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Jena Griswold  
Colorado Secretary of State  
1600 Broadway Suite 200  
Denver, CO 80203

*Re: Notice of Revised Draft of Proposed Rules, Written Public Comment*

To Whom it May Concern:

Please accept this public comment concerning the Revised Draft of Proposed Rules (changes to the Secretary’s Rules Concerning Campaign and Political Finance, (8 CCR 1505-6 *et seq*) dated July 9 2019.

Overall, Campaign Integrity Watchdog supports any effort to streamline and clarify rules for campaign finance law, so long as the rules do not contradict express constitutional or statutory language; because the Secretary lacks authority to make law or to overturn, subvert, or ignore constitutional mandates, any such “rules” in conflict with law are *ultra vires* and *void ab initio*.

Ultimately, any rules promulgated by the Secretary (along with any statutes passed by the legislature) must give effect to the stated purpose of Colorado Constitution Art. XXVIII and the Fair Campaign Practices Act (FCPA) by “providing for full and timely disclosure” and “strong enforcement of campaign finance requirements.” [*Colo. Const. Art. XXVIII Section 1, Purpose*]

Specific comments on individual sections of the proposed rules follows below.

**All comment are in bold italic.**

*Amendments to 8 CCR 1505-6:*

Rule 1. Definitions

*[Amendments to Rule 1.4]*

1.4 “Contribution” has the same meaning as set forth in Colo. Const. article XXVIII, section ~~2(5)(b)~~ 2(5)(A), and section 1-45-103(6), C.R.S.

***[Concur; corrects typographical error in previous rules version.]***

1.4.1 A contribution does not include an endorsement of a candidate or an issue by any person, or include interest earned in an interest-bearing bank account, dividend income from invested committee funds, earned income from commercially reasonable transactions, **or transfers of money within a political party.**

***[Oppose. Certain transfers of money within a political party may qualify as a “contribution” per the express language of Colo. Const. Art. XXVIII §2(5)(a), depending on the scope of what may be considered to fall within the definition of “political party” – does the scope include entities affiliated with, but not actually part of, the political party structure itself? Clarification needed]***

1.4.2 Volunteer services

(a) Time-based services volunteered by an individual are not considered a contribution if the individual receives no direct or indirect compensation for the time volunteered.

(b) If an individual volunteers only a portion of his or her time-based services, the volunteered portion is not considered a contribution.

(c) Any unpaid services that create a thing of value are not considered a 1 contribution. If volunteer services yield a thing of value, “contribution” only 2 includes the reasonable value of the materials involved, unless the value is de 3 minimis.

***[Concur, although the rule seems redundant to existing express constitutional and statutory language]***

1.4.3 “Contribution in support of the candidacy” as outlined in Colo. Const. Article XXVIII, Section 2(2), includes all contributions given directly to, or EXPENDITURES OR SPENDING coordinated with, a candidate for a specific public office, including those to a person who maintains a candidate committee after an election cycle.

***[Support; clarifies and emphasizes existing constitutional and statutory language]***

*Amendments to Rules 1.6 et seq, 1.7, 1.8 et seq*

***[No Comment]***

*New Rule 1.23*

1.23 “TRANSFER” AS USED IN SECTION 1-45-107.5(14), C.R.S., MEANS THE DISPOSITION OF OR PARTING WITH AN ASSET OR AN INTEREST IN AN ASSET. IT DOES NOT INCLUDE PAYMENT TO A VENDOR OR PAYMENT OF A CONTRACT FOR GOODS OR SERVICES.

***[NOTE: C.R.S. 1-45-107.5 does not have a subsection (14); the rule is inapposite. Since a Rule cannot create new law absent constitutional or statutory authority, this new “rule” would seem to be void ab initio, given that it lacks any statutory reference.]***

*[Amendments to Rule 2.2.3 concerning Candidate committees]*

2.2.3 A candidate committee may accept the contribution limit specified in Colo. Const. Article 1 XXVIII, Section 3(1) AND SECTION 1-45-103.7(1.5), C.R.S. for the primary election even if the primary election is canceled under section 1-4-104.5(1), C.R.S. or the candidate is running unopposed. ***[Support. The change reflects customary practice and conforms with precedent applicable to third-party or unaffiliated candidates running without a primary opponent]***

*[Amendments to Rule 2.2.4(b)(1) concerning managing unexpended campaign contributions]*  
**(Revised Draft Rules p.3 of 16)**

(b) Candidates seeking re-election to the same office

(1) A candidate committee may retain contributions to use in a subsequent election cycle for the same public office, in an amount not to exceed the political party contribution limit in Colo. Const. Article XXVIII, Section 3(3) AND SECTION 1-45-103.7(1.5)(A)(III), C.R.S. (as adjusted by Rule ~~10-16~~ 10 10.17).

***[Support. Ratifies current practice and clarifies existing statutory language]***

*[Amendments to Rule 2.4.3 concerning personal financial disclosures]*

2.4.3 If a candidate withdraws his or her candidacy by submitting appropriate documentation before filing the disclosure statement required in section 1-45-110(2)(a), C.R.S., the candidate need not file a disclosure statement. Any fines that the candidate accrued before withdrawing may be waived by the ~~Secretary of State~~ APPROPRIATE FILING OFFICE.

***[Concur. There is no need for a non-candidate to submit a candidate personal financial disclosure]***

*[Amendments to Rule 5] (Revised Draft Rules p. 3 of 16, beginning line 17)*

**Rule 5. Independent Expenditures and Independent Expenditure Committees**

*[Current Rule 5.1 is amended and recodified as New Rule 22]*

***[Comment: Re-numbering current Rule 5.2 et seq to 5.1 et seq is not problematic. However, given that funds donated are fungible, adding a “purpose” requirement onto statutory language governing disclosure is of dubious constitutionality.]***

Rule 5.1.1 (re-numbered):

***[Comment: recommend striking “for the purpose of making an independent expenditure” since money is fungible, and donations may not be encumbered with “purpose” unless each donation is specifically earmarked (which falls under a separate law, C.R.S. 1-45-107.5(10). Consequently, the “for the purpose of” language add confusion rather than clarity; all donations made to an “independent expenditure committee” are presumptively directly or indirectly in support “for the purpose of” making or enabling independent expenditures. ]***

*[A portion of Current Rule 1.7 is recodified under New Rule 5.2 as follows:]*

5.2 An independent expenditure committee may not coordinate its campaign-related expenditures with a candidate, candidate committee, or political party. Nothing in these rules limits joint fundraising efforts or the transfer of funds raised through joint fundraising efforts by an independent expenditure committee or other committee as long as each committee pays its allocated share of joint fundraising expenses and no committee participating in the joint fundraising activity receives more than its allocated share of funds raised in accordance with applicable contribution limits.

***[Comment: the prohibition on “coordination” between independent expenditure committees and candidates/political parties is not limited to expenditures alone. Consequently, any “joint fundraising efforts” involving an IEC in coordination with either a candidate or a political party are disallowed, rendering this rule as applied in such circumstances ultra vires.***

*[Amendments to Rule 7.1.1 concerning Federal PACs]*

7.1.1 A Federal PAC that qualifies as a political committee under Colo. Const. Article XXVIII, section 2(12), must register with the Secretary of State’s office as a state political committee and follow all requirements for state political committees; EXCEPT THAT A FEDERAL PAC IS NOT REQUIRED TO FORM A SEPARATE BANK ACCOUNT FOR THE STATE POLITICAL COMMITTEE SO LONG AS THE FUNDS USED FOR THE STATE POLITICAL COMMITTEE CAN BE SEPARATELY IDENTIFIED. Nothing in this rule requires a Federal PAC to observe Colorado requirements for contributions, expenditures, or other campaign finance activity 7 for federal elections or elections in states other than Colorado.

***[Comment: given the fungibility of funds, how can a state political committee funds be “separately identified” if they are in the same bank account as a Federal PAC’s funds? How can the applicable contribution limits for state vs. federal political committees be discerned or enforced if the funds are commingled? Additionally, the new rule language may violate Colo. Const. Art. XXVIII §3(9)]***

*[Amendments to Rule 9.1 concerning registered agents]*

9.1 The registered agent or a designated filing agent for any committee must sign the committee's registration form and all disclosure reports. For registration forms and reports filed by a candidate or candidate committee, the candidate must sign. [Sections 1-45-108(3), (5), and (6), C.R.S.] FOR PURPOSES OF THIS REQUIREMENT, AN ELECTRONIC LOGIN WILL FULFILL THE SIGNATURE REQUIREMENT.

***[Support. This rules change ratifies current practice and expressly validates how e-filing of disclosure reports via TRACER are actually conducted]***

*Amendments to Rule 10.1.3 concerning unexpended campaign contributions]*

10.1.3 Unexpended contributions may not be used for personal purposes EXCEPT TO REIMBURSE A CANDIDATE FOR REASONABLE AND NECESSARY EXPENSES FOR THE CARE OF A CHILD OR A DEPENDENT AS ALLOWED UNDER SECTION 1-45-103.7(6.5), C.R.S.

***[No Comment]***

*[Amendments to Rule 10.2.3 (no changes to Rules 10.2.1 and 10.2.2)]*

10.2 Except for independent expenditure committees and small-scale issue committees, committees must report contributions as follows:

10.2.3 Disclosure of occupation and employer

(a) The requirement to disclose the A CONTRIBUTOR'S OR DONOR'S occupation and employer ~~of a contributor in Colo. Const. Article XXVIII, Section 7 and section 1-23-45-108, C.R.S.,~~ applies ONLY to any one-time contribution OR DONATION of \$100 or more, and not to THE PERSON'S aggregate ~~contributions totaling \$100 or more~~ CONTRIBUTIONS OR DONATIONS.

(b) Except for a committee exercising its right to cure under section 1-45-109(4)(c) 1-45-111.7(4), C.R.S., if a committee does not report REQUIRED occupation and employer information for a contribution of \$100 or more, and the committee is unable to gather the information within 30 days after receipt of the contribution, the committee must return the contribution to the contributor no later than the 31st day after receipt. [~~Colo. Const. Article XXVIII, Section 7]~~

***[Comment: the additional text inserted into the rules change is unnecessarily unwieldy, and contains inapposite language (example: "donor" applies exclusively to funds given to IECs, which are expressly exempted from the scope of this rules section) and adds confusion. Recommend removing language referencing "donor" or "donations" from this rule section. Additionally, aside from the lack of constitutionality of section 1-45-109(4)(c) and 1-45-111.7(4) C.R.S. et seq, the rule requiring return of a contribution lacking occupation/employer data within 30 days after receipt is self-contradictory as applied under that statutory language.]***

*[Amendments to Rules 10.4.1 through 10.4.3 (no changes to Rules 10.4.4 through 10.4.6)]*

10.4 A contribution or donation is received on the date that it is accepted by the committee.

10.4.1 A contribution or donation by check OR MONEY ORDER is accepted, at the latest, on the date that the contribution or donation is deposited into the committee account. If a committee receives a donation by check OR MONEY ORDER at least five business days before the end of a reporting period, the committee must deposit the check OR MONEY ORDER or return to the contributor before that reporting period closes.

10.4.2 A cash contribution or donation is accepted the date the cash is in the committee's possession.

***[Concur. Rules change reflects applicable constitutional/statutory requirements]***

10.4.3 A contribution or donation made by credit card, PayPal, or other payment intermediary service is accepted on the date the contributor or donor authorizes the payment, OR IF UNKNOWN, ON THE DATE THE PAYMENT INTERMEDIARY SERVICE ELECTRONICALLY TRANSFERS THE CONTRIBUTION OR DONATION.

**[Oppose. Every payment intermediary service captures the date that a contribution or payment is authorized; therefore, the date of authorization is never "unknown." Also, because transfer of payment may be delayed by either the intermediary or the recipient, the resultant delay in disclosure may unlawfully disguise amounts received from public view.]**

*[Amendments to Rules 10.5 and 10.6]*

10.5 A committee must maintain all financial records for 180 days after any general election cycle in which the committee received contributions. If a complaint is filed against the committee, the committee must maintain financial records until final disposition of the complaint and any consequent litigation. The committee must maintain COVERED ORGANIZATION AND LLC affirmations for one year after the end of the election cycle. [~~Colo. Const. Article XXVIII, Section 3(9)~~]

10.6 If a committee receives a contribution in excess of the contribution limit, the committee must return the excess to the contributor within ten days of receipt or within three days after receiving notification from the ~~Secretary of State~~ APPROPRIATE FILING OFFICE, whichever is sooner, and will not be held liable.

***[Comment: It is unclear why the reference to the applicable constitutional reference is stricken; it is also unclear why "Secretary of State" is stricken from the Secretary's rules]***

*[Amendments to Rule 10.16]*

10.16 Disclosure of contributions by limited liability companies (LLCs) [Section 1-45-103.7(5), (6), (7), 16 and (8), C.R.S.]

***[Comment: the renumbering and strikethrough of certain provisions contains several redundancies; the renumbered 10.16.1 contains requirements expressly included in the renumbered 10.16.2 (occupation/employer information). If the intent is to simplify and reduce the number of provisions, eliminate the renumbered 10.16.1 and start with the content in the renumbered 10.16.2]***

*[Amendments to Rule 10.17]*

***[Comment: it seems odd that the contribution limits for executive offices have been repeatedly adjusted for inflation, but the limits for legislative office remain unchanged and extraordinarily low (compared across states) since adoption of Amendment 27. This appears to be disparate treatment for similarly situated individuals, which raises constitutional equal protection concerns.]***

*[Amendments to Rule 11.5 concerning electioneering communications]*

11.5 A committee need not file electioneering communication reports separate from regularly filed disclosure reports if the expenditure or spending subject to Colo. Const. Article XXVIII, Section 6 and ~~Rule 11.4~~ is identified as an electioneering communication or regular biennial school electioneering communication. The disclosure of electioneering communication expenditures or spending on a regularly filed report must include the name of the candidate(s) referred to in the communication.

**[No Comment]**

12.5 If the ~~Secretary of State~~ APPROPRIATE FILING OFFICE receives verifiable information in writing that the candidate is deceased, the ~~Secretary of State~~ APPROPRIATE FILING OFFICE may immediately terminate the candidate's candidate committee in TRACER.

***[Comment: Please explain the rationale for replacing "Secretary of State" with "appropriate filing office" in this amended rule and others.]***

*[Repeal of Current Rule 16.3, renumbering and additional amendments to Current Rule 16.4 concerning special districts]*

***[Comment: the renumbered Rule 16.3 appears to violate the express language of Colorado Constitution Art. XXVIII Section 2(2) defining "candidate" to include "any person who seeks nomination or election to any state or local public office that is to be voted on in this state at any ... special district election." The Secretary does not have authority to contravene, modify, or add/subtract requirements to constitutional language, rendering the rule ultra vires.]***

*[Amendments to Rule 17.2.4 concerning filing schedules]*

***[Comment: Please explain the rationale for replacing "Secretary of State" with "appropriate filing office" in this amended rule and others.]***

*[Amendments to Rule 17.15.1(a)(1)]*

17.5 Reports for former officeholders, persons not elected to office, and term-limited office holders

17.5.1 Annual reporting

(a) A candidate committee for a candidate not elected to office, who was formerly in 14 office, or who is term-limited may submit a written request to file only an annual 15 report for each calendar year.

(1) Statewide AND SCHOOL DISTRICT candidate committees must file an annual report not later than January 15th of the following year.

***[Comment: relieving a term-limited elected official from the requirement to file quarterly reports, while continuing to receive contributions and/or make expenditures, evades the required disclosure transparency mandated under Art. XXVIII and the FCPA and is void; because the Secretary lacks the authority to contravene constitutional or statutory mandates, Section 17.5.1(a) as applied to elected officials maintaining a candidate committee is contrary to law and ultra vires].***

*[Amendments to Rules 18.1.1(c), 18.1.2, concerning requests for waiver or reduction of campaign finance 19 penalties]*

18.1.1 A request for waiver or reduction of campaign finance penalties imposed under Colo. Const. Article XXVIII, Section 10(2) must state the reason for the delinquency.

*[No changes to (a) and (b)]*

(c) The ~~Secretary of State~~ APPROPRIATE FILING OFFICE will not consider a waiver request after a penalty has been paid.

18.1.2 Requests for waiver or reduction of campaign finance penalties imposed under Colo. Const. Article XXVIII, ~~Sections 9(2)~~ or SECTION 10(2) must be considered by the appropriate officer ~~and Administrative Law Judges~~ according to the following rules:

***[Comment: amended Rule 18.1.2 purporting to shift authority for reviewing requests for waiver or reduction of campaign finance penalties imposed pursuant to Section 10(2) from Administrative Law Judges to an "appropriate officer" is directly contrary to the requirements in the express constitutional language of Art. XXVIII Section 10(2)(b), mandating "the secretary shall refer the appeal to an administrative law judge." As such, the rule is unconstitutional and ultra vires].***

*[Amendments to Rules 18.1.3]*

18.1.3 The appropriate officer ~~or Administrative Law Judge~~ may consider any additional factors that establish good cause or may otherwise be relevant to the request for waiver or reduction of campaign finance penalties. In considering a request, the appropriate officer ~~or Administrative Law Judge~~ may request additional information, including but not limited to financial or other records maintained by the filer.



***[Comment: as above, striking Administrative Law Judge from the process of reviewing appeals or requests for waiver of penalty is contrary to law and directly contrary to the requirements in the express constitutional language of Art. XXVIII Section 10(2)(b), mandating “the secretary shall refer the appeal to an administrative law judge.” As such, the rule is unconstitutional and ultra vires].***

*[Rule 18.2 repeals and amendments]*

18.2 Complaints.

***[Comment: the entirety of Rule 18.2 is unconstitutional, as the Secretary never had any legitimate constitutional or statutory authority to replace the enforcement mechanism passed by a voter-referred constitutional amendment (Amdmt. 27, 2002). Consequently, the rule was, is, and remains unconstitutional and ultra vires. Notably, several provisions of the Secretary’s Rules 18.2 are the subject of constitutional challenges currently being considered by the Colorado Court of Appeals].***

~~18.2.11~~ 18.2.2 The elections division will make documents related to a complaint publicly available as follows:

(a) The original complaint, notice of initial review, final agency decision, and any complaint filed by the elections division with a hearing officer will be publicly available at the time the elections division provides the document to the respondent.

(b) Any additional documentation related to the complaint, including a notice of intent to cure and supporting evidence, or documents related to the elections division’s investigation, will be publicly available, SUBJECT TO THE RESTRICTIONS SET FORTH IN SECTION 1-45-111.7(5)(A), C.R.S. AND SECTION 1-45-107.5(14)(D)(IV)(C), C.R.S., at the time the elections division issues a final agency decision or files a complaint with a hearing officer.

(c) The elections division may redact any document related to a complaint if it is necessary to protect any person’s private or confidential information.

(D) ANY DOCUMENT THE ELECTIONS DIVISION RECEIVES UNDER SECTION 1-45-25 111.7(A)(III), C.R.S. WILL NOT BE RETAINED AFTER THE TIME NECESSARY TO REVIEW, 26 INVESTIGATE, PROSECUTE A COMPLAINT, OR ANY APPEAL, AS APPLICABLE.

***[Comment: the Secretary’s attempt to eliminate public access to documents that are part of an adjudicative proceeding and therefore a matter of public record and interest is contrary to both letter and spirit of Art. XXVIII and the FCPA. Oppose.]***

*[New Rule 21.2 concerning coordination]*

## 21.2 PRE-CANDIDACY COORDINATION

21.2.1 FOR PURPOSES OF SECTION 1-45-103.7(11)(A), C.R.S., A PERSON ACTIVELY SOLICITS FUNDS FOR AN INDEPENDENT EXPENDITURE COMMITTEE WITH THE INTENT OF BENEFITTING HIS OR HER FUTURE CANDIDACY WHEN THE PERSON:

(A) ORGANIZES, DIRECTS, OR PLANS A FUNDRAISING EVENT FOR THE INDEPENDENT EXPENDITURE COMMITTEE; OR ASKS FOR, ENCOURAGES, OR SUGGESTS A DONATION TO THE INDEPENDENT EXPENDITURE COMMITTEE; AND

(B) KNOWS OR REASONABLY SHOULD KNOW THAT THE INDEPENDENT EXPENDITURE COMMITTEE WILL SUPPORT THE PERSON'S FUTURE CANDIDACY.

***[Comment: Support. Additional review of current rules regarding "coordination" between an Independent Expenditure Committee with candidates and/or political parties should also address contact between officers/agents/etc. of an IEC with officers/agents/etc. of a candidate, candidate committee and/or political party].***

*[Current Rule 5.1 is amended and recodified as New Rule 22 as follows:]*

## **RULE 22. DISCLAIMER STATEMENTS**

~~5.1~~ 22.1 Disclaimer requirement for nonbroadcast independent expenditure communications, INCLUDING ONLINE COMMUNICATIONS.

~~5.1.1~~ 22.1.1 Under section 1-45-107.5(5)(C), C.R.S., ~~any nonbroadcast communication that constitutes an independent expenditure~~ COMMUNICATIONS must contain a clear and conspicuous disclaimer that is clearly readable, printed in text that is no less than 15 percent of the size of the largest font used in the communication, or at least eight-point font, and includes:

(a) The name of the person that paid for the communication; and

(b) ~~AIN THE CASE OF AN INDEPENDENT EXPENDITURE,~~ A statement that the communication is not authorized by any candidate.; AND

(C) A NATURAL PERSON WHO IS THE REGISTERED AGENT IF THE PERSON IDENTIFIED IN SUBSECTION (A) ABOVE IS NOT A NATURAL PERSON.

~~5.1.2~~ 22.1.2 These requirements do not apply to bumper stickers, pins, buttons, pens, and 20 similar small items upon which the disclaimer cannot be reasonably printed.

22.1.3 IF THE SIZE, FORMAT, OR DISPLAY REQUIREMENTS OF AN ELECTRONIC OR ONLINE COMMUNICATION MAKE IT IMPRACTICABLE TO INCLUDE A DISCLAIMER STATEMENT ON THE COMMUNICATION, THE DISCLAIMER STATEMENT MUST BE AVAILABLE BY MEANS OF A DIRECT LINK FROM THE COMMUNICATION TO THE WEB PAGE OR APPLICATION SCREEN CONTAINING THE STATEMENT.

(A) THE INFORMATION PROVIDED IN THE DIRECT LINK ARE SUBJECT TO ALL OF THE SIZE AND CONTENT REQUIREMENTS IN RULE 22.1.1.

- (B) THE INFORMATION PROVIDED IN THE DIRECT LINK MUST BE CLEARLY AND CONSPICUOUSLY DISPLAYED, AND BE IMMEDIATELY APPARENT ON THE SCREEN.
- (C) IF THE COMMUNICATION IS A DIRECT OR INDIRECT ELECTRONIC MESSAGE TO A PERSON, INCLUDING BUT NOT LIMITED TO A TEXT MESSAGE, ONLY THE INITIAL COMMUNICATION MUST CONTAIN THE DIRECT LINK.
- (D) FOR PURPOSES OF THIS RULE, IT IS IMPRACTICABLE TO INCLUDE A DISCLAIMER STATEMENT IF THE TEXT OF THE REQUIRED DISCLAIMER STATEMENT WOULD CONSTITUTE 20 PERCENT OR MORE OF THE TOTAL COMMUNICATION.

***[Comment: Generally Support, with some caveats. Overall, expanding the disclaimer requirement to all electoral communications, not merely “independent expenditure” communications, increases transparency and accountability while closing a loophole that has been exploited by several unscrupulous groups (including many successfully prosecuted under the constitutional enforcement process by Campaign Integrity Watchdog over the opposition of previous administrations. CIW particularly supports the language allowing a disclaimer to be provided via “direct link” (welcome to the 21<sup>st</sup> Century) vs. cluttering a communication; on a related note, CIW fails to discern additional informational value of listing registered agent].***

## **Conclusion**

Where the Secretary’s new rules governing adjudication of campaign finance complaints are derived from and consistent with constitutional language and authority, CIW generally supports the amendments. Where the rules are contrary to express constitutional and/or statutory language, they are void *ab initio* and “must be set aside.” *Gessler v. Colo. Common Cause*, 2014 CO 44, ¶19, 327 P.3d 232.

The previous Secretary’s usurpation of the constitutional enforcement process, however, remains unconstitutional and opposed by CIW, along with any rules facilitating the breach of public trust and violation of the rights of Colorado citizens to petition their government for redress of grievances, secured under the First Amendment to the U.S. Constitution and as expressly provided in Colorado Constitution Article XXVIII Section 9(2), as adopted by voters in passing Amendment 27 by referred constitutional ballot initiative in 2002, expressly repealing the Secretary’s previous role and authority in enforcement of campaign finance violations.

*/signed/ Matt Arnold*

***Campaign Integrity Watchdog***

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