Cayman Islands closed-ended funds

Insights - 23/05/2023

This client briefing provides an overview of the process of and legal considerations connected with establishing and operating a closed-ended fund in the Cayman Islands.

This briefing is intended to provide a general summary of the position in law as at the date of publication shown above, and is not to be taken as specific legal advice applicable to particular issues or circumstances. If such advice is required, please contact your usual Ogier contact or one of our investment fund specialists as detailed on this page.

1. Formation and statutory requirements

The most common form of entities used for Cayman closed-ended fund structures are exempted limited partnerships, limited liability companies and exempted companies. For detailed guidance on the establishment and ongoing obligations for such entities, please see our client briefings: Cayman Islands Exempted Limited Partnerships, Cayman Islands Limited Liability Companies and Cayman Islands Exempted Companies.

2. Private Funds Act (Revised)

The Private Funds Act (Revised) (**PF Act**) applies to Cayman Islands closed-ended funds such as private equity funds. If such a fund falls within the definition of a 'private fund', the PF Act provides for its registration with, and its regulation by, the Cayman Islands Monetary Authority (**CIMA**). 'Mutual funds' such as open-ended hedge funds are not caught by the PF Act and continue to be regulated under the Mutual Funds Act (Revised). See our client briefing Cayman Islands Open-Ended Funds for guidance on Cayman mutual funds.

The definition of 'private fund' in the PF Act covers any company, unit trust or partnership that offers or issues or has issued to investors its participating, non-redeemable (at the option of the investor) investment interests, the purpose or effect of which is the pooling of investor funds with the aim of enabling investors to receive profits or gains from such entity's acquisition,

holding, management or disposal of investments, where (a) the holders of investment interests do not have day-to-day control over the acquisition, holding, management or disposal of the investments; and (b) the investments are managed as a whole by or on behalf of the fund operator directly or indirectly. The PF Act expressly excludes certain licensed or registered entities and any 'non-fund arrangements' (see below for further details) from the definition of a private fund.

Classification of an entity is often highly fact-sensitive, and related definitions, CIMA guidance and industry practice mean that it is essential to consider the particular features of each vehicle and structure with experienced Cayman counsel.

Broad principles that may be relevant include:

- vehicles that only issue debt are not deemed to be issuing investment interests and so do not fall within the scope of the PF Act
- entities whose interests are held only by promoters, operators (e.g. directors) or by the founders, principals, owners or stakeholders of the entity or the entity's manager or adviser will be out of scope
- the PF Act expressly exempts 'non-fund arrangements' including (amongst others) securitisation special purpose vehicles; structured finance vehicles; debt issuing vehicles; preferred equity financing vehicles; sovereign wealth funds; single family offices; joint ventures; proprietary vehicles; holding vehicles; officer, manager or employee incentive, participation or compensation schemes and programmes or schemes to similar effect; individual investment management arrangements; arrangements not operated by way of business; and funds whose investment interests are listed on a stock exchange specified by CIMA, CIMA has provided helpful industry guidance as to the scope of any such 'non-fund arrangements'
- vehicles which are intentionally and expressly established for only one investor will generally be outside the definition of a 'private fund' as there will be no 'pooling of investor funds'
- vehicles that are set up to hold only a single investment are likely to be in-scope as are co-investment vehicles, alternative investment vehicles (**AIVs**) and master funds

3. Registration requirements

Timing

A private fund must submit an application for registration to CIMA within 21 days of its acceptance of capital commitments, and in any event before accepting capital contributions from investors in respect of investments.

Documents to be filed

An application for registration as a private fund must be submitted electronically on CIMA's regulatory enhanced electronic forms submission (**REEFS**) secure portal and must be accompanied by the following:

- a completed prescribed application form
- Certificate of Incorporation/Registration (as applicable)
- constitutive documents (Memorandum and Articles of Association/Trust Deed/Declaration of Partnership (as applicable))
- a copy of the offering document, marketing materials or a summary of the fund's terms
- auditor's consent letter
- administrator's consent letter (if applicable)
- structure chart
- prescribed details relating to the fund's anti-money laundering officers (see 'Obligations under anti-money laundering legislation' below)

It generally takes approximately one week from the date the application is submitted for the fund to be recorded on CIMA's website as a registered private fund and to receive a copy of the Certificate of Registration. However, the Certificate of Registration will be dated with the date of submission of the registration documents.

Fees

Private funds will be required to submit a registration fee of US$366 and are subject to an initial and annual registration fee of US$4,268. If applicable, AIV fees of US$305 per AIV will apply (with a fee cap of 25 AIVs).

4. Operating requirements

The PF Act seeks to ensure that there is transparency and proper documentation of a private fund's core operations and processes. The PF Act achieves this though audit, valuation, custody, cash monitoring and securities identification requirements: set out in the PF Act and in Rules and Guidance issued by CIMA. The fund's policies and procedures should be reviewed on a periodic basis to ensure continued compliance.

The applicable operating requirements may be summarised as follows:

Audit – audited financial statements, signed-off by a CIMA-approved Cayman Islands auditor, must be submitted to CIMA within six months of a private fund's financial year end, although CIMA may allow limited extensions (up to a maximum of an additional three months) in certain circumstances. The PF Act expressly permits a private fund to prepare and file combined/consolidated financial accounts in certain circumstances (including consolidation with non-Cayman funds). Accounts are filed electronically through CIMA's REEFs portal, supported by a Fund Annual Return (**FAR**) which provides CIMA with certain details regarding the private fund. A private fund is also required to file a related fund entity form (**RFE Form**) with CIMA at the same time as filing its FAR. This RFE Form provides prescribed information relating to the private fund's 'related fund entities' (such as parallel funds, co-investment funds and AIVs).

Valuation – valuations of the assets of a private fund must be carried out at a frequency that is appropriate to the assets held by the private fund. Generally, valuations will be required on at least an annual basis, although, the PF Act expressly empowers CIMA to waive the valuation requirements, either absolutely or subject to such conditions as it deems appropriate. To the extent valuations are not performed by an appropriately qualified independent third party, the valuation function established by the manager or operator (e.g. general partner) of the private fund must be independent from the portfolio management function or the potential conflicts of interest must be properly identified, managed, monitored and disclosed to investors (**Conflicts Rule**). Where the valuation is not carried out by an independent third party, CIMA may require the private fund to have its valuation verified by an auditor or independent third party.

CIMA's Rule on Calculation of Asset Values – Registered Private Funds (**NAV Rules**) requires private funds to establish, implement and maintain a NAV Calculation Policy (as defined in the NAV Rules) that ensures a private fund's net asset value (**NAV**) is fair, reliable, complete, neutral and free from material error and is verifiable. Such policy must be calculated in accordance with the International Financial Reporting Standards or Generally Accepted Accounting Principles of the United States of America, Japan or Switzerland or a non-high risk jurisdiction (being any jurisdiction that is not on the list of high risk jurisdictions issued by the Financial Action Task Force). The NAV Rules require, amongst other things, that the policy must be written and disclosed in the private fund's constitutional documents or marketing materials or other form of investor communication typically used by the fund. In addition to such disclosure, a private fund's constitutional documents or marketing materials or other form of investor communication must explicitly describe the limitations and conflicts of the NAV Calculation Policy, and any material involvement by the fund's investment manager/advisor in the pricing of the fund's portfolio, or otherwise in the calculation, determination or production of the NAV and any conflicts of interest caused by such involvement.

Custody – where it is both practical and proportionate to do so, having regard to the nature of the private fund and the type of assets it holds, a custodian must be appointed to:

- hold, in segregated accounts opened in the name, or for the account, of the private fund, the custodial fund assets
- verify, based on information provided by the private fund and available external information, that the private fund holds title to any other fund assets and maintain a record of those other assets

Where no custodian is appointed, the fund must notify CIMA of such fact1. In such circumstances, a private fund must instead appoint a person to carry out title verification in line with (b) above. Such function may be performed by an administrator or another independent third party or may be performed by the manager (or a person who has a control relationship with the manager) or operator of the private fund subject to the Conflicts Rule.

Cash monitoring – a private fund must appoint a person to: monitor the cash flows of the private fund; including ensuring that all cash has been booked in cash accounts opened in the name, or for the account, of the private fund; and ensuring that all payments made by investors in respect of investment interests have been received. Such function may be performed by an administrator, custodian or another independent third party, or may be performed by the manager (or a person who has a control relationship with the manager) or operator of the private fund, subject to the Conflicts Rule.

Securities identification – a private fund that regularly trades securities or holds them on a consistent basis must maintain a record of the identification codes (for example, ISINs) of the securities it trades and holds and must make these records available to CIMA upon request.

The PF Act provides that where a private fund chooses to report consolidated or combined financial statements with an AIV, the AIV will not have to comply with these operating requirements. An AIV is defined as a vehicle that is formed in accordance with the constitutional documents of a private fund for the purposes of making, holding and disposing of one or more investments wholly or mainly related to the business of that private fund and only has as its members, partners or trust beneficiaries, persons that are members, partners or trust beneficiaries of the private fund.

Segregation of Assets - CIMA's Rule on Segregation of Assets – Registered Private Funds (**Segregation Rules**) requires that private funds must establish, implement and maintain (or oversee the establishment, implementation and maintenance of) strategies, policies, controls and procedures to ensure compliance with the Segregation Rules consistent with the fund's offering document or marketing materials, as the case may be, and appropriate for the size, complexity and nature of the fund's activities and investors. The Segregation Rules state that all financial assets and liabilities of a private fund and any part thereof (including investor funds and investments) (**Portfolio**) must be accounted for separately from any assets of the manager, operator or custodian of the private fund. The Segregation Rules also provide that the overriding requirement of the Segregation Rules is that a private fund must ensure that no

manager, operator or custodian of the fund uses the Portfolio to finance its own or any other operations.

The Segregation Rules state that the transfer and reuse of assets by a custodian, as consented to by or on behalf of the private fund (e.g. re-hypothecation), is not prohibited, provided that a description of the arrangements entered into with any custodian allowing for the possibility of such transfer and reuse (and the maximum level of such transfer and reuse) is disclosed in the offering documents or otherwise disclosed to investors before they invest, and that any material changes thereto are also disclosed to investors.

In a formal notice, CIMA has clarified that the Segregation Rules do not prohibit prime brokerage/custody arrangements that allow, in accordance with established and accepted industry practice, a custodian/sub-custodian to hold all client assets in a commingled client omnibus account along with the assets of other clients.

Marketing Materials - If the private fund prepares an offering memorandum and/or marketing materials (which encompasses any documents on the basis of which investors are solicited to purchase investment interests in the private fund), these must comply with CIMA's Rule on the Contents of Marketing Materials – Registered Private Funds (**Contents Rules**). Where the functions of valuation, title verification and/or cash monitoring are performed by the manager (or a person who has a control relationship with the manager) or the operator (e.g. general partner), this should be disclosed in accordance with the Contents Rules in any offering memorandum or marketing materials, and if none, by separate notification to investors. The detail of the Contents Rules is beyond the scope of this client briefing; please liaise with your usual Ogier contact for full details.

All operating conditions and procedures need to be appropriate and proportionate given the scale and operations of a private fund. Where independent third parties are not engaged to carry out the above functions, CIMA may require that third party verification be undertaken. The PF Act provides that CIMA's supervision and monitoring of private funds, including the above operating conditions, is risk-based.

5. Corporate governance

CIMA requires a minimum of two directors for private funds that are companies and will require a minimum of two natural persons to be named in respect of a general partner or corporate director of a private fund. Directors appointed to private funds are not currently required to be registered pursuant to the Director Registration and Licensing Act (Revised).

Corporate Governance for Operators of a closed-ended fund

CIMA issued new and updated regulatory measures in April 2023, including a new Statement of

Guidance on Corporate Governance – Mutual Funds and Private Funds (**Corporate Governance SOG**) which came into effect on 14 April 2023, a new Rule on Corporate Governance for Regulated Entities (**Corporate Governance Rule**, which should be read in conjunction with the Corporate Governance SOG) and a new Rule and Statement of Guidance – Internal Controls for Regulated Entities (**Internal Controls Rule and SOG** and together with the Corporate Governance Rule, the **New Regulatory Measures**). The New Regulatory Measures come into effect on 14 October 2023.

The Corporate Governance SOG applies to all regulated private (and mutual) funds and is intended to provide the Operators of a regulated private (and mutual) fund with guidance on the minimum expectations for the sound and prudent governance of the regulated private (and mutual) funds that they operate and is not intended to be prescriptive or exhaustive. The **Operators** of a regulated private (and mutual) fund are considered to be its governing body meaning, the board of directors of a fund incorporated as a company, the general partner(s) of a fund formed as an exempted limited partnership, the manager (or equivalent) of a fund incorporated as a limited liability company or the trustee(s) in the case of a unit trust.

The New Regulatory Measures apply to all regulated entities in the Cayman Islands, including regulated private funds.

CIMA has expressly recognised that the application of the Corporate Governance SOG, the Corporate Governance Rule and the Internal Controls Rule and SOG should be appropriate for, and proportionate to, the size, complexity, structure, nature of business and risk profile of the regulated fund's operations.

By way of high level summary, the Corporate Governance SOG provides guidance on seven core elements of corporate governance: the oversight function of the Operators, conflicts of interest, Operator meetings, duties of Operators, documentation, relations with CIMA and risk management. Please see our client briefing Enhancement of Cayman's corporate governance framework for regulated funds for an overview of the core elements of the Corporate Governance SOG.

Similarly, the Corporate Governance Rule requires all regulated entities, including regulated private funds, to establish, implement and maintain a corporate governance framework which must address, at a minimum: its objectives and strategies; structure and governance of the governing body; appropriate allocation of oversight and management responsibilities; independence and objectivity; collective duties of the governing body; duties of individual directors of the governing body; appointments and delegation of functions and responsibilities; risk management and internal control systems; conflicts of interest and code of conduct; remuneration policy and practices; reliable and transparent financial reporting; transparency of communications; duties of senior management; and relations with CIMA.

The Internal Controls Rule and SOG is comprised of two parts, Part I sets out the general rules

and guidelines for all regulated entities covering each of the five components of internal control, namely: control environment; risk identification and assessment; control activities and segregation of duties; information and communications; and monitoring activities and correcting deficiencies in internal controls and Part II provides sector specific rules and guidelines (which is not specific to regulated investment funds).

From these sources, we would highlight that (amongst other matters) the governing body should constitute an appropriate number of individual(s) as required by applicable acts and regulations in the Cayman Islands with a diversity of skills, background, experience and expertise to ensure that there is an overall adequate level of competence at the operator level. The Operators must exercise independent judgment, always acting in the best interests of the fund (other than where lawfully permitted or required to consider other interests) and, taking into consideration the interests of the investors as a whole. Operators are required to act honestly and in good faith at all times. In addition, Operators must operate with due skill, care and diligence and should ensure they have sufficient and relevant knowledge and experience to carry out their duties. The Operators must ensure that the fund's investment strategy is clearly described in the constitutional documents or offering documents of the fund. The Operators must regularly monitor whether the investment manager is performing in accordance with the defined investment criteria, investment strategy and restrictions. The Operators are responsible for approving the appointment and removal of service providers. The Operators should review all material service provider contracts to ensure roles and responsibilities are clearly defined and that the responsibilities are clearly divided between each service provider. The Operators should also ensure thorough understanding of the scope and nature of the responsibilities of each service provider and ensure that the roles and responsibilities of such providers are clearly set out. They should ensure that the terms of the fund's contracts with its service providers are consistent with industry standard. They must also regularly verify or seek confirmation from service providers that they are acting in accordance with the fund's constitutional and offering documents. The Operators should communicate adequate information to the fund's investors, including any material changes to the fund. In addition, Operators should communicate and evidence communication of material changes relating to investor rights to the investors of the regulated fund at the time the changes are being made or on an ongoing basis. The Operators should as necessary, and at all material times, inform themselves of the fund's investment activities, performance and financial position, including conducting inquisitorial reviews of the fund's financial results and audited financial statements and monitoring the fund's net asset valuation policy and the calculation of its net asset value. The Operators of a regulated fund have ultimate responsibility for overseeing and supervising the affairs of the fund. However, subject to the considerations set out above, the Operators may delegate certain duties to service providers. The Operators should require regular reporting from the fund's investment manager and other service providers in order to enable it to make informed decisions and to adequately oversee and supervise the operations of the regulated fund. The Operators must monitor compliance with relevant acts, regulations, rules and standards and establish periodic

verification of adherence with compliance standards.

The Operators of a regulated private fund should convene at least once per year, or more frequently where the circumstances of size, complexity, structure, nature of business and risk profile or size, nature and complexity of the fund's operations require. Operator meetings provide an opportunity for the Operators to (amongst other matters) review and assess the fund's investment activities, performance and financial position, to engage with the fund's service providers (as part of the ongoing requirement to monitor and supervise delegated functions, which the Operators retain ultimate responsibility for). Operator meetings are not required to take place in the Cayman Islands nor are they required to take place in person. The Operators should fully, accurately and clearly record in writing all meetings and any material decisions and/or considerations and an agenda should be circulated in advance of each meeting to allow the Operators to appraise themselves of the matters to be considered.

The Operators of a regulated fund must suitably identify, disclose, monitor and manage all its conflicts of interest. The Operators should implement a documented conflicts of interest policy (which may be contained within the body of the regulated private fund's constitutional documents, offering documents or marketing materials (as applicable)) which requires disclosure of conflicts on at least an annual basis or at any time where a conflict could be relevant.

Additionally, with respect to an closed-ended fund formed as a company, directors owe duties at common law (including fiduciary duties); statutory duties; and duties to third parties in contract or in tort. For guidance on these duties, please see our client briefing Acting as a director of a Cayman Islands company.

6. Ongoing obligations

Obligations under the PF Act

The PF Act imposes on registered private funds the following continuing obligations:

- to file with CIMA a copy of material amendments to its current offering document/summary of terms/marketing materials or prescribed details filed with CIMA and/or any changes to its registered office or principal office within 21 days
- to have its accounts audited annually by an auditor approved by CIMA (unless CIMA grants an exemption whether absolute or conditional) and to file those accounts with CIMA within six months of the end of the private fund's financial year. However, a private fund that has not received capital contributions from its investors for the purposes of investment is exempted from this requirement, provided a declaration in the prescribed form from an operator of the private fund is filed with CIMA within six months of the private fund's financial year end attesting to the private fund not being in receipt of capital contributions

- to comply with the valuation, custody, cash monitoring and securities identification requirements set out under 'Operating requirements' above, including the production of any periodic reports
- to comply with the AML Regulations (see below)
- to maintain a minimum of two directors for corporate private funds and a minimum of two natural persons in respect of a general partner or corporate director of a private fund
- to file a FAR with CIMA on an annual basis. The FAR (together with an RFE Form (where applicable)) is usually submitted electronically by the auditor through CIMA's REEFS portal. The FAR includes general information about the fund, operational information such as the nature of the investments held as well as financial information about the fund. As part of the FAR filing, the private fund will need to file with CIMA a declaration from its operator confirming that the private fund has complied with the sections of the PF Act relating to valuation, safekeeping of assets and cash monitoring
- to pay the prescribed annual registration fee to CIMA on or before 15 January in each year, failing which a penalty equal to one-twelfth of the annual fee is charged for each month or part-month of default
- to maintain certain records and books of account

Other statutory obligations

For a detailed description of other statutory obligations for Cayman entities, including maintenance of statutory registers, changes to prescribed particulars and/or constitutive documents filed with the General Registry, corporate governance, obligations and liabilities please see our client briefings: Cayman Islands Exempted Limited Partnerships, Cayman Islands Limited Liability Companies and Cayman Islands Exempted Companies.

7. Obligations under anti-money laundering legislation

The Proceeds of Crime Act (Revised) (**PCA**), the Proliferation Financing (Prohibition) Act (Revised), the Anti-Money Laundering Regulations (**AML Regulations**) and the Guidance Notes on the Prevention and Detection of Money Laundering, Terrorist Financing and Proliferation Financing in the Cayman Islands issued by CIMA together comprise the anti-money laundering regime of the Cayman Islands (**AML Regime**). Generally, whether regulated or not, Cayman investment funds, including private funds, will all fall within scope of the Cayman Islands AML Regime as they will be considered to be engaged in 'relevant financial business' as defined under the PCA.

The AML Regime requires that a private fund must maintain the following in accordance with

the AML Regime:

- investor identification and verification
- adoption of a risk-based approach to monitor investors and financial activities including adequate systems to identify risk in relation to persons, countries and activities, including screening against all applicable sanctions lists
- record-keeping procedures
- risk-management procedures concerning the conditions under which an investor may invest prior to verification
- observance of the list of sanctioned countries, published by any competent authority, do not sufficiently comply with the recommendations of the Financial Action Task Force
- suspicious activity reporting procedures
- procedures to monitor and ensure compliance with the AML Regime
- procedures in place to test the anti-money laundering and countering terrorist financing and proliferation financing systems in place
- such other procedures of internal control, including an appropriate effective risk-based independent audit function and communication as may be appropriate for the ongoing monitoring of business relationships or one-off transactions for the purpose of forestalling and preventing money laundering, terrorist financing and proliferation financing

In addition, private funds must appoint named individuals to the roles of anti-money compliance officer (**AMLCO**), money laundering reporting officer (**MLRO**) and deputy money laundering reporting officer (**DMLRO**); the AMLCO and MLRO (or DMLRO) may be the same individual, but the same person cannot serve as both MLRO and DMLRO. The AMLCO will be responsible for overseeing the effectiveness of the private fund's AML systems, compliance with applicable AML legislation and guidance and the day-to-day operation of the AML policies and procedures. The MLRO/DMLRO must receive all reports of suspicious activity in relation to any aspect of the private fund and its activity; the MLRO/DMLRO should determine whether the information contained in any report supports the suspicion reported in order to determine whether, in all the circumstances, he/she in turn should submit a suspicious activity report to the Financial Reporting Authority of the Cayman Islands.

8. Obligations under FATCA and CRS

Almost every Cayman private fund will be a Reporting Cayman Islands Financial Institution for the purposes of the US Foreign Account Tax Compliance Act (**FATCA**) and the Common Reporting Standard issued by the OECD (**CRS**).

As a result, a private fund will be required to:

- register with the US Internal Revenue Service in order to obtain a GIIN (a Global Intermediary Identification Number) and, accordingly, give one or more individuals authority to complete such registration. Typically the private fund will authorise the manager to do this on the fund's behalf following incorporation of the fund
- conduct requisite due diligence on all of its investors in order to identify the tax residency of each investor and to determine whether the interest held by that investor constitutes a 'reportable account' under the regulations issued in respect of FATCA and CRS. Generally, private funds address this by (i) seeking appropriate self-certifications and beneficial ownership information from investors at the time of investment, and (ii) engaging the fund administrator or another specialist provider to assist with the fund's FATCA and CRS due diligence and reporting obligations
- provide notification to the Cayman Islands Tax Information Authority (**TIA**) of certain prescribed details, and to identify a Principal Point of Contact and a Change Notice Person. This notification is generally required to be made by 30 April in the year following registration of the private fund
- report the requisite information on each of its 'reportable accounts' to the TIA prior to the applicable deadlines. Reporting periods are generally calendar years, with the reports themselves generally due on or before 31 July in the year following the relevant reporting year
- maintain written compliance policies and procedures in connection with the fund's compliance with its FATCA and CRS obligations (even where the fund has delegated performance of its FATCA and CRS obligations to a third party service provider and, in respect of the delegated services, is relying on the policies and procedures of that service providers)
- in the case of CRS, file a CRS Compliance Form containing certain prescribed information by 12 September in each year (unless extended by the TIA, for example to 15 September 2024 in the case of filing due in 2023)

9. Obligations under data protection legislation

The Cayman Islands Data Protection Act (Revised) (**DP Act**) provides a framework of rights and duties to regulate the processing of individuals' personal data broadly based on the same internationally recognised privacy principles that form the basis for other data protection laws globally. Under the DP Act, an entity established in the Cayman Islands that handles any individual's personal information has certain obligations with respect to that information and must ensure that such individual is formally apprised of by whom, and for what purpose, any of their personal data is being used.

A private fund will therefore be responsible for complying with the requirements of the DP Act and the data protection principles in respect of personal data processed by the fund or on behalf of the fund by any third party processors such as its administrator and other service providers. The private fund must ensure that investors are provided with an appropriate privacy notice and that contracts with service providers that process personal data on behalf of the fund comply with the DP Act.

10. Obligations under economic substance legislation

Private funds will be regarded as 'investment funds' for the purposes of the International Tax Co-operation (Economic Substance) Act (Revised) (**ES Act**) and are therefore excluded from the definition of 'relevant entity' under the ES Act and out-of-scope of such law. However, all Cayman private funds must make an annual notification filing to confirm such exempt status.

1. In practice, the absence of notification of a custodian currently serves as notice to CIMA of the absence of a custodian. This practice may change in the future.

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