DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR Chief Counsel's Office

Special Trial Attorney

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SUBJECT: The use of Section 269 and 482 to prevent duplication of loss

This advice is a supplement to a Field Service Advice issued by Deborah Butler on July 22, 2000(200043007). In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

A =
B =
C =
D =
E =
Date1=
Date2=
Date3=
Date4=
Date5=
Year1=
Year2=
Year3=
#a =

#b =
#c =
#d =
#e =
#f =
#g =
#h =
#i =
a =
b =
c =

ISSUES

1. Whether I.R.C. § 269(a)(2) can be applied to disallow any loss by D on the sale or disposition of worthless properties.

2. Whether, upon D's abandonments of "worthless" C-contributed properties, section 482 permits the Service to make appropriate primary and correlative allocations (to D and C, respectively) and conforming adjustments (to the basis of C's D APS) to prevent the replication of losses that had effectively been sustained as of the time of the section 351 transfer.

CONCLUSIONS

1. Since E was not a shareholder of D immediately before C'S transfer of the properties to D, I.R.C. § 269(a)(2) can be applied to disallow any loss by D on the sale or disposition of worthless properties.

2. The Service believes such allocations and adjustments fall within the broad mandate of section 482 to prevent evasion of taxes and to clearly reflect income, and would, in fact, be necessary to prevent the replication of losses that had effectively been sustained as of the time of the section 351 transfer.

FACTS

D was formed on or about Date1, by E. E did not receive any stock of D upon D'S formation. The only shareholder of D at the time of D's formation, was an individual incorporator holding one share of D stock.

On or about Date2, C, an indirect subsidiary of E, acquired #a shares of D APS in a purported section 351 transaction in exchange for a, b, and c properties with a combined tax basis of #b and a fair market value of about #c. At the same time, A and B, sister companies of C, contributed income-producing properties in exchange for D common stock and non-voting preferred stock. Concurrently with the purported section 351 transaction, an additional #d shares of APS were privately sold to institutional investors for #e per share. (The Service in a previous FSA dated March 1, 2000 (200023016) concluded that the above mentioned transaction met the requirements of Section 351.)

In Date 5, C sold #f shares of its APS to outside investors for #g, and reported a loss of #h. In Year1, D began to sell or abandon certain high basis, low value C-contributed properties and take corresponding loss deductions. As of Date3, D's remaining C-contributed properties were all non-producing and had a total basis of less than #i.

D files a separate tax return from that of the E consolidated group, which includes E, C, A, and B. The E consolidated group's taxable years ending Date4, Year1 and Year2 are at issue in this case. The 1968 section 482 regulations, T.D. 6952, 1968-1 C.B. 218, effective for taxable years beginning on or before April 21, 1993, are applicable with respect to the taxable year Year1 abandonments. (We understand there were no abandonments in the preceding taxable year) The temporary 1993 section 482 regulations, T.D. 8470, 1993-1 C.B. 90, effective for taxable years beginning after April 21, 1993, but before October 6, 1994, are applicable with respect to the taxable Year2 abandonments. <u>See</u> Temp. Treas. Reg. § 1.482-1T(h) (1993). The final 1994 section 482 regulations, T.D. 8552, 1994-2 C.B. 93, are generally effective for taxable years beginning after October 6, 1994. <u>See</u> Treas. Reg. § 1.482-1(j) (1994). Pursuant to Treas. Reg. § 1.482-1(j)(2) (1994), a taxpayer may elect to apply retroactively the 1994 section 482 regulations, but we understand that no such election has been made in this case. Thus, the final 1994 section 482 regulations are applicable with respect to abandonments in taxable years subsequent to the taxable years at issue in this case.

<u>LAW AND ANALYSIS</u>

1. I<u>.R.C. § 269(a)(2)</u>

I.R.C. § 269(a)(2) provides: (a) IN GENERAL.-If-

...

(2) any corporation acquires, or acquired on or after October 8, 1940, directly or indirectly, property of another corporation, not controlled, directly or indirectly, immediately before such acquisition, by such acquiring corporation or its shareholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation, and the principal purpose for which such

acquisition was made is evasion or avoidance of Federal income tax by securing the benefit of a deduction, credit, or other allowance which such corporation would not otherwise enjoy, then the Secretary may disallow such deduction, credit or other allowance. For purposes of this section, control means the ownership of stock possessing at least 50 percent of the total combined voting power of all classes of stock entitled to vote or at least 50 percent of the total value of shares of all classes of stock entitled to vote.

Under Treas. Reg. 1.269-3(c)(1), if a corporation acquires property having in its hands an aggregate carryover basis which is materially greater than its aggregate fair market value at the time of such acquisition and utilizes the property to create tax reducing losses, then it is assumed that, in absence of evidence to the contrary, the principal purpose for acquiring such property was evasion or avoidance of Federal income tax. However, in order for this assumption to apply, the additional requirements of I.R.C. § 269(a)(2) must be met. In the instant case, the requirements of lack of common control of the transferor and transferee must be met, in order for the statute to apply. In the instant case these requirements were met because E was not a shareholder of D immediately before the transfer of property from C to D.

Common control

I.R.C. § 269(a)(2) does not apply to asset acquisitions where the transferee and the transferor were under common control immediately before the transaction. Boris, L. Bitker & James S. Eustice, Federal Taxation of Corporations And Shareholders,

¶ 14.41 [3][d] (7th ed.) It is clear that E owned 100 percent of the voting power and value of C, the transferor, immediately before the Date2 transfer. The existence of common control then turns on whether E owned any stock of D prior to the transfer. Although the facts recite that E formed D on Date1, E did not receive any stock of D upon D's formation. The only shareholder of D, at the time of D's formation, was an individual incorporator holding one share of D stock. Since E did not receive any stock in exchange for any contribution it made in forming D, E was not a shareholder of D immediately before the transfer of property from C to D. Therefore, common control would not exist for purposes of 269(a)(2) because neither D nor its shareholders controlled C immediately before the transfer.

Principal purpose

In order for I.R.C. § 269(a) to apply, the principal purpose of the acquisition must be to evade or avoid Federal income tax. Under Treas. Reg. 1.269-3(c)(1), if a corporation acquires property having in its hands an aggregate carryover basis which is materially greater than its aggregate fair market value at the time of such acquisition and utilizes the property to create tax reducing losses, then it is assumed, that in absence of evidence to the contrary, the principal purpose for acquiring such property was evasion or avoidance of Federal income tax.

In the instant case, D acquired property with a basis materially in excess of its fair market value, and this property was used to create a double deduction (i.e. a loss on preferred stock and worthless assets). Therefore, the principal purpose of D'S acquisition of the worthless properties from C was to avoid or evade income tax. In the instant case, there was no substantial purpose for the transfer of worthless properties from C to D other than tax avoidance.

The taxpayer's stated business purpose for this transfer was to raise cash through the sale of these properties. The business purpose of raising cash did not require the incorporation of D. In addition, the properties that were worthless at the time of the Date 2 transfer did not produce any cash. However, the sale of the APS stock by C, as well the sale of the value properties by D did produce cash.

Securing the benefit

In order for 269(a) to apply, the acquisition must secure the benefit of a deduction, credit or other allowance that such person or corporation would not otherwise enjoy. In the instant case, when D acquired the worthless built in loss property from C, it secured the benefit of the use of a loss it otherwise would not enjoy. (Absent the transfer, the built in loss would have been recognized by C on the abandonment of the property.)

The taxpayer may argue that this transaction was a tax planning method used to effect a business motivated acquisition, and that courts have refused to apply I.R.C. § 269 to transactions of this type. Arwood Corp. v. Commissioner, T.C. Memo 1971-2 (1971). However, there was no business purpose for the transfer of the worthless properties. Therefore, it appears D did secure the benefit of a deduction it otherwise would not enjoy.

Carryover basis

In order for § 269(a)(2) to apply, the acquiring corporation's basis in the property must be determined by reference to transferor's basis in that property. In the instant case, D acquired property from C as a part of a I.R.C. § 351 transaction. Therefore D'S basis in the property it acquired from C was determined by reference to C'S basis in the property. Therefore, the carryover basis requirement of I.R.C. § 269(a)(2) is met.

Summary

Because the available information indicates that E was not a shareholder of D immediately before the transfer of property from C to D, the Service should go forward with the argument that I.R.C. § 269(a)(2) can be applied to disallow any loss by D on the sale or disposition of worthless properties.

2. A.-<u>Section 482 Allocations in the Context of Nonrecognition Transactions</u>

<u>Law and analysis</u>

The Commissioner's broad authority to make allocations under section 482 in the context of nonrecognition transactions such as section 351 exchanges has long been recognized by the courts. Such allocations have been upheld when: (1) the nonrecognition transaction was entered into for tax purposes, or (2) the nonrecognition transaction does not clearly reflect the income of the parties to the transaction. The seminal case in which a Court applied section 482 in holding that a nonrecognition transaction did not clearly reflect the income of the parties to the transaction is <u>National Securities Corp. v. Commissioner</u>, 137 F.2d 600 (3d Cir.), <u>cert. denied</u>, 320 U.S. 794 (1943).

In <u>National Securities</u>, a parent corporation held 1,000 shares of Standard Gas and Electric Company (SG&E) stock that had declined in value from approximately $140,000 (when purchased in 1929) to $8,562.50 (in 1936). In 1936, the SG&E stock was transferred in a section 112 (a predecessor to section 351) exchange to the taxpayer, a wholly-owned subsidiary of the parent, for 800 shares of the subsidiary's stock. In the same taxable year as the nonrecognition transfer, the subsidiary sold the transferred SG&E stock for $7,175 and claimed a loss on its tax return equal to the difference between this amount and its basis (<u>i.e.</u>, $140,000), which the subsidiary had carried over from its parent under section 113 (a predecessor to section 362). The Commissioner determined that the loss should be reallocated to the parent corporation (which was unable to use it) in order to clearly reflect income.[1] This determination was upheld by the Third Circuit Court of Appeals, which stated:

> It seems most reasonable to treat the loss as one which had in fact been sustained by the parent rather than by the subsidiary. The shifting of the loss to the subsidiary gives an artificial picture of its true income and one which it was unnecessary for the Commissioner to accept. . . . The Commissioner was justified in finding that the

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[1] The taxpayer was, however, entitled to that part of the loss deduction which represented the difference between the fair market value of the shares when acquired by the taxpayer ($8,562.50) and the amount for which the taxpayer sold them ($7,175). <u>See</u> 137 F.2d at 601.

> taxpayer's income was not clearly reflected by its return for 1936 since the return included a loss which was in fact incurred by the parent.

137 F.2d at 602-603.

The effect of the loss reallocation on the parent's basis in the 800 shares of stock in the subsidiary obtained in the nonrecognition transfer (i.e., a conforming adjustment) was not addressed in the Third Circuit opinion, nor in the earlier Board of Tax Appeals opinion, National Securities Corp. v. Commissioner, 46 B.T.A. 562 (1942).

B. **Discussion of Section 482 Theories**

In order to develop the strongest case possible for the application of section 482, we would recommend the field develop the following facts on an asset by asset basis showing: (a) to what extent the losses associated with the abandoned properties had economically accrued to C at the time of the Date2 section 351 transfer; and (b) to what extent the nonrecognition transaction clearly reflects the income of the parties involved in the transaction; and (c) whether the transfer of property involved a tax avoidance purpose. See National Securities Corp v. Commissioner, 137 F.2d 600 (3d Cir.), cert denied, 320 U.S. 794 (1943). Compare Eli Lilly & Co. v. Commissioner, 84 T.C. 996, 1117 (1985). (Where the Tax Court seemed to view transactions like that present in National Securities and in the instant case (i.e., built in gains or losses on transferred property) as requiring reallocation when the "sole purpose" of the transfer of such properties was to achieve tax consequences on the disposition of the property by the transferee that were more favorable than the tax consequences of a disposition by the transferor.)

When such factual development occurs, National Securities and its progeny appear to support the proposed primary and correlative allocations, under the theory that the inclusion of "worthless" properties in the section 351 transaction resulted in a distortion of true taxable income because losses sustained on the properties were built in before their transfer and hence were losses generated by C. Therefore, those losses should be allocated from D to C.

We also believe that if such facts are developed, the proposed section 482 allocations may be made even though the abandonments occur in taxable years subsequent to the taxable year of the section 351 transaction. We note that this is arguably a novel approach, in that the National Securities line of cases do not directly address a conforming adjustment to basis when section 482 is applied in the context of a section 351 transaction. We believe, however, that the authorities discussed above generally support the conforming adjustments to basis, which logically and analytically follow from the primary and correlative allocations and are necessary to prevent the inappropriate replication of losses that had effectively been sustained at the time of the section 351 transaction. Such loss replication is not eliminated solely through the proposed primary and correlative section 482 allocations because when only these allocations are made, C's basis in its remaining D APS would continue to reflect (in part) the abandoned properties' built-in losses.

Adjustments to the basis of C's APS are thus required to conform C's accounts to reflect the primary and correlative section 482 allocations. See Treas. Reg. 1.482-1(g)(3)(i) (Appropriate adjustments must be made to conform a taxpayer's accounts to reflect allocations made under section 482.)

The National Securities theory underlying the primary and correlative section 482 allocations reallocates abandonment losses to C, to the extent these losses had economically accrued to C at the time of the section 351 transaction. Under these circumstances, it is not appropriate for the basis of C's APS to continue to replicate reallocated losses. Under National Securities, D would be entitled to abandonment losses to the extent of any decrease in an abandoned property's value subsequent to the Date2 section 351 transaction. See 137 F.2d at 601. As a corollary, C would be entitled to losses attributable to a post-contribution decrease in the value of its D APS (which would reflect the value of D's assets). The analysis used in the example set forth below accordingly assumes that post-contribution decreases in an abandoned property's value may properly be replicated.

We note that the application of section 482 in the context of a nonrecognition transfer also requires a consideration of Eli Lilly & Co. v. Commissioner, 84 T.C. 996 (1985), aff'd in part and rev'd in part, 856 F.2d 855 (7th Cir. 1988). In Eli Lilly & Co., the Commissioner sought to reallocate to a United States corporation income earned through the use of intangibles in the manufacture and sale of products in 1971, 1972, and 1973, claiming that the section 351 transaction transferring the intangibles in 1966 to a wholly-owned Puerto Rican subsidiary should be disregarded to prevent a distortion of income resulting from a mismatching of expenses and income. The Tax Court, however, finding that the transaction had a bona fide business reason (i.e. to qualify for the tax benefits of section 931) and that its form and substance comported with economic reality, held that there was no tax avoidance and that no mismatching had occurred. As a result, the Commissioner could not invoke either the tax avoidance standard or the "clear reflection of income standard" of section 482, and the Tax Court instead looked to whether a fair value was paid for the transfer of the intangibles. These findings were upheld by the Seventh Circuit Court of Appeals. The Tax Court in Eli Lilly & Co. stated that section 482 could be applied to override nonrecognition transactions in certain situations: (1) Where the transaction was entered into solely for tax purposes or (2) Where the nonrecognition transaction does not clearly reflect the income of the parties to the transaction.[2] However, the Tax Court in Eli Lilly & Co. found that the nonrecognition transaction in that case had a bona fide business reason and that its form and substance comported with economic reality. As a result, the transaction was not solely entered into for tax purposes, and the transaction did clearly reflect the income of the parties to the transaction. Therefore, the above mentioned situations were not applicable in applying section 482 to override the Eli Lilly & Co. nonrecognition transaction. There is, moreover, other case authority for the broad application of section 482 in the non-recognition context based solely on the clear reflection of income prong.[3]

Finally, we note that the National Securities line of cases involves the transferee's complete disposition, within a short time frame, of all property received in a nonrecognition transfer. In the present case, in contrast, it must be considered that D held on to the majority of the C-contributed properties through Year3 (if not later). The time lag between the Date2 section 351 transaction and D's abandonments of C-contributed properties may complicate the application of section 482 in the instant case.

The section 482 theory we have developed begins by making primary and correlative allocations to reduce D'S losses and to increase C'S losses from the abandonment of C-contributed properties deemed "worthless" at the time of the section 351 transaction.[4] The example set forth below, illustrates one application of the section 482 theory.

Example

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[2] The Tax Court in Eli Lilly, stated that section 482 could override section 351 where there was a tax avoidance motive for the transaction or there was an absence of a clear reflection of income. That Court seemed to view transactions like that present in National Securities and in the instant case (i.e., built in gains or losses on transferred property) as requiring reallocation as a tax avoidance case rather than as a clear reflection case, despite the fact that the Tax Court, and the Court of Appeals in National Securities treated such a transaction as a clear reflection situation and did not require a showing of tax avoidance. (See National Securities 46 BTA at 567 (1942))

[3] See, e.g., G.D. Searle & Co. v. Commissioner, 88 T.C. 252 (1987), in which the Tax Court noted that an independent business purpose is not in and of itself a complete defense to a section 482 reallocation if such an allocation is appropriate to clearly reflect income.

[4] We assume that the tax years in question with respect to D are open. Therefore the Service can make a primary adjustment to D's income with respect to the tax years in question.

The section 482 theory developed below starts from the premise that the loss reported by C upon its Date5 sale of D shares must be entirely recaptured before abandonment losses reallocated to C through primary section 482 allocations are permitted to affect C's taxable income. A primary allocation reduces D'S losses and a correlative allocation increases C'S losses in year 3. As noted, the primary allocation to D disallows the abandonment loss to D in the taxable year of the abandonment, to the extent such loss exceeds the fair market value of the property as of the date of the section 351 transfer.

An additional section 482 allocation is necessary to clearly reflect C's income in the taxable year of the abandonment, to the extent the abandonment loss has already been reflected in the loss reported by C upon its sale of D APS — i.e., the additional section 482 allocations will prevent the reallocated abandonment losses from having an effect on C's taxable income until the amount of the reallocated abandonment losses exceeds C's APS sale loss. Conforming adjustments would then be made to C's basis in its D APS to reflect the section 482 allocations.

The application of this theory is illustrated in the following example:
Assume a Year 1 section 351 transaction in which C contributes the following properties to D in exchange for 250 shares of D:

Year1-Section 351 Transaction	Property A	Property B	**TOTAL**
Adjusted Basis	100	150	250
Fair Market Value	10	20	30
Built-In Loss	(90)	(130)	(220)

Assume Property A and Property B are D's only assets. In **Year 1**, C sells 50 D shares for their fair market value of 6, taking a loss of 44. Thereafter, C holds 200 D shares with a fair market value of 24 and an adjusted basis of 200. The effects of the Year 1 D share sale can be illustrated as follows:

YEAR 1 — Sell 50 Shares		**C's 200 remaining D shares**	
Adjusted Basis	50	Adjusted Basis	200
Fair Market Value	6	Fair Market Value	24
Loss on Sale	(44)	Built-In Loss	(176)

In **Year 3**, D abandons Property A. Under National Securities, D is allowed a loss of 10 — i.e., D is entitled to the abandonment loss to the extent of any decrease in Property A's value subsequent to the Year 1 section 351 transaction. The primary allocation denies D 90 of the abandonment loss, increasing D's Year 3 income by 90 (Property A's 100 adjusted basis less Property A's 10 fair market value at the time of the Section 351 transaction). The Service makes a correlative allocation reallocating to C **90** of the abandonment loss. An additional section 482 allocation is then necessary to clearly reflect income because, under the section 482 theory developed in this example, C is considered to have already taken a portion of the reallocated Year 3 abandonment loss upon its Year 1 sale of D shares.[5] The amount of the additional section 482 allocation is **44** — i.e., the amount of C's Year 1 loss on its sale of 50 D shares. The effects of the Year 3 allocations to C may be illustrated as follows:

YEAR 3 — Section 482 Allocations to C		
Reallocate abandonment loss	(90)	[100 - 10]
Additional section 482 allocation to recapture Year 1 loss on D shares	44	
Net effect on C's Year 3 income	(46)	

An initial conforming adjustment of **(90)** reflects the reallocated abandonment loss, followed by a further conforming adjustment of **44** to reflect the recapture of the Year 1 stock sale loss. The net effect of the conforming adjustments is to decrease C's basis in its 200 D shares by **46** to 154, with a built-in loss of 138 (i.e., 154 adjusted basis less 16 fair market value). The effects of the Year 3 conforming adjustments may be illustrated as follows:

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[5] Under the section 482 theory developed in this Example, when the amount of the first abandonment loss is greater than the stock sale loss, the additional section 482 allocation will equal the Year 1 stock sale loss. No further additional section 482 allocations will be necessary because the stock sale loss will have been completely "consumed" (i.e., the inappropriate loss replication will have been eliminated). When, however, the amount of the first abandonment loss is less than the stock sale loss, the first additional section 482 allocation will be equal to the abandonment loss (in no case will the additional section 482 allocation exceed the amount of the abandonment loss). Subsequent abandonments will trigger further additional section 482 allocations, never exceeding the amount of the abandonment loss, until the total amount of the additional section 482 allocations is equal to the Year 1 stock sale loss.

YEAR 3 — Conforming Adjustments to Basis		**C's 200 remaining D shares** (as of end of Year 3)	
Reflect reallocated abandonment loss	(90)	Adjusted Basis [200-46]	154
Reflect Year 1 loss on share sale	44	Fair Market Value [20 x (200/250)]	16
Net effect on C's basis in shares	(46)	Built-In Loss	(138)

In **Year 4**, D abandons Property B. Under National Securities, D is allowed a loss of 20. The primary allocation denies D 130 of the abandonment loss, increasing D's Year 4 income by 130 (Property B's 150 adjusted basis less Property B's 20 fair market value at the time of the section 351 transaction). The Service makes a correlative allocation reallocating to C **(130)** of the abandonment loss.

A conforming adjustment of **(130)** reflects the reallocated abandonment loss, reducing C's basis in its 200 D shares to 24, with a built-in loss of 24 (i.e., 24 adjusted basis less zero fair market value). The effects of the Year 4 section 482 allocations may be illustrated as follows:

YEAR 4 — Section 482 Allocations		**C's 200 remaining D shares** (as of end of Year 4)	
Primary allocation to D	130	Adjusted Basis [200-176]	24
Correlative allocation to C	(130)	Fair Market Value	0
Conforming adjustment (to C's	(130)	[D has no assets]	
basis)		Built-In Loss	(24)

Applying the above example's section 482 theory in this factual scenario, and assuming a write-off of C's zero fair market value D shares, C has been allowed total losses of **244**, as follows:

Total C losses (as of end of Year 4)	
Loss on Year 1 sale of 50 D shares [6 - 50]	(44)
Net effect of Year 3 allocations	(46)
Net effect of Year 4 allocations	(130)
Write-off of zero fair market value D shares	(24)
TOTAL	(244)

This amount is equal to the total built-in loss of 220 as of the Year 1 section 351 transaction plus the "real" loss of 24 in C's remaining 200 D shares. D has been allowed total losses of **30**, an amount equal to the decrease in the C-contributed properties' values subsequent to the Year 1 section 351 transaction. Loss replication has thus been eliminated except to the extent of the 24 built-in loss in C's D shares (which have a zero fair market value following the abandonment of Property B). As explained above, the replication of losses attributable to a post-contribution decrease in the value of the abandoned properties is consistent with National Securities.

Summary

Although National Securities and its progeny do not discuss the specific section 482 primary and correlative allocations and conforming adjustments proposed in the present case, we believe such allocations and adjustments fall within the broad mandate of section 482.

We have set forth above a section 482 theory to prevent the replication of losses economically sustained at the time of the section 351 transaction. As noted above, the National Securities line of cases do not directly provide for a conforming adjustment to basis when section 482 is applied in the context of a section 351 transaction. Moreover, the time lag between the Date5 section 351 transaction and D's abandonments of worthless C-contributed properties presents a complicating factor in the use of section 482 in this case, given that the National Securities line of cases involves the transferee's complete disposition within a short time of all property received in a nonrecognition transfer.

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Please call if you have any further questions.

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