FEDERAL REGULATORY UPDATE AND REVIEW

CAPPS 35TH ANNUAL CONFERENCE
LONG BEACH, CALIFORNIA
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MAYNARD
COOPER GALE

ABOUT THE **PRESENTERS**

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- Chief Operations Officer, Santa Barbara Business College
- ACICS Commissioner
- More than 18 years of experience in regulatory, academic, and operational roles within the for-profit education sector.

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- Shareholder, Maynard, Cooper & Gale, PC, and Chair of the firm's Education Group
- Defends and advises schools on all types of student and employee litigation and represents schools before all levels of regulators (ED, state AGs, state agencies and boards, and accreditors)

ABOUT THE **PRESENTERS**

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- Advises institutions of higher education on a broad array of regulatory matters, with particular focus on federal, state, and accrediting agency laws and standards
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THE CURRENT REGULATORY LANDSCAPE

THE **OBAMA ADMINISTRATION**

- **Gainful Employment** – Final Rule published October 31, 2014, to be effective July 1, 2015.
- **Borrower Defense to Repayment (2016)** – Final Rule published November 1, 2016, to be effective July 1, 2017.
- **State Authorization** – Final Rule published December 19, 2016, to be effective July 1, 2018.
- **Title IX:**
  - Dear Colleague Letter on Sexual Violence issued on April 4, 2011.
  - Questions and Answers on Title IX and Sexual Violence issued on April 29, 2014.

THE **TRUMP ADMINISTRATION**

- **Gainful Employment:**
  - Enforcement of key provisions delayed or suspended.
  - New and simplified GE Disclosure Templates and distribution requirements announced in May and June 2019.
  - July 1, 2019 – Final Rule published rescinding all GE regulations in their entirety, to be effective July 1, 2020.
  - Secretary DeVos exercised her authority to allow early implementation of the 2019 Final Rule effective immediately.
  - Any institution that did not adopt early implementation must comply with 2014 Final Rule until July 1, 2020, including submitting the 2018-2019 GE data report that was due to ED by October 1, 2019, and making all required marketing and pre-admission disclosures.

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- **Borrower Defense to Repayment:**
  - May 24, 2017 – California Association of Private Postsecondary Schools (CAPPS) filed suit, alleging that the 2016 BDR regulations violated the Administrative Procedures Act.
  - June 16, 2017 – ED announced delay of 2016 BDR effective date pending resolution of CAPPS litigation and intention to create a new BDR rule.
  - July 6, 2017 – Students file *Bauer v. DeVos* suit in federal court in Washington seeking declaration that the delay of 2016 BDR violated federal law.
  - October 24, 2017 – ED published interim final rule that delayed 2016 BDR effective date to July 1, 2018.

THE **TRUMP ADMINISTRATION**

- **Borrower Defense to Repayment (cont.):**
  - November 2017-February 2018 – ED conducted negotiated rulemaking sessions to craft new BDR regulations, with no consensus.
  - February 14, 2018 – ED issued final rule delaying the 2016 BDR regulations effective date to July 1, 2019.
  - July 31, 2018 – ED issued proposed rule outlining new BDR regulations.
  - September 17, 2018 – Court in *Bauer* ruled that ED violated APA by delaying effective date of 2016 BDR.

THE TRUMP ADMINISTRATION

- **Borrower Defense to Repayment (cont.):**
  - March 15, 2019 – ED issued guidance regarding effective date and implementation requirements for 2016 BDR regulations.
  - August 30, 2019 – ED published unofficial Final Rule for 2019 BDR, to be effective July 1, 2020.
  - September 23, 2019 – ED published official 2019 BDR regulations.
  - We issued a Client Alert on September 9, 2019, on the 2019 BDR regulations, which is publicly available on our website at https://www.maynardcooper.com/blog-post/client-alert-2019-borrower-defense-to-repayment/.

THE **TRUMP ADMINISTRATION**

- **State Authorization:**
  - July 3, 2018 – ED published Final Rule delaying effective date of 2016 State Authorization regulations until July 1, 2020, and announcing its intention to conduct new rulemaking to reconsider portions of 2016 SA.
  - August 23, 2018 – NEA and others sued ED, alleging that delay of 2016 SA violated HEA and APA.
  - April 26, 2019 – US District Court for the Northern District of California granted NEA's motion for summary judgment and vacated July 3, 2018, Final Rule with 30-day stay.
  - May 26, 2019 – 2016 SA regulations took effect.

THE **TRUMP ADMINISTRATION**

- **State Authorization (cont.):**
  - July 22, 2019 – ED issued guidance Q&A re compliance with 2016 SA regulations. In the Q&A:
    - ED acknowledged that California has a registration process for out-of-state for-profit institutions that provide distance education in California that satisfies 2016 SA.
    - ED determined that California does not have a process to manage complaints by California students enrolled in out-of-state non-profit and public institutions and does not participate in an acceptable reciprocity arrangement.
    - ED announced that until California complies with 2016 SA, California students enrolled in such non-profit and public out-of-state institutions are no longer eligible for Title IV.

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- **State Authorization (cont.):**
  - July 26, 2019 – California Department of Consumer Affairs announced new complaint resolution process in which it will refer complaints to "the appropriate accrediting agency or governmental entity to handle."
  - August 2, 2019:
    - ED advised California DCA that the new complaint resolution process does not fully comply with 2016 SA.
    - ED determined, however, that the 2019 SA regulations (see "Miscellaneous 2019 Rulemaking" below), which it "intends to publish for early implementation as soon as possible," provide greater flexibility in this arena.

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- **State Authorization (cont.):**
    - ED concluded: "Accordingly, to avoid the disruption in education programs for California students adversely affected by the 2016 [SA] regulations and so as to provide a bridge for institutions serving these students to the new 2019 [SA] regulations, . . . the Department will assume that California will modify its plan to refer student complaints to a California State agency for adjudication until such time as early implementation occurs." ED announces that with this and other "modifications made, the Department will consider California to have had an acceptable plan in place dating back to May 26, 2019. . . [so that] no student will experience an interruption in his or her education or federal student aid."

THE **TRUMP ADMINISTRATION**

- **State Authorization (cont.)**
  - As of September 24, 2019, California DCA has not changed its complaint procedures for California students taking distance education courses from out-of-state non-profit and public institutions.
  - We await publication of 2019 SA Final Rule.

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- **Miscellaneous 2019 Rulemaking:**
  - July 31, 2018 – ED announced its intention to form a negotiated rulemaking committee and two subcommittees to make recommendations to the full committee. It also announced public hearings in September 2018 regarding the proposed topics.
  - October 15, 2018 – With feedback from September hearings, ED announced its intention to establish the Accreditation and Innovation Committee and three subcommittees:
    - Distance Learning & Educational Innovation Subcommittee
    - Faith-Based Entities Subcommittee
    - TEACH Grants Subcommittee

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- **Miscellaneous 2019 Rulemaking (cont.):**
  - The topics for consideration by the full committee were:
    - Requirements for accrediting agencies;
    - Criteria for the Secretary's recognition of accrediting agencies, emphasizing educational quality;
    - Simplification of the Department's recognition review process;
    - Clarification of the core role of each member of the oversight Triad;
    - Roles and responsibilities of institutions and accrediting agencies in teachouts;

THE TRUMP ADMINISTRATION

- **Miscellaneous 2019 Rulemaking (cont.):**
  - The topics for consideration by the full committee were (cont.):
    - Elimination of outdated regulations;
    - Technical changes and corrections to regulations; and
    - Recommendations from the subcommittees.
  - The topics for the Distance Learning subcommittee were:
    - Simplification of state authorization requirements;
    - Definition of “regular and substantive interaction”;
    - Definition of “credit hour”;

THE **TRUMP ADMINISTRATION**

- **Miscellaneous 2019 Rulemaking (cont.):**
  - The topics for the Distance Learning subcommittee were (cont.):
    - Requirement that an institution demonstrate a reasonable relationship between program length and entry-level job requirements;
    - Barriers to innovation in postsecondary education and student completion, graduation and employment; and
    - Direct assessment and competency-based education.
  - The TEACH Grant subcommittee was established to consider simplification and clarification of program requirements and to minimize and address inadvertent grant-to-loan conversions.

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- **Miscellaneous 2019 Rulemaking (cont.):**
  - The Faith-Based Institutions Subcommittee was tasked with considering:
    - Requirements for accrediting agencies to honor institutional mission; and
    - Regulations on eligibility of faith-based entities and students enrolled at those entities to participate in Title IV.
- Committee reached consensus on all topics in April 2019!
- June 12, 2019 – ED issued Notice of Proposed Rulemaking announcing proposed rule on first "bucket" of regulations agreed to by Committee and said it will issue additional NPRMs for the remaining two buckets.

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- The first bucket of consensus regulations addressed:
  - Accreditation requirements and recognition procedures;
  - State authorization requirements (i.e., 2019 SA), including new disclosure requirements regarding professional licensure and certification that would apply to all programs, not just those programs delivered online;
  - Distance education and direct assessment requirements;
  - Written arrangements between institutions and between institutions and other entities; and
  - Eligibility of additional locations.
- We await the publication of the Final Rule for the first bucket and proposed regulations for the remaining two buckets.

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- **Title IX:**
  - September 22, 2017 – Secretary DeVos withdraws the April 4, 2011, Dear Colleague Letter on Sexual Violence and the April 29, 2014 Questions and Answers on Title IX and Sexual Violence.
  - That same day, Secretary DeVos issues Questions and Answers on Campus Sexual Misconduct, outlining new interim requirements and expectations.
  - November 29, 2018 – ED issues proposed new Title IX regulations to advise institutions how they must "respond to sexual harassment, including defining the conduct that rises to the level of Title IX as conduct serious enough to jeopardize a person's equal access to the [institution's] education program or activity, and confining [an institution's] Title IX obligations to sexual harassment of which it has actual knowledge."

THE **TRUMP ADMINISTRATION**

- **Title IX (cont.):**
  - The November 29, 2018 noticed provided for a 60-day comment period.
  - January 28, 2019 – ED extends comment period two additional days, until January 30, 2019.
  - February 14, 2019 – ED extends comment period for one additional day on February 15, 2019.
  - ED received more than 124,000 comments.
  - We await publication of the Final Rule.

BORROWER DEFENSE **REGULATIONS**

- 2016 BDR regulation imposed a host of new financial responsibility tests and requirements, the details of which have been reported elsewhere and that are beyond the scope of this presentation.
- 2016 BDR also established significant restrictions on the use of predispute arbitration agreements and class action waivers with regard to student disputes and imposed new reporting requirements regarding litigation activities, financial matters, and regulatory and administrative developments that ED determined could impact the institution's financial responsibility or administrative capability.
- ED's March 15, 2019, guidance provided explanation and clarification of these new reporting requirements.

STUDENT DISPUTE **RESOLUTION**

- **The 2016 BDR regulation added provisions to the Program Participation Agreement regarding student disputes:**
  - 34 CFR 685.300(d) – Institution agrees not to require a student to pursue a BDR claim through an internal dispute process before the student can file a complaint with an applicable accrediting agency or governmental agency.
  - 34 CFR 685.300(e) – Institution agrees not to attempt to rely in any way on any predispute agreement with respect to any aspect of a class action that is related to a BDR claim.
  - 34 CFR 685.300(f) – Institution agrees not to enter into a predispute agreement to arbitrate a BDR claim or to rely in any way on a predispute arbitration agreement with respect to any aspect of a BDR claim.

STUDENT DISPUTE **RESOLUTION**

- **An institution with existing arbitration agreements or class action waiver agreements must either**
  - Amend the agreements to conform with the new guidance; or
  - Provide notice to students that these agreements will not be enforced, at least with respect to BDR claims.
- **If an institution choses the notice option, the notice must be provided to students no later than either**
  - Mandatory exit counseling; or
  - The date on which the institution files its initial response to a demand for arbitration or service of a complaint from a student who has not already been sent a notice or amendment.

STUDENT DISPUTE **RESOLUTION**

- **An institution with a class action waiver agreement entered into prior to May 14, 2019, must use the exact notice language mandated in the 2016 BDR regulation:**
  - "We agree not to use any predispute agreement to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court or you may be a member of a class action lawsuit even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained."

STUDENT DISPUTE **RESOLUTION**

- **An institution with an arbitration agreement entered into prior to May 14, 2019, must use the exact notice language mandated in the 2016 BDR regulation:**
  - "We agree not to use any predispute arbitration agreement to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit regarding such a claim or you may be a member of a class action lawsuit regarding such a claim even if you do not file it. This provision does not apply to any other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Direct Loan or the provision of educational services for which the loan was obtained."

STUDENT DISPUTE **RESOLUTION**

- **Institutions can continue using class action waivers and arbitration agreements after May 14, 2019, so long as these agreements make clear that they do not apply to BDR claims.**
- **In these cases, institutions must use the exact language mandated in the 2016 BDR regulation to carve out BDR claims (see following pages):**
  - New class action waiver agreement carve-out language is provided in 34 CFR 685.300(e)(3)(i).
  - New arbitration agreement carve-out language is provided in 34 CFR 685.300(f)(3)(i).

STUDENT DISPUTE **RESOLUTION**

- **Mandatory BDR claim carve-out language for use in new class action waiver agreements:**
  - "We agree that neither we nor anyone else will use this agreement to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court or you may be a member of a class action lawsuit even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Direct Loan or the provision by us of educational services for which the Direct Loan was obtained. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained."

STUDENT DISPUTE **RESOLUTION**

- **Mandatory BDR claim carve-out language for use in new arbitration agreements:**
  - "We agree that neither we nor anyone else will use this agreement to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit for such a claim or you may be a member of a class action lawsuit for such a claim even if you do not file it. This provision does not apply to lawsuits concerning other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained."

ONGOING **PROCEEDINGS**

- The March 15, 2019, guidance provides that the predispute arbitration and class action waiver bans apply to any proceeding that was initiated under a predispute arbitration agreement, was ongoing as of October 16, 2018, and was not concluded as of March 15, 2019.
- In such cases, institutions were required to notify students with the appropriate notice(s) that these provisions would not be enforced no later than March 25, 2019.

WHAT IS A **BDR CLAIM?**

- **The prohibitions on class actions waivers and predispute arbitration agreements apply only to BDR claims:**
  - These rules apply only to borrowers of federal loans. "Borrower" is defined in 34 CFR 685.222(a)(4) as:
    - The [student] borrower; and
    - In the case of a Direct PLUS Loan, any endorsers, and for a Direct PLUS Loan made to a parent, the student on whose behalf the parent borrowed.
  - A BDR claim refers to an act or omission of the institution attended by the student that relates to the making of a Direct Loan for enrollment at the institution or the provision of educational services for which the loan was provided.

WHAT IS A **BDR CLAIM?**

- The March 15 guidance emphasizes that BDR claims do not include matters such as personal injury tort or sexual or racial harassment claims.
- The regulation mandates that the question of whether a claim constitutes a BDR claim is to be resolved by the court.

REPORTING **OBLIGATIONS**

- **Institutions are required to submit certain records regarding legal actions with respect to BDR claims to ED:**
  - Arbitration records as provided in 34 CFR 685.300(g):
    - The initial claim and any counterclaim;
    - The arbitration agreement filed with the arbitrator;
    - Any judgment or award issued by the arbitrator;
    - If the arbitrator refuses to administer or dismisses a claim due to the institution's failure to pay required filing or administrative fees, any communication from the arbitrator related to the refusal or dismissal; and
    - If the arbitrator determines that the arbitration agreement regarding educational services does not comply with the arbitrator's fairness principles, rules or similar requirements, any communication from the arbitrator related to the determination.

REPORTING **OBLIGATIONS**

- Arbitration records must be provided within 60 days of any filing of such records by the institution with the arbitrator or within 60 days of receipt by the institution of such records filed or sent by someone other than the institution, such as the arbitrator or the student.
- The March 15, 2019, guidance directs that such records must be filed by email to borrowerdefense@ed.gov.

REPORTING **OBLIGATIONS**

- **Institutions are required to submit certain records regarding litigation with respect to BDR claims, not just arbitration:**
  - Judicial records as provided in 34 CFR 685.300(h):
    - The complaint and any counterclaim;
    - Any dispositive motion filed by a party to the suit;
    - The ruling on any dispositive motion and the judgment issued by the court.
- **Judicial records must be submitted within 30 days of filing or receipt of the complaint, answer, or dispositive motion and within 30 days of receipt of any ruling on a dispositive motion or a final judgment.**
- **The March 15, 2019, guidance directs that such records must be filed by email to borrowerdefense@ed.gov.**

REPORTING **OBLIGATIONS**

- **Institutions also have numerous reporting obligations under the financial responsibility regulations in the 2016 BDR (34 CFR 668.171), including:**
  - Various debts, settlements or other liabilities arising for any reason;
  - BDR-related litigation initiated by a federal or state agency;
  - All other litigation of any kind, with no provision for materiality;
  - Certain accrediting agency actions;
  - Potential program ineligibility under Gainful Employment; and
  - Withdrawal of owner's equity by any means from an institution with a composite score less than 1.5.
- **According to the March 15, 2019, guidance, all reporting triggered by the financial responsibility regulations should be directed to FSAFRN@ed.gov.**

FEDERAL TRADE COMMISSION REGULATORY ACTION

- June 2019 – FTC announced new Operation Call It Quits program designed to crack down on robocallers.
- August 27, 2019 – FTC announces $30 Million settlement with Career Education Corporation to resolve allegations that CEC used sales leads that it acquired from lead generators who deceived consumers or failed to provide proper disclosures to consumers regarding how their information would be used.
- Before a purchased consumer lead can be contacted using automated dialing technology, the consumer must give express written consent that is valid only if "clear and conspicuous" disclosures are provided.
- In the CEC settlement, the FTC reiterated recent guidance that clarified and defined the FTC's interpretation for "clear and conspicuous."

FEDERAL TRADE COMMISSION REGULATORY ACTION

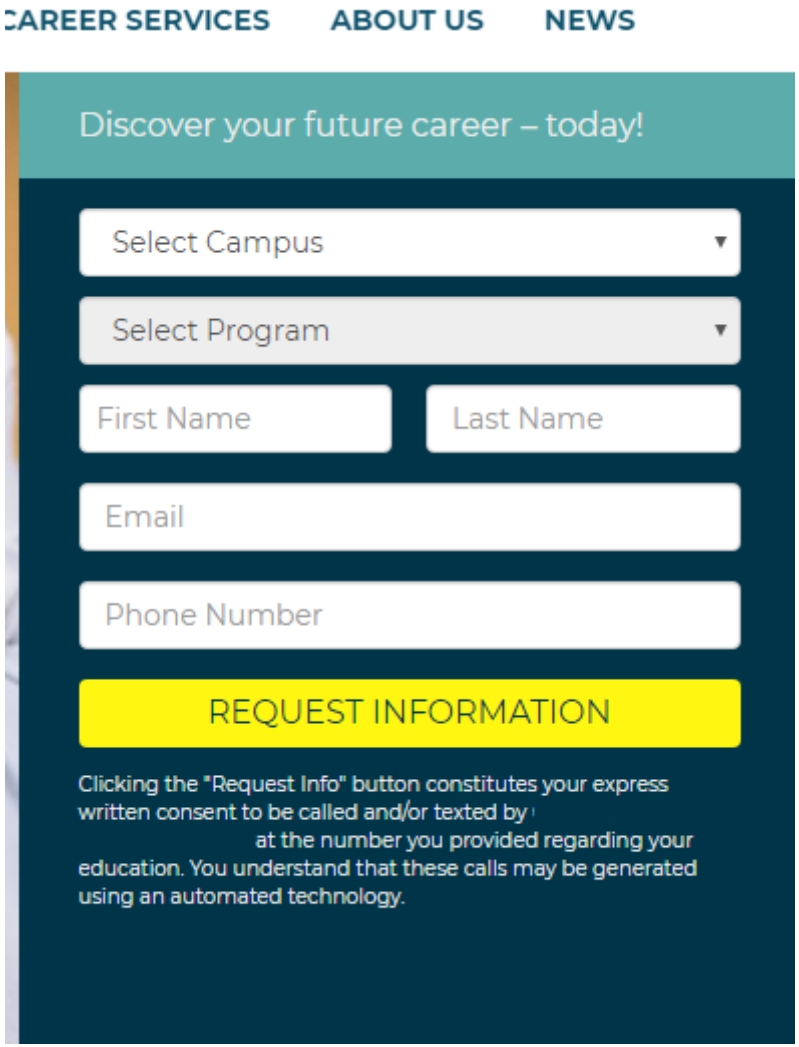
- "'Clear[ly] and Conspicuous[ly]' means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:
    - In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made through only one means.
    - A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

FEDERAL TRADE COMMISSION REGULATORY ACTION

- 'Clear[ly] and Conspicuous[ly]' means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways (cont.):
  - An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.
  - In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.
  - The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

FEDERAL TRADE COMMISSION REGULATORY ACTION

- 'Clear[ly] and Conspicuous[ly]' means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways (cont.):
    - The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.
    - The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.
    - When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, 'ordinary consumers' includes reasonable members of that group."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