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July 07, 2020

***Via Federal eRulemaking Portal***

Secretary Alex M. Azar, II.
Department of Health and Human Services
U.S. Department of Health & Human Services
200 Independence Avenue
S.W. Washington, D.C. 20201

Administrator Seema Verma
Centers for Medicare & Medicaid Services
Attention: CMS–5531–IFC
P.O. Box 8016,
Baltimore, MD 21244–8016.

RE: Interim Final Rule—"Additional Policy and Regulatory Revisions in Response to the COVID–19 Public Health Emergency and Delay of Certain Reporting Requirements for the Skilled Nursing Facility Quality Reporting Program"
[RIN: 0938-AU32; file code CMS-5531-IFC]

Dear Secretary Azar and Administrator Verma:

The undersigned Attorneys General of California, New York, Colorado, Maine, Maryland, Oregon, Vermont, Washington,[1] and the District of Columbia (the States) urge the U.S. Department of Health and Human Services (HHS) and the Centers for Medicare & Medicaid Services (CMS) (collectively HHS) to amend Subsection X of the May 8, 2020 Interim Final Rule (IFR) "Additional Policy and Regulatory Revisions in Response to the COVID–19 Public Health Emergency." 84 Fed. Reg. 27,550, 27,599 (May 8, 2020). Subsection X provides a two-month delay in the implementation of the Separate Abortion Billing Rule regarding Section 1303 of the Affordable Care Act (ACA), which requires separate premium transactions, a payment for abortion coverage of at least $1 and another for the remaining health benefits,

[1] QHP issuers in Washington are not subject to the Separate Abortion Billing Rule or the IFR, as the Rule is invalid and without force in the *State of Washington. Washington v. Azar*, No. 20-47, slip op. at 12 (E.D. Wash. Apr. 9, 2020), notice of appeal filed (Jun. 8, 2020). The State of Washington supports and joins in the other States' opposition to the IFR.

risking an individual's overall coverage for any nonpayment of $1. The Separate Abortion Billing Rule is illegal and harmful, and the delay promulgated in Subsection X is insufficient.

In December 2019, HHS promulgated the Separate Abortion Billing Rule, which requires separate billing of abortion coverage for policies offered on the insurance Exchanges. 84 Fed. Reg. 71,674 (December 27, 2019) (to be codified at 45 C.F.R. pt. 155, 156).[2] As we pointed out in our April 07, 2020 letter to you, the Separate Abortion Billing Rule is not only unnecessary, but administratively onerous and expensive.[3] The 2019 novel coronavirus (COVID-19) has taken an unprecedented toll on our States' public health and economies—requiring total focus of our state agencies for the past three months since mid-March—a delay of a mere two months is wholly inadequate when even the Centers for Disease Control and Prevention (CDC) and the National Institute of Allergies and Infectious Disease (NIAID) predict that a second wave of COVID-19 will hit our communities.[4] Any increase in the States' infection rates risks more lives and could further strain the States' healthcare systems. Moreover, implementing this Rule during a pandemic is contrary to the U.S. Department of Health and Human Services' (HHS) own stated goal of providing entities the administrative flexibility to respond effectively to the serious public health threats posed by the spread of COVID-19.[5]

As you know, the Separate Abortion Billing Rule requires two separate payment transactions (one for at least $1 for abortion coverage and one for the remaining health benefits) for all consumers in qualified health plans that offer abortion coverage. The Rule mandates costly and onerous new billing systems that will lead to consumer confusion and coverage loss. The Rule will severely undermine our States' healthcare policy priorities, jeopardize patient safety if left uninsured, and burden our health insurance markets. For this reason, and others, on

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[2] *Patient Protection and Affordable Care Act; Exchange Program Integrity*, 84 Fed. Reg. 71,674 (Dec. 27, 2019), at https://www.govinfo.gov/content/pkg/FR-2019-12-27/pdf/2019-27713.pdf.

[3] *See* States' April 7, 2020 Letter Re: Request to Suspend Implementation of the Final Rule, Patient Protection and Affordable Care Act; Exchange Program Integrity, 84 Fed. Reg. 71,674 (Dec. 27, 2019), in light of Coronavirus (COVID-19) pandemic and OMB Directive M-20-16, attached at Attachment 1.

[4] Lena Sun, *CDC director warns second wave of coronavirus is likely to be even more devastating*, Washington Post (April 21, 2020), https://www.washingtonpost.com/health/2020/04/21/coronavirus-secondwave-cdcdirector/; Chuck Schilken, *Dr. Anthony Fauci: 'Football may not happen' if there's a second coronavirus wave*, Los Angeles Times (June 18, 2020), https://www.latimes.com/sports/story/2020-06-18/dr-anthony-fauci-football-second-coronavirus-wave-nfl-ncaa

[5] *See* 84 Fed. Reg. 27,550 ("This interim final rule with comment period (IFC) gives individuals and entities that provide services to Medicare, Medicaid, Basic Health Program, and Exchange beneficiaries needed flexibilities to respond effectively to the serious public health threats posed by the spread of the coronavirus disease 2019 (COVID-19)."

January 30, 2020, we sued the Administration challenging the unlawful Rule. Today, we repeat our urgent request that HHS withdraw the Rule entirely, or at a minimum, amend the IFR to suspend implementation of the Rule indefinitely pending successful containment of COVID-19 and the expected prolonged economic recovery.

**A. The COVID-19 Pandemic Presents Unprecedented Challenges**

As our nation's healthcare system strains in response to COVID-19, injecting uncertainty to the States' economies and healthcare infrastructure, federal action must focus on facilitating access to health coverage to ensure treatment and support for those battling the disease, responding to pandemic-related economic disruptions, and supporting states in their efforts to minimize their respective public health crises. Without coverage, millions may refrain from obtaining treatment or face financial ruin if they choose to seek care—especially as millions of Americans have suffered job losses as a result of the pandemic.[6] This is more than a threat, it has become a reality: only five months after the U.S. government confirmed the first known case of COVID-19, almost 130,000 Americans have died.[7]

- In New York, the early epicenter of the outbreak in the United States, a total of 397,649 people tested positive and there have been 24,913deaths.[8]
- In California, a total of 271,684 people tested positive and there have been 6,337 deaths.[9]
- In Colorado, a total of 34,065 people tested positive and there have been 1,701 deaths.[10]

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[6] Since mid-March, more than 40 million people have filed unemployment claims, representing one out of four American workers. *U.S. Jobless Claims Pass 40 Million: Live Business Updates*, New York Times (May 28, 2020), https://www.nytimes.com/2020/05/28/business/unemployment-stock-market-coronavirus.html.

[7] *See* Centers for Disease Control and Prevention, "Coronavirus Disease 2019 (COVID-19): Cases in the U.S" (as of July 6, 2020), available at https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html; Jamie Ducharme, "COVID-19 Has Killed More Than 100,000 Americans," *Time Magazine* (May 27, 2020), at https://time.com/5843349/coronavirus-death-toll-100000/.

[8] *NY State of Health*, NYS COVID-19 Tracker (as of July 6, 2020), available at https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Map?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n.

[9] *California Department of Public Health*, "COVID-19" (as of July 6, 2020), available at https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx.

[10] *Colorado Department of Public Health & Environment*, "COVID-19 data" (as of July 6, 2020), available at https://covid19.colorado.gov/covid-19-data.

- In Maine, a total of 3,034 people tested positive and there have been 109 deaths.[11]
- In Maryland, a total of 69,904 people tested positive and there have been 3,121 deaths.[12]
- In Oregon, a total of 10,395 people tested positive and there have been 215 deaths.[13]
- In Vermont, a total of 1,251 people tested positive and there have been 56 deaths.[14]
- In Washington, a total of 35,849 people tested positive and there have been 1,359 deaths.[15]
- In the District of Columbia, a total of 10,515 people tested positive and there have been 561 deaths.[16]

As of this letter, the number of cases continue to rise and the States and communities across the country are experiencing the pandemic in different stages. The volatility from state to state could continue through the duration of the pandemic, necessitating different policy and public health responses for states and localities. In fact, in early June "[a] single day reveal[ed] divergent realities across the country: As cases drop in the Northeast and some cities reopen[ed]," places like Arkansas experienced a significant rise in infections, and cities like Chicago continued to see its death rates spike.[17] The uncertainty of the extent and spread of this virus requires that state agencies remain vigilant in their response efforts, and anticipate costs and manage resources accordingly. The ever-changing nature of the pandemic, which has

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[11] *Maine Center for Disease Control & Prevention*, "COVID-19 Updates and Information" (as of July 6, 2020), available at https://www.maine.gov/dhhs/mecdc/infectious-disease/epi/airborne/coronavirus/data.shtml.

[12] *Maryland Department of Health*, "Coronavirus Disease 2019 (COVID-19) Outbreak" (as of July 6, 2020), available at https://coronavirus.maryland.gov/.

[13] *Oregon Health Authority*, "COVID-19 Updates" (as of July 6, 2020), available at https://govstatus.egov.com/OR-OHA-COVID-19.

[14] *Vermont Department of Health*, "Daily Update on Novel Coronavirus (COVID-19)" (as of July 6, 2020), available at https://www.healthvermont.gov/sites/default/files/documents/pdf/Covid-19-Daily-Update.pdf.

[15] *Washington Department of Health*, "COVID-19 Data Dashboard" (as of July 6, 2020), available at https://www.doh.wa.gov/Emergencies/NovelCoronavirusOutbreak2020COVID19/DataDashboard.

[16] *Government of the District of Columbia*, "Coronavirus Data" (as of July 6, 2020), available at https://coronavirus.dc.gov/page/coronavirus-data.

[17] Julie Bosman and Mitch Smith, "Is America's Pandemic Waning or Raging? Yes," *The New York Times* (June 01, 2020), at https://www.nytimes.com/2020/06/01/us/coronavirus-united-states.html.

already lasted over five months, only underscores the ineffectiveness of a one-time, two-month delay of a Rule that is unnecessary at the outset.

**B. Efforts to Counter COVID-19 Will Be Undermined**

Requiring two separate payment transactions from consumers undermines efforts to streamline and increase access to coverage during this national health crisis, including those taken by states. In response to the pandemic, many states have opened the ACA-authorized Special Enrollment Periods through their respective health insurance Exchanges.

- California first announced a Special Enrollment Period on March 20 lasting until June 30, 2020, which has now been extended until July 31, 2020. The most recent data shows that 175,030 people have signed up for health care coverage between March 20 and June 20, which is more than twice the number who signed up for medical insurance through Covered California's Exchange during the same time last year.[18]

- Vermont similarly instituted a Special Enrollment Period, and the state's Exchange, Vermont Health Connect, enrolled 1,050 people into qualified health plans from March 20 to May 22, 2020.

- Colorado implemented two new Special Enrollment Periods during which the state's Exchange, Connect for Health Colorado, enrolled 14,263 Coloradans in health coverage from March 20 to April 30,2020.

- Maryland implemented an on-going Special Enrollment Period, and more than 40,000 residents have signed up to receive health coverage.[19]

- The District of Columbia implemented a Special Enrollment Period that, from March 20, 2020 through June 28, 2020, allowed an additional 2,785 enrollees to secure health coverage.

- New York also opened a Special Enrollment Period to permit uninsured New Yorkers to enroll in healthcare coverage; as of June 28, 2020, 6,400 individuals enrolled in

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[18] *Covered California*, "California Extends Special-Enrollment Deadline to Give Consumers More Time to Sign Up for Health Care Coverage During COVID-19 Pandemic" (June 23, 2020), at https://www.coveredca.com/newsroom/news-releases/2020/06/23/california-extends-special-enrollment-deadline-to-give-consumers-more-time-to-sign-up-for-health-care-coverage-during-covid-19-pandemic/.

[19] *Maryland Health Connection*, "Nearly 40,000 Marylanders Have Enrolled During Coronavirus Emergency Special Enrollment Period" (June 9, 2020), available at https://content.govdelivery.com/accounts/MDHC/bulletins/28fb48c.

qualified health plans.[20] Moreover, New York has taken a number of actions to ensure that consumers remain enrolled in coverage, including continuing Medicaid coverage for anyone enrolled on March 18, 2020 and extending renewal dates for all Marketplace enrollees due to renew in April-August 2020.

- Washington also implemented a Special Enrollment Period from March 10 to May 8, 2020 during which 22,000 customers signed up for health coverage, including 7,000 uninsured Washington residents who came in through the COVID-19 Special Enrollment Period.

The Special Enrollment Period coverage gains across the country are at risk under the Rule, as issuers will still be required to send two separate bills and require separate payment transactions from consumers starting August 26, 2020—mid-pandemic and eight months into the health plan year. Consumers that miss the new separate $1 transaction risk losing their entire health coverage. Requiring two separate bills from carriers and then two separate payments from consumers, while in the middle of a pandemic, only intensifies confusion and jeopardizes coverage at a time when increasing access to care is critical to our response.

Early lessons from this virus have demonstrated that the need for medical services is immediate, as the risks of serious complications and death can increase within a matter of days.[21] And while testing for COVID-19 may be free, treatment for the virus or the ensuing medical complications may not be.[22] *See* Section D. Emergency medical bills for uninsured individuals can add up to tens of thousands of dollars.[23] To avoid these disastrous public health and

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[20] *New York State of Health*, "NY State of Health and New York State Department of Financial Services Announce Special Enrollment Period for Uninsured New Yorkers, as Novel Coronavirus Cases Climb," Press Release (Mar. 16, 2020), available at https://info.nystateofhealth.ny.gov/news/press-release-ny-state-health-and-new-york-state-department-financial-services-announce-special.

[21] Qin Sun, et al., *Lower mortality of COVID-19 by early recognition and intervention: experience from Jiangsu Province*, Annals of Intensive Care (Mar. 18, 2020) ("Since there have been no effective antiviral treatments for COVID-19 [7, 8], the vital way to reduce mortality is early and strong intervention to prevent the progression of disease").

[22] Megan Leonhardt, "Uninsured Americans could be facing nearly $75,000 in medical bills if hospitalized for coronavirus," *CNBC* (Apr. 1, 2020), available at https://www.cnbc.com/2020/04/01/covid-19-hospital-bills-could-cost-uninsured-americans-up-to-75000.html; Reed Abelson, "Now That Coronavirus Tests Are Free, Some Insurers Are Waiving Costs for Treatment," *New York Times* (updated Mar. 31, 2020), at https://www.nytimes.com/2020/03/19/health/coronavirus-tests-bills.html.

[23] Abigail Abrams, "Total Cost of Her COVID-19 Treatment: $34,927.43," *Time Magazine* (March 19, 2020), at https://time.com/5806312/coronavirus-treatment-cost/.; Ross Barkan, "A $1.1m hospital bill after surviving the coronavirus? That's America for you," *The*

economic consequences, at a minimum, the implementation of the Rule must be postponed until there is better containment of COVID-19 across the country and States can refocus their resources.

### C. Pressing Ahead with Implementation During the COVID-19 Pandemic is Irresponsible, Unnecessary, and Contrary to OMB Directives

Rushing to implement the Separate Abortion Billing Rule on August 26, 2020, or any other time while the COVID-19 pandemic is still greatly affecting our communities, would be inconsistent with the Office of Management and Budget's (OMB) Directive M-20-16, "Federal Agency Operational Alignment to Slow the Spread of Coronavirus COVID-19," issued on March 17, 2020. This Directive instructs federal agencies to "prioritize all resources to slow the transmission of COVID-19" and otherwise focus exclusively on mission-critical functions.[24] There is no reason to believe implementation of this Rule, which puts health coverage at risk, would "slow the transmission of COVID-19;" nor can implementation of this Rule be considered "mission-critical." By forcing the States and issuers to prioritize altering their billing systems or other processes—despite HHS's representation that enforcement may not occur until plan year 2021—CMS unnecessarily detracts from the States' and issuers' abilities to prioritize responding to the national crisis of COVID-19 and contravenes the White House's Directive to federal agencies "to ensure that available resources can be re-prioritized to mission-critical activities."[25]

The pandemic has imposed additional implementation burdens on state healthcare departments and agencies beyond those administrative burdens raised by the public and the Attorneys General multistate comment letter.[26] For example, the Colorado and District of Columbia departments of insurance released bulletins effectively placing a moratorium on the cancellation of individual and group policies for non-payment of premiums during the COVID-19 public health emergency.[27] The California Insurance Commissioner issued a Notice

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*Guardian* (June 16, 2020), https://www.theguardian.com/commentisfree/2020/jun/16/coronavirus-hospital-bill-healthcare-america.

[24] *See Memorandum for the Heads of Departments and Agencies*, Executive Office of the President (March 17, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-16.pdf.

https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-16.pdf.

[25] *Id.*

[26] Attorneys General Multistate Comment Letter on behalf of the States of California, New York, Oregon, Pennsylvania, and Washington (January 8, 2019), available at https://www.regulations.gov/document?D=CMS-2018-0135-73336.

[27] *Policy Directives for Small and Large Group Health Benefit Plans Related to COVID-19*, Bulletin No. B-4.105, Colo. Dep't of Reg. Agencies (March 27, 2020);

instructing all insurance companies to stop enforcing policy or statutory deadlines on policyholders for claims or coverage until 90 days after the statewide "state of emergency" or any other "state of emergency" has ended related to COVID-19.[28]

Similarly, the Department of Vermont Health Access has temporarily waived financial verifications and extended coverage periods.[29] NY State of Health launched an awareness campaign to reach New Yorkers at risk of losing job-based health insurance due to COVID-19 and to promote NY State of Health as a safety net where individuals can find and enroll in affordable, comprehensive health coverage. New York has also instructed health issuers to permit enrollees additional time to pay their premiums for subsidized and commercial insurance during the period of the emergency.[30] Specific to Medicaid, New York has simplified the Medicaid application process; extended renewals for applications with local departments of social services so that district staff can focus on new applications; ceased all case terminations, consistent with federal law; and even made in-person application assistors available to consumers by phone. These and other efforts have required the States to expend significant resources, including engagement with issuers, consumers, and providers, as well as coordination with other state agencies. And, when the current national and state emergency statuses are lifted, resources will be required to reinstate normal business processes—which will require all

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https://drive.google.com/file/d/1VeVORK_6-1dEAXP6TDbKZ33gyD5vSc3D/view; *Policy Directives for Continuation of Individual Health Insurance Coverage during the COVID-19 Public Health Emergency*, Bulletin No. B-4.107, Colo. Dep't of Reg. Agencies (April 21, 2020); *Response to COVID-19 Public Health Emergency*, Commissioner's Order No. 01-2020, D.C. Dep't of Ins., Sec., & Banking (March 20, 2020); https://disb.dc.gov/sites/default/files/u65602/Order-re-Emergency-Response-to-COVID-19-03.20.2020-sec.pdf (see provision #9 related to terminations); *Order re Relief to Policyholders During Public Health Emergency*, Commissioner's Order No. 03-2020, D.C. Dep't of Ins., Sec., & Banking (April 27, 2020); https://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/Order%20re%20Relief%20to%20Policyholders%20During%20Public%20Health%20Emergency%20v.04.27.20%20%28v2%29.pdf (see provision #1 related to terminations).

[28] *Insurance Commissioner Lara calls for extension of policyholder deadlines for claims until after the COVID-19 state of emergency*, Cal. Dep't of Ins. (Apr. 3, 2020), available at http://www.insurance.ca.gov/0400-news/0100-press-releases/2020/release035-2020.cfm.

[29] *COVID-19 Stay Informed and Protect Your Health*, Vermont Health Access, https://dvha.vermont.gov/covid-19

[30] *NY Department of Financial Services*, "DFS Issues New Emergency Regulation Requiring Commercial Health Insurers To Defer Payment Of Premiums Through June 1st For Consumers & Businesses Experiencing Financial Hardship During Covid-19 Pandemic," (Apr. 08, 2020), available at https://dfs.ny.gov/reports_and_publications/press_releases/pr202004082.

available resources—leaving none to implement onerous and unnecessary new Exchange billing practices that threaten loss of coverage.

Moreover, in many state-based Exchanges, insurance premiums are slated to increase significantly in light of the substantial delivery of services due to COVID-19 infections and deaths, further burdening already economically vulnerable consumers who have experienced layoffs and furloughs.

Covered California's chief actuary expects premiums in both the individual and employer markets for 2021 to increase by 40% or more solely because of the unexpected COVID-19 costs.[31] But the impact on other states is still uncertain; many do not yet have information about the anticipated increases to insurance premiums. Further, the public costs of COVID-19 remain unknown. Covered California estimates that, at a low projection of 4 million Americans infected by COVID-19, treatment for the virus could cost over $28.8 billion in hospital care for severe cases alone.[32] According to the CDC, infections have already reached over 2.8 million across the U.S.[33] At this current rate of infection—in only five months—the U.S. is more than halfway past Covered California's cost estimates. Thus, the extensive cost increases imposed by the Separate Abortion Billing Rule will have even graver consequences now, and HHS must take into account the impediments and additional burdens in light of COVID-19.

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In this challenging time, there is a critical need for the expansion of healthcare coverage to help those who have lost their jobs and those in need of care in response to COVID-19. HHS should withdraw the Separate Abortion Billing Rule immediately. At minimum, the States urge HHS to amend the IFR and entirely suspend implementation of the Rule pending containment of COVID-19, ensuring that we prioritize mission-critical functions like facilitating health coverage to save lives.

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[31] *Covered California*, "Covered California Releases the First National Projection of the Coronavirus (COVID-19) Pandemic's Cost to Millions of Americans With Employer or Individual Insurance Coverage," Press Release (March 24, 2020), at https://www.coveredca.com/newsroom/news-releases/2020/03/24/covered-california-releases-the-first-national-projection-of-the-coronavirus-covid-19-pandemics-cost/.

[32] *Covered California*, Policy/Actuarial Brief: "The Potential National Health Cost Impacts to Consumers, Employers and Insurers Due to the Coronavirus (COVID-19)" March 22, 2020 (revised from March 21, 2020), at https://hbex.coveredca.com/data-research/library/COVID-19-NationalCost-Impacts03-21-20.pdf.

[33] *Centers for Disease Control and Prevention*, "Cases in the U.S." (as of July 6, 2020), available at https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html.

Sincerely,

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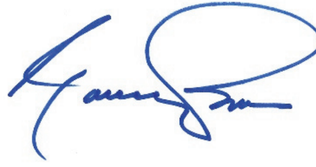

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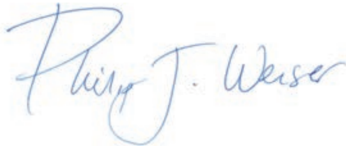

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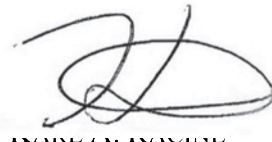

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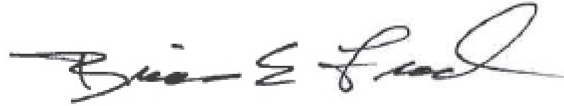

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