or attach an additional sheet.)

ITEM		ITEM	
2. Tract Location and Description		5. Type of Interest Held in the Agricultural Land (Check one)	
A. Legal Description or FSA Tract Number		A. Fee Interest (Ownership) Whole <input type="checkbox"/>	
B. County or Parish		B. Fee Interest (Ownership) Partial <input type="checkbox"/> What Percent	
C. Number of Acres		C. Life Estate <input type="checkbox"/>	
D. State		D. Trust Beneficiary <input type="checkbox"/>	
3. Owner or Lessee of Tract (In Item 2A) (See Page 2)		E. Purchase Contract <input type="checkbox"/>	
A. Name:		F. Other (Check Box and Explain Below) <input type="checkbox"/>	
B. Tax ID No. (Nine Digits)		6. How was this Tract Acquired or Transferred?	
C. Legal Address (Street, City, State/Province, Country)		A. Cash Transaction <input type="checkbox"/>	
D. Type of Owner (If Item D1 is checked, skip Items D2 and D3.)		B. Credit or Installment Transaction <input type="checkbox"/>	
1. Individual. (Indicate citizenship of husband and/or wife if applicable).		C. Trade <input type="checkbox"/>	
a. Citizenship of individual(s)		D. Gift or Inheritance <input type="checkbox"/>	
2. Government (Country)		E. Foreclosure <input type="checkbox"/>	
3. Organization		F. Other (Check Box and Explain Below) <input type="checkbox"/>	
a. Type		7. Value of Agricultural Land:	
1) Corporation		A. Purchase Price of Land or if a land disposition, the original price paid by seller. \$	
2) Partnership		B. Non-Purchase, Estimated Value at the Time of Acquisition \$	
3) Estate		C. What is the estimated current value or if a land disposition, the selling price of the tract of land? \$	
4) Trust		D. How much of purchase price in Item 7A remains to be paid? \$	
5) Institution		8. Date of Acquisition or Transfer (See Instructions, Item 8, Page 2.)	
6) Association		Month _____ Day _____ Year _____	
7) Other (Check box and Explain):		9. Current Land Use (Usual use of land for idle land, report as Other Agriculture).	
b. Government or country under whose law the organization is created		A. Crop	
c. Principal place of business (For organizations only)		B. Pasture	
d. List on separate sheet, the Name, Address and Country of all foreign persons who individually or in the aggregate hold significant interest or substantial control 1/ in the person owning the land.		C. Forest or Timber	
E. Complete only if Item 1C, Land Disposition, is checked.		D. Other Agriculture	
1. Name of Person Receiving Tract		E. Non-Agriculture	
2. Address (Street, City, State/Province, Country)		F. Total Acres (Should equal Item 2C)	
		10. Intended Use as of This Date.	
		Check one or more or enter "NA" if Item 1C or 1E above is checked.	
		Check or "NA"	

The background is a dark blue field filled with a complex network of thin, light blue lines connecting various points. These points are represented by small, glowing blue dots of varying sizes and brightness, creating a sense of depth and connectivity. The overall effect is that of a digital or neural network.

***State Restrictions on Foreign
Investment in Real Estate***



State	Relevant Provision	Restriction	Reporting	Penalty
Colorado	Colo. Const. art. II, § 27	None	None	None
Kentucky	Ky. Rev. Stat. Ann. §§ 381.290 to 381.300	Yes, restricts aliens to non-enemies, must become a citizen with 8 years or escheat	None	None
Louisiana	La. Const. Ann. art. I, § 4 La. Stat. Ann. §§ 3:3613 to 3:3619 La. Stat. Ann. § 9:2717.1	Yes, foreign adversaries as defined in 15 CFR 7.4(a) and OFAC database and person connected to them (post 8/1/2023)	None	Sale
North Dakota	N.D. Cent. Code Ann. §§ 10-06.1-01 to 10-06.1-27 N.D. Cent. Code Ann. § 47-01-09 N.D. Cent. Code Ann. §§ 47-10.1-01 to 47-10.1-06	Yes: ag land unless used for R&D and < 160 acres; farmland or rangeland by all corporations or LLCs except livestock farm corporations or LLCs; ownership of real property by foreign adversaries	Yes, limited livestock farm corporations and LLCs	Divestment

State	Relevant Provision	Restriction	Reporting	Penalty
Ohio	Ohio Rev. Code Ann. § 2105.16 Ohio Rev. Code Ann. §§ 5301.254; 5301.256; 5301.99	Yes, ownership of agricultural land by foreign adversaries, state sponsors of terrorism, and sanctioned persons as maintained on OH SOS registry	Yes, 30 days to OH Secretary of State	Escheat and violation of reporting requirements will be fined the greater of 25% of market value or \$5,000
Oklahoma	Okla. Const. art. XXII, § 1 Okla. Const. art. XXII, § 2 Okla. Stat. tit. 18, §§ 951 to 956 Okla. Stat. tit. 60, §§ 121 to 127	Yes, ownership of any land in the state by aliens or any noncitizens	None	Escheat
Pennsylvania	68 Pa. Stat. Ann. §§ 22 to 24; 28 to 31 68 Pa. Stat. Ann. §§ 41 to 47	Yes, acquiring an interest in agricultural land, exceeding 100 acres is prohibited, except such as may be acquired by devise or inheritance, and such as may be held as security for indebtedness. This shall not apply to citizens, foreign governments, or subjects of a foreign country whose rights to hold land are secured by treaty.	State monitors AFIDA filings	Forfeiture if within 5 years of acquisition

State	Relevant Provision	Restriction	Reporting	Penalty
South Dakota	S.D. Const. art. VI, § 14 S.D. Codified Laws §§ 43-2A-1 to 43-2A-8 S.D. Codified Laws §§ 47-9A-1 to 47-9A-23 S.D. Codified Laws § 59-11-24 to 24.1	Yes, ownership of agricultural land in excess of 160 acres by aliens and foreign governments is restricted	Yes, to the SD SOS	Forfeited to the state
Texas	Tex. Prop. Code Ann. § 5.005	None	None	None
West Virginia	W. Va. Const. art. II, § 5 W. Va. Code Ann. § 11A-3-45a W. Va. Code Ann. 11A-3-48a W. Va. Code Ann. § 36-1-21 W. Va. Code Ann. §§ 11-A-3-45a, -48a	Yes, but very narrow, the restriction limits individual citizens, entities, or governments designated as a “country of particular concern” from participating or purchasing property at a public auction	None	None

- More and more state level restrictions being brought to committee with each passing year, including Colorado, Kentucky, Texas, West Virginia, New York, California, and more
- We are seeing some local restrictions as well



CTA:
Corporate Transparency Act

Corporate Transparency Act (CTA)

31 U.S.C. §5336

- NOT specifically related to foreign ownership; rather, focused on terrorism, money laundering, and other misconduct
- Is a beneficial ownership filing requirement for businesses operating in the U.S.
- Requires all businesses, subject to exceptions, to file a report of their beneficial ownership with FinCen (<https://www.fincen.gov/boi>)
- All businesses created before January 1, 2024, must file by January 1, 2025
- All businesses created between January 1, 2024, and January 1, 2025, must file within 90 days of formation
- All business created after January 1, 2025, must file within 30 days of formation
- Updates to be filed within 30 days

However...

- The future of the CTA is unclear as it has seen significant opposition
- On December 3, 2024, a Federal judge in Texas issued a preliminary injunction against enforcement of the CTA. It is unknown what will happen with this case and the CTA after the change in presidential administrations.



Questions?

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