Going Deep on Mental Health Parity
Taking action Now in light of proposed regulations

October 31, 2023

National Alliance
of Healthcare Purchaser Coalitions
Driving Health, Equity and Value

Speakers

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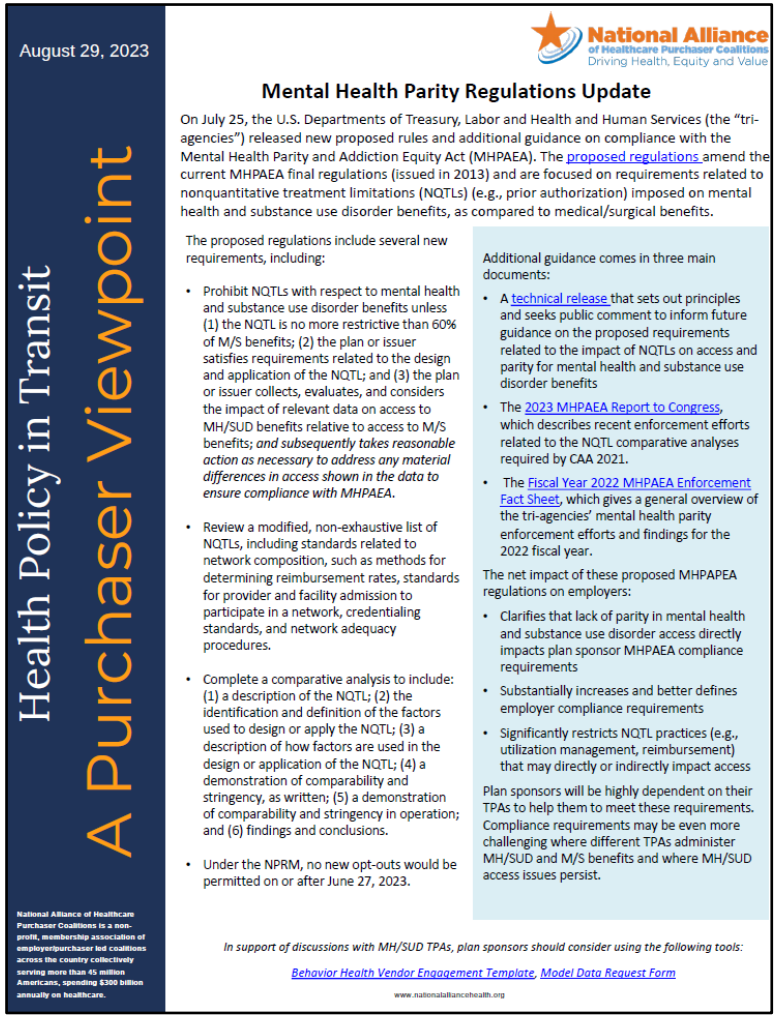
Mental Health Parity Regulation Update

Proposed Regulations:

- Highly anticipated
- Highly impactful
- Highly concerning



August 29, 2023

Health Policy in Transit

A Purchaser Viewpoint

National Alliance of Healthcare Purchaser Coalitions is a non-profit, membership association of employer/purchaser led coalitions across the country collectively serving more than 45 million Americans, spending $300 billion annually on healthcare.

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Mental Health Parity Regulations Update

On July 25, the U.S. Departments of Treasury, Labor and Health and Human Services (the "tri-agencies") released new proposed rules and additional guidance on compliance with the Mental Health Parity and Addiction Equity Act (MHPAEA). The proposed regulations amend the current MHPAEA final regulations (issued in 2013) and are focused on requirements related to nonquantitative treatment limitations (NQTLs) (e.g., prior authorization) imposed on mental health and substance use disorder benefits, as compared to medical/surgical benefits.

The proposed regulations include several new requirements, including:

- Prohibit NQTLs with respect to mental health and substance use disorder benefits unless (1) the NQTL is no more restrictive than 60% of M/S benefits; (2) the plan or issuer satisfies requirements related to the design and application of the NQTL; and (3) the plan or issuer collects, evaluates, and considers the impact of relevant data on access to MH/SUD benefits relative to access to M/S benefits; *and subsequently takes reasonable action as necessary to address any material differences in access shown in the data to ensure compliance with MHPAEA.*
- Review a modified, non-exhaustive list of NQTLs, including standards related to network composition, such as methods for determining reimbursement rates, standards for provider and facility admission to participate in a network, credentialing standards, and network adequacy procedures.
- Complete a comparative analysis to include: (1) a description of the NQTL; (2) the identification and definition of the factors used to design or apply the NQTL; (3) a description of how factors are used in the design or application of the NQTL; (4) a demonstration of comparability and stringency, as written; (5) a demonstration of comparability and stringency in operation; and (6) findings and conclusions.
- Under the NPRM, no new opt-outs would be permitted on or after June 27, 2023.

Additional guidance comes in three main documents:

- A technical release that sets out principles and seeks public comment to inform future guidance on the proposed requirements related to the impact of NQTLs on access and parity for mental health and substance use disorder benefits
- The 2023 MHPAEA Report to Congress, which describes recent enforcement efforts related to the NQTL comparative analyses required by CAA 2021.
- The Fiscal Year 2022 MHPAEA Enforcement Fact Sheet, which gives a general overview of the tri-agencies' mental health parity enforcement efforts and findings for the 2022 fiscal year.

The net impact of these proposed MHPAPEA regulations on employers:

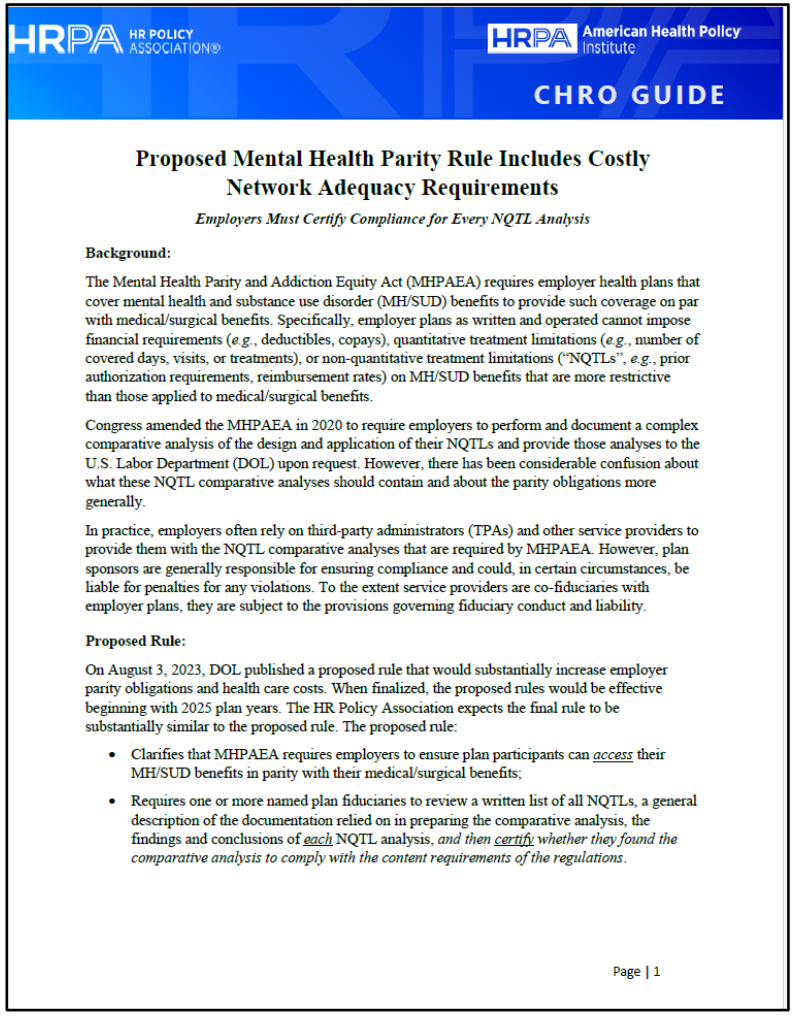
- Clarifies that lack of parity in mental health and substance use disorder access directly impacts plan sponsor MHPAEA compliance requirements
- Substantially increases and better defines employer compliance requirements
- Significantly restricts NQTL practices (e.g., utilization management, reimbursement) that may directly or indirectly impact access

Plan sponsors will be highly dependent on their TPAs to help them to meet these requirements. Compliance requirements may be even more challenging where different TPAs administer MH/SUD and M/S benefits and where MH/SUD access issues persist.

In support of discussions with MH/SUD TPAs, plan sponsors should consider using the following tools:

Behavior Health Vendor Engagement Template, Model Data Request Form

www.nationalalliancehealth.org



HRPA HR Policy Association®

HRPA American Health Policy Institute

CHRO GUIDE

Proposed Mental Health Parity Rule Includes Costly Network Adequacy Requirements

Employers Must Certify Compliance for Every NQTL Analysis

Background:

The Mental Health Parity and Addiction Equity Act (MHPAEA) requires employer health plans that cover mental health and substance use disorder (MH/SUD) benefits to provide such coverage on par with medical/surgical benefits. Specifically, employer plans as written and operated cannot impose financial requirements (*e.g.*, deductibles, copays), quantitative treatment limitations (*e.g.*, number of covered days, visits, or treatments), or non-quantitative treatment limitations ("NQTLs", *e.g.*, prior authorization requirements, reimbursement rates) on MH/SUD benefits that are more restrictive than those applied to medical/surgical benefits.

Congress amended the MHPAEA in 2020 to require employers to perform and document a complex comparative analysis of the design and application of their NQTLs and provide those analyses to the U.S. Labor Department (DOL) upon request. However, there has been considerable confusion about what these NQTL comparative analyses should contain and about the parity obligations more generally.

In practice, employers often rely on third-party administrators (TPAs) and other service providers to provide them with the NQTL comparative analyses that are required by MHPAEA. However, plan sponsors are generally responsible for ensuring compliance and could, in certain circumstances, be liable for penalties for any violations. To the extent service providers are co-fiduciaries with employer plans, they are subject to the provisions governing fiduciary conduct and liability.

Proposed Rule:

On August 3, 2023, DOL published a proposed rule that would substantially increase employer parity obligations and health care costs. When finalized, the proposed rules would be effective beginning with 2025 plan years. The HR Policy Association expects the final rule to be substantially similar to the proposed rule. The proposed rule:

- Clarifies that MHPAEA requires employers to ensure plan participants can *access* their MH/SUD benefits in parity with their medical/surgical benefits;
- Requires one or more named plan fiduciaries to review a written list of all NQTLs, a general description of the documentation relied on in preparing the comparative analysis, the findings and conclusions of *each* NQTL analysis, *and then certify whether they found the comparative analysis to comply with the content requirements of the regulations*.

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Mental Health Parity and Addiction Equity Act (MHPAEA) Background

- Requires employer health plans that cover MH/SUD benefits to provide such coverage on par with med/surg benefits
- Specifically, employer plans ***as written and operated*** cannot impose restrictions on MH/SUD benefits that are more restrictive than those applied to medical/surgical benefits
  - Financial requirements (e.g., deductibles, copays),
  - Quantitative treatment limitations (e.g., number of covered days, visits, or treatments)
  - Non-quantitative treatment limitations ("NQTLs") e.g., prior authorization, reimbursement rates)
- Congress amended the MHPAEA in 2020
  - Required employers to perform and document a complex comparative analysis of the design and application of their NQTLs and provide those analyses to the U.S. Labor Department (DOL) upon request
- Challenges
  - Considerable confusion about what NQTL comparative analyses should contain and about parity obligations more generally.
  - In practice, employers rely on TPAs and other service providers to provide them with the NQTL comparative analyses that are required by MHPAEA.
  - However, plan sponsors are generally responsible for ensuring compliance and could, in certain circumstances, be liable for penalties for any violations.

Proposed DOL Parity Rules

- Clarifies that MHPAEA requires employers to ensure plan participants ***can access*** their MH/SUD benefits in parity with their medical/surgical benefits;
- Requires one or more named plan fiduciaries to
  - Review a written list of all NQTLs and a general description of the documentation relied on in preparing the comparative analysis, the findings and conclusions of each NQTL analysis,
  - Certify whether they found the comparative analysis to comply with the content requirements of the regulations.
- Requires employer plans to collect, evaluate, and consider the impact of various outcome data (e.g., claim denial rates) and take "reasonable action" to address "material differences" in accessing MH/SUD benefits compared to medical/surgical benefits
  - Such action must be documented in the employer's NQTL comparative analysis
  - Material difference is not defined in the proposal

The proposed DOL Parity Rules published August 3, 2003 substantially increase employer parity obligations and health care costs.

When finalized, the proposed rules would be effective beginning with 2025 plan years.

Expect the final rule to be substantially similar to the proposed rule.

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Proposed DOL Parity Rules

- Increases the NQTL standards related to:
  - Network composition and network adequacy metrics
  - Provider reimbursement rates,
  - Prior authorization
- Requires employer plans to collect and evaluate specific data points related to:
  - Network composition
  - Number and percentage of relevant claims denials
  - In-network and out-of-network utilization rates
  - Network adequacy metrics (including time and distance data, and data on providers accepting new patients)
  - Provider reimbursement rates (including as compared to billed charges).
- Requires employer plans to provide "meaningful MH/SUD benefits"
  - If a plan provides treatment for a specific condition in one benefit classification, it must provide for treatment in all six benefit classifications.

6 "Benefit Classifications"

- Inpatient/in- network
- Inpatient/out-of-network
- Outpatient/in-network
- Outpatient/out-of-network
- Prescription drugs
- Emergency care

Proposed Rules – Focus on NQTL Analysis

- An employer's obligation to perform and document a NQTL comparative analysis is not dependent upon a DOL audit request, and employers have just ten business days to provide their comparative analyses to DOL.
- DOL expects "more complete comparative analyses from the start of the review process" and will expect any deficiency "to be cured more quickly." In the future, DOL may not provide opportunities to employers to address problems before issuing a final determination of non-compliance.
- New employer certification requirement beginning in 2025.
    - Employer NQTL comparative analyses must include a certification by one or more named fiduciaries who have reviewed the analysis, stating they found it to be in compliance with the proposed rule's content requirements.

Consider giving TPAs ERISA Fiduciary Status

Employers may want to consider specifying in contracts with a TPA and/or service provider that those parties are a named fiduciary with respect to MHPAEA compliance. Require them to confirm all NQTL comparative analyses have been performed and request a copy.

13 Examples of Proposed Rules/60% Rule

1. *More restrictive **prior authorization** requirement in operation.*
2. *More restrictive **peer-to -peer concurrent review** requirements in operation.*
3. *More restrictive peer-to-peer review medical necessity standard in operation; deviation from independent professional **medical and clinical standards**.*
4. *Not comparable and more stringent methods for determining **reimbursement rates** in operation.*
5. *Exception for impartially applied generally recognized independent professional medical or clinical standards.*
6. *More restrictive prior authorization requirement; exception for impartially applied generally recognized independent professional medical or clinical standards not met.*
7. ***Impermissible NQTL imposed** following a final determination of noncompliance and direction by Secretary.*
8. ***Provider network admission standards** not more restrictive and compliant with requirements for design and application of NQTLs.*
9. *More restrictive requirement for **primary caregiver participation applied to ABA therapy**.*
10. *More restrictive exclusion for **experimental or investigative treatment applied to ABA therapy**.*
11. *Separate **EAP exhaustion treatment limitation** applicable only to mental health benefits*
12. *Separate **residential exclusion treatment limitation** applicable only to mental health benefits.*
13. ***Standards for provider admission** to a network.*

60% Rule

Refers to the "substantially all/ predominant test".

If an NQTL does not apply to at least two-thirds of all Medical/Surgical benefits in a classification, then that NQTL would not be permitted to be applied to MH/SUD benefits in that classification.

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Source: https://www.govinfo.gov/content/pkg/FR-2023-08-03/pdf/2023-15945.pdf

Key Takeaways for Employers

- The proposed rule clearly signals DOL's parity enforcement **focus going forward will be on ensuring parity regarding access to MH/SUD benefits**
  - This will be a difficult standard for TPA/ASOs to meet.
  - Get all of your NTQL analyses from your TPA/ASOs.
  - Consider outside counsel if you need it.
  - Be prepared to respond to any DOL audit letter.
- Start asking questions about your plan's network composition well before 2025.
  - Time and distance data
  - Data on providers accepting new patients,
  - Number and percentage of relevant claims denials
  - In-network and out-of-network utilization rates
  - Provider reimbursement rates as compared to billed charges.•
- Be prepared to modify your TPA/ASO contracts when the final rule is published.
  - We expect the final rule will be published before July 2024, and for it to be effective beginning

Notably, DOL recognizes there are significant challenges to building parity compliant MH/SUD networks because of the shortage of providers in some geographic locations.

If an employer plan is otherwise compliant with their parity obligations and the employer has taken comprehensive action to address network access issues, *DOL will not find the employer out of compliance if plan participants have to rely on out-of-network providers due to provider shortages.*

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Additional Takeaways for Employers of Proposed Rule

- Will significantly reduce the ability to apply certain medical management techniques (e.g., prior authorization) to MH/SUD benefits.
- Expect higher costs for plan administration, indemnification and legal review, and higher provider reimbursement rates for MH/SUD claims.
- DOL expects premiums to increase, out-of-pocket costs to be lower, increased costs from expanded coverage and utilization of MH/SUD benefits, and changes in provider utilization patterns.
- Potential improvements in timely access to in-network MH/SUD providers but given the shortage of providers it is unclear how much.
- Need to review plan documents for potential problems.
- Employer plans should have clear protocols and processes in place to ensure the TPA/ASOs for both medical/surgical and MH/SUD benefits provide all of the information necessary for MHPAEA compliance

Vendor Engagement Template

- Network Access
- Other Access
- Quality of Care Management
- Integration Into Primary Care
- Workplace Mental Health
- Appendix
  - State of Tennessee Employer Case Study

https://www.nationalalliancehealth.org/resources/behavioral-health-vendor-engagement-template/

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NORC 2023 Report

Compares access barriers for mental health versus physical health

This patient-experience survey explored key topics such as:

- how often mental health or substance use care is needed but not received
- how difficult it is to find in-network providers accepting new patients
- how often and why patients use out-of-network providers for mental health or substance use care versus physical health care
- how often patients feel that mental health or substance use care from PCPs and other physical health providers is insufficient
- how often services are denied

Some results shown by carrier

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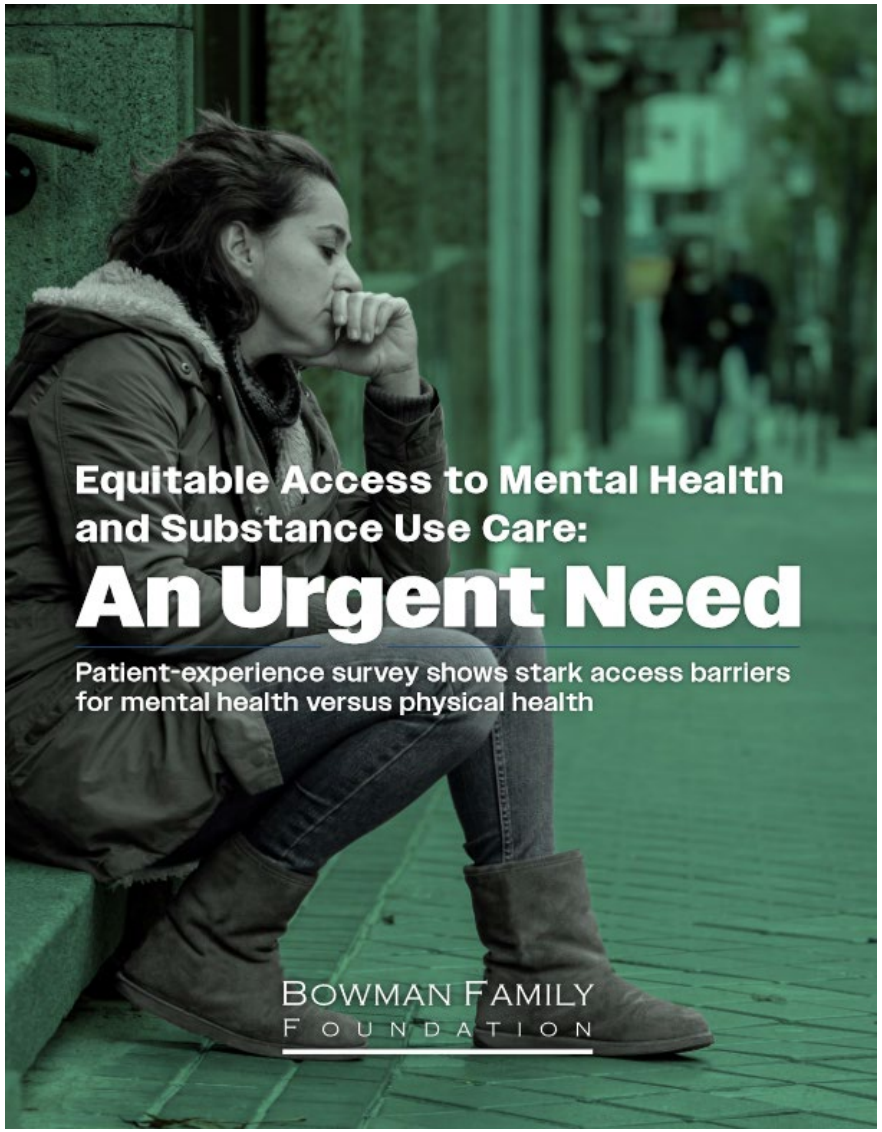

https://www.mhtari.org/Survey_Conducted_by_NORC.pdf

Without enough psychiatrists, pediatricians have become front-line mental health workers

- A survey of nearly 2,800 patients revealed that 69% of adolescents who sought mental health or substance use care between 2019 and 2022 did not receive it on at least one occasion
- Mental, emotional and behavioral disorders have become the most common illnesses affecting children today, with about 20% of young people experiencing a diagnosable mental health disorder
- “Probably the majority of mental health and substance use disorders start in people under 18 and we know a lot of these people don’t get screened and identified and referred to care”

- Dr. Henry Harbin

Without enough psychiatrists, pediatricians have become front-line mental health workers

Detroit Free Press

In the face of a youth mental health crisis, adolescents are struggling to access care, a new report finds. A survey of nearly 2,800 patients revealed that 69% of adolescents who sought mental health or substance use care between 2019 and 2022 did not receive it on at least one occasion.

With so few pediatric psychiatrists and mental health professionals available, primary care providers are increasingly trying to fill the gap, offering front-line mental health care they are mastering on the job.

“We prescribed so much more psychotropic medication than I've ever prescribed in my career just within the last five years,” said Dr. Stephanie Goodson, a pediatrician with Michigan Medicine who also consults with the American Academy of Pediatrics on peer-to-peer training. “I've just had to learn how to feel more comfortable with it and how to handle the follow-up with it. And I'm seeing that more commonly done by all primary care physicians that I've talked to.”

Mental, emotional and behavioral disorders have become the most common illnesses affecting children today, with about 20% of young people experiencing a diagnosable mental health disorder.

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Link: https://medicine.umich.edu/dept/pediatrics/news/archive/202307/without-enough-psychiatrists-pediatricians-have-become-front-line-mental-health-workers

Questions

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Annual Forum

Monday, November 13

1:00 – 2:30 PM
Workshop
Emerging Excellence in Mental Health Strategy

Tuesday, November 14

11:25am
Innovator Showcase
Innovative Treatment Alternatives for Trauma

1:25 -1:45 PM
Ted Talk
Walking the Edges of Excellence & Catastrophe

Registration Link: https://nationalalliancehealth.swoogo.com/2023annualforum/begin

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Upcoming Webinar

Fiduciary Check In: Employer Attestations - Fair price

Date: November (TBD)

Invited speakers: Jamie Greenleaf & Tony Sorrentino

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