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HOUSE BILL 447

45TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2002

INTRODUCED BY

Ben Lujan

AN ACT

RELATING TO TAXATION; PROVIDING A GROSS RECEIPTS TAX DEDUCTION FOR CERTAIN FOOD SALES; INCREASING THE RATE OF THE GROSS RECEIPTS TAX AND THE COMPENSATING TAX; CREATING NEW DISTRIBUTIONS TO CITIES AND COUNTIES; MODIFYING THE COUNTY EQUALIZATION DISTRIBUTION; INCREASING THE CIGARETTE TAX RATE; MODIFYING DISTRIBUTIONS OF THE CIGARETTE TAX; AMENDING AND ENACTING SECTIONS OF THE NMSA 1978.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. A new section of the Tax Administration Act is enacted to read:

"[NEW MATERIAL] DISTRIBUTION TO MUNICIPALITIES FROM GROSS RECEIPTS TAX--FOOD DEDUCTION OFFSET.--

A. A distribution pursuant to Section 7-1-6.1 NMSA 1978 shall be made to each municipality in an amount, subject . 140856. 2

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1 to any increase or decrease made pursuant to Section 7-1-6.15  
2 NMSA 1978, equal to the total deductions claimed pursuant to  
3 Section 7-9-92 NMSA 1978 for the month by taxpayers with  
4 business locations attributable to the municipality multiplied  
5 by the sum of the combined rate of all municipal local option  
6 gross receipts taxes in effect in the municipality for the  
7 month plus one and two hundred twenty-five thousandths  
8 percent.

9 B. For the purposes of this section, "business  
10 locations attributable to the municipality" means business  
11 locations:

12 (1) within the municipality;

13 (2) on land owned by the state, commonly  
14 known as the "state fair grounds", within the exterior  
15 boundaries of the municipality;

16 (3) outside the boundaries of the  
17 municipality on land owned by the municipality; and

18 (4) on an Indian reservation or pueblo grant  
19 in an area that is contiguous to the municipality and in which  
20 the municipality performs services pursuant to a contract  
21 between the municipality and the Indian tribe or Indian pueblo  
22 if:

23 (a) the contract describes an area in  
24 which the municipality is required to perform services and  
25 requires the municipality to perform services that are

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1 substantially the same as the services the municipality  
2 performs for itself; and

3 (b) the governing body of the  
4 municipality has submitted a copy of the contract to the  
5 secretary. "

6 Section 2. A new section of the Tax Administration Act  
7 is enacted to read:

8 "[NEW MATERIAL] DISTRIBUTION TO COUNTIES FROM GROSS  
9 RECEIPTS TAX--FOOD DEDUCTION OFFSET.--A distribution pursuant  
10 to Section 7-1-6.1 NMSA 1978 shall be made to each county in  
11 an amount, subject to any increase or decrease made pursuant  
12 to Section 7-1-6.15 NMSA 1978, equal to the sum of the  
13 following:

14 A. the total deductions claimed pursuant to  
15 Section 7-9-92 NMSA 1978 for the month by taxpayers with  
16 business locations in the county within a municipality  
17 multiplied by the combined rate of all county local option  
18 gross receipts taxes in effect for the month that are imposed  
19 throughout the county; and

20 B. the total deductions claimed pursuant to  
21 Section 7-9-92 NMSA 1978 for the month by taxpayers with  
22 business locations in the county but not within a municipality  
23 multiplied by the combined rate of all county local option  
24 gross receipts taxes in effect for the month that are imposed  
25 in the county area not within a municipality. "

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1           Section 3. A new section of the Tax Administration Act  
2 is enacted to read:

3           "[NEW MATERIAL] PENALTY FOR FAILURE TO ACCURATELY REPORT  
4 DEDUCTION FOR FOOD SALES. --A taxpayer who fails to accurately  
5 report a deduction claimed pursuant to Section 7-9-92 NMSA  
6 1978 shall pay a penalty of the correct deduction amount  
7 multiplied by twice the total local option tax rates in effect  
8 at the taxpayer's business location for which the deduction  
9 was claimed. "

10           Section 4. Section 7-1-6.11 NMSA 1978 (being Laws 1983,  
11 Chapter 211, Section 16, as amended) is amended to read:

12           "7-1-6.11. DISTRIBUTIONS OF CIGARETTE TAXES. --

13           A. Except as provided in Subsection E of this  
14 section, a distribution pursuant to Section 7-1-6.1 NMSA 1978  
15 shall be made to the county and municipality recreational fund  
16 in an amount equal to [~~four and three quarters~~] two and three  
17 hundred seventy thousandths percent of the net receipts,  
18 exclusive of penalties and interest, attributable to the  
19 cigarette tax.

20           B. Except as provided in Subsection E of this  
21 section, a distribution pursuant to Section 7-1-6.1 NMSA 1978  
22 shall be made to the county and municipal cigarette tax fund  
23 in an amount equal to [~~nine and one half~~] four and seven  
24 hundred thirty-nine thousandths percent of the net receipts,  
25 exclusive of penalties and interest, attributable to the

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1 cigarette tax.

2 C. Except as provided in Subsection E of this  
3 section, a distribution pursuant to Section 7-1-6.1 NMSA 1978  
4 shall be made to the cancer center at the university of New  
5 Mexico school of medicine in an amount equal to [~~four and~~  
6 ~~three quarters~~] twelve and thirty-four hundredths percent of  
7 the net receipts, exclusive of penalties and interest,  
8 attributable to the cigarette tax.

9 D. Except as provided in Subsection E of this  
10 section, a distribution pursuant to Section 7-1-6.1 NMSA 1978  
11 shall be made to the New Mexico finance authority in an amount  
12 equal to [~~seven and one eighth~~] three and five hundred fifty-  
13 four thousandths percent of the net receipts, exclusive of  
14 penalties and interest, attributable to the cigarette tax.

15 E. If the amount of distributions in any fiscal  
16 year pursuant to Subsection A, B, C or D of this section is  
17 less than the amount of the distributions made pursuant to  
18 that subsection in fiscal year 2002, the amount distributed  
19 pursuant to that subsection shall be increased by an amount  
20 sufficient to result in a total distribution for the fiscal  
21 year equal to the amount distributed in fiscal year 2002. "

22 Section 5. Section 7-1-6.16 NMSA 1978 (being Laws 1983,  
23 Chapter 213, Section 27, as amended) is amended to read:

24 "7-1-6.16. COUNTY EQUALIZATION DISTRIBUTION. --

25 A. Beginning on September 15, 1989 and on

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1 September 15 of each year thereafter, the department shall  
2 distribute to any county that has imposed or continued in  
3 effect during the state's preceding fiscal year a county gross  
4 receipts tax pursuant to [~~the County Gross Receipts Tax Act~~]  
5 Section 7-20E-9 NMSA 1978 an amount equal to:

6 (1) the product of a fraction, the numerator  
7 of which is the county's population and the denominator of  
8 which is the state's population, multiplied by the annual sum  
9 for the county; less

10 (2) the net receipts received by the  
11 department during the report year, including any increase or  
12 decrease made pursuant to Section 7-1-6.15 NMSA 1978,  
13 attributable to the county gross receipts tax at a rate of  
14 one-eighth percent. Provided that for any month in the report  
15 year, if no county gross receipts tax was in effect in the  
16 county in the previous month, the net receipts, for the  
17 purposes of this section, for that county for that month shall  
18 be zero.

19 B. If the amount determined by the calculation in  
20 Subsection A of this section is zero or a negative number for  
21 a county, no distribution shall be made to that county.

22 C. As used in this section:

23 (1) "annual sum" means for each county the  
24 sum of the monthly amounts for those months in the report year  
25 which follow a month in which the county had in effect a

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1 county gross receipts tax;

2 (2) "monthly amount" means an amount equal to  
3 ~~[the product of]~~ the sum of five percent of the total amount  
4 of deductions claimed pursuant to Section 7-9-92 NMSA 1978 for  
5 the month plus the net receipts received by the department in  
6 the month attributable to the state gross receipts tax  
7 multiplied by a fraction, the numerator of which is one-eighth  
8 percent and the denominator of which is ~~[the tax rate imposed~~  
9 ~~by Section 7-9-4 NMSA 1978 in effect on the last day of the~~  
10 ~~previous month]~~ five percent;

11 (3) "population" means the most recent  
12 official census or estimate determined by the bureau of the  
13 census for the unit or, if neither is available, the most  
14 current estimated population for the unit provided in writing  
15 by the bureau of business and economic research at the  
16 university of New Mexico; and

17 (4) "report year" means the twelve-month  
18 period ending on the July 31 immediately preceding the date  
19 upon which a distribution pursuant to this section is required  
20 to be made. "

21 Section 6. Section 7-9-3 NMSA 1978 (being Laws 1978,  
22 Chapter 46, Section 1, as amended by Laws 2001, Chapter 65,  
23 Section 1 and also by Laws 2001, Chapter 343, Section 1) is  
24 amended to read:

25 "7-9-3. DEFINITIONS. -- As used in the Gross Receipts and

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1       **Compensating Tax Act:**

2               A. "department" means the taxation and revenue  
3 department, the secretary of taxation and revenue or any  
4 employee of the department exercising authority lawfully  
5 delegated to that employee by the secretary;

6               B. "buying" or "selling" means any transfer of  
7 property for consideration or any performance of service for  
8 consideration;

9               C. "construction" means building, altering,  
10 repairing or demolishing in the ordinary course of business  
11 any:

12                       (1) road, highway, bridge, parking area or  
13 related project;

14                       (2) building, stadium or other structure;

15                       (3) airport, subway or similar facility;

16                       (4) park, trail, athletic field, golf course  
17 or similar facility;

18                       (5) dam, reservoir, canal, ditch or similar  
19 facility;

20                       (6) sewerage or water treatment facility,  
21 power generating plant, pump station, natural gas compressing  
22 station, gas processing plant, coal gasification plant,  
23 refinery, distillery or similar facility;

24                       (7) sewerage, water, gas or other pipeline;

25                       (8) transmission line;



- 1 (9) radio, television or other tower;
- 2 (10) water, oil or other storage tank;
- 3 (11) shaft, tunnel or other mining

4 appurtenance;

- 5 (12) microwave station or similar facility;

- 6 (13) retaining wall, wall, fence gate or
- 7 similar structure; or

- 8 (14) similar work;

9 "construction" also means:

- 10 (15) leveling or clearing land;

- 11 (16) excavating earth;

- 12 (17) drilling wells of any type, including
- 13 seismograph shot holes or core drilling; or

- 14 (18) similar work;

15 D. "financial corporation" means any savings and  
16 loan association or any incorporated savings and loan company,  
17 trust company, mortgage banking company, consumer finance  
18 company or other financial corporation;

19 E. "engaging in business" means carrying on or  
20 causing to be carried on any activity with the purpose of  
21 direct or indirect benefit, except that:

- 22 (1) "engaging in business" does not include
- 23 having a worldwide web site as a third-party content provider
- 24 on a computer physically located in New Mexico but owned by
- 25 another nonaffiliated person; and

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1 (2) "engaging in business" does not include  
2 using a nonaffiliated third-party call center to accept and  
3 process telephone or electronic orders of tangible personal  
4 property or licenses primarily from non-New Mexico buyers,  
5 which orders are forwarded to a location outside New Mexico  
6 for filling, or to provide services primarily to non-New  
7 Mexico customers;

8 F. "gross receipts" means the total amount of  
9 money or the value of other consideration received from  
10 selling property in New Mexico, from leasing property employed  
11 in New Mexico, from selling services performed outside New  
12 Mexico the product of which is initially used in New Mexico or  
13 from performing services in New Mexico. In an exchange in  
14 which the money or other consideration received does not  
15 represent the value of the property or service exchanged,  
16 "gross receipts" means the reasonable value of the property or  
17 service exchanged.

18 (1) "Gross receipts" includes:

19 (a) any receipts from sales of tangible  
20 personal property handled on consignment;

21 (b) the total commissions or fees  
22 derived from the business of buying, selling or promoting the  
23 purchase, sale or leasing, as an agent or broker on a  
24 commission or fee basis, of any property, service, stock, bond  
25 or security;

1 (c) amounts paid by members of any  
2 cooperative association or similar organization for sales or  
3 leases of personal property or performance of services by such  
4 organization; and

5 (d) amounts received from transmitting  
6 messages or conversations by persons providing telephone or  
7 telegraph services.

8 (2) "Gross receipts" excludes:

9 (a) cash discounts allowed and taken;

10 (b) New Mexico gross receipts tax,  
11 governmental gross receipts tax and leased vehicle gross  
12 receipts tax payable on transactions for the reporting period;

13 (c) taxes imposed pursuant to the  
14 provisions of any local option gross receipts tax that is  
15 payable on transactions for the reporting period;

16 (d) any gross receipts or sales taxes  
17 imposed by an Indian nation, tribe or pueblo; provided that  
18 the tax is approved, if approval is required by federal law or  
19 regulation, by the secretary of the interior of the United  
20 States; and provided further that the gross receipts or sales  
21 tax imposed by the Indian nation, tribe or pueblo provides a  
22 reciprocal exclusion for gross receipts, sales or gross  
23 receipts-based excise taxes imposed by the state or its  
24 political subdivisions;

25 (e) any type of time-price

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1 differential; and

2 (f) amounts received solely on behalf  
3 of another in a disclosed agency capacity.

4 (3) When the sale of property or service is  
5 made under any type of charge, conditional or time-sales  
6 contract or the leasing of property is made under a leasing  
7 contract, the seller or lessor may elect to treat all  
8 receipts, excluding any type of time-price differential, under  
9 such contracts as gross receipts as and when the payments are  
10 actually received. If the seller or lessor transfers his  
11 interest in any such contract to a third person, the seller or  
12 lessor shall pay the gross receipts tax upon the full sale or  
13 leasing contract amount, excluding any type of time-price  
14 differential;

15 G. "manufacturing" means combining or processing  
16 components or materials to increase their value for sale in  
17 the ordinary course of business, but does not include  
18 construction;

19 H. "person" means:

20 (1) an individual, estate, trust, receiver,  
21 cooperative association, club, corporation, company, firm,  
22 partnership, limited liability company, limited liability  
23 partnership, joint venture, syndicate or other entity,  
24 including any gas, water or electric utility owned or operated  
25 by a county, municipality or other political subdivision of

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1 the state; or

2 (2) a national, federal, state, Indian or  
3 other governmental unit or subdivision, or an agency,  
4 department or instrumentality of any of the foregoing;

5 I. "property" means real property, tangible  
6 personal property, licenses, franchises, patents, trademarks  
7 and copyrights. Tangible personal property includes  
8 electricity and manufactured homes;

9 J. "leasing" means an arrangement whereby, for a  
10 consideration, property is employed for or by any person other  
11 than the owner of the property, except that the granting of a  
12 license to use property is the sale of a license and not a  
13 lease;

14 K. "service" means all activities engaged in for  
15 other persons for a consideration, which activities involve  
16 predominantly the performance of a service as distinguished  
17 from selling or leasing property. "Service" includes  
18 activities performed by a person for its members or  
19 shareholders. In determining what is a service, the intended  
20 use, principal objective or ultimate objective of the  
21 contracting parties shall not be controlling. "Service"  
22 includes construction activities and all tangible personal  
23 property that will become an ingredient or component part of a  
24 construction project. Such tangible personal property retains  
25 its character as tangible personal property until it is

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1 installed as an ingredient or component part of a construction  
2 project in New Mexico. However, sales of tangible personal  
3 property that will become an ingredient or component part of a  
4 construction project to persons engaged in the construction  
5 business are sales of tangible personal property;

6 L. "use" or "using" includes use, consumption or  
7 storage other than storage for subsequent sale in the ordinary  
8 course of business or for use solely outside this state;

9 M. "secretary" means the secretary of taxation and  
10 revenue or the secretary's delegate;

11 N. "manufactured home" means a movable or portable  
12 housing structure for human occupancy that exceeds either a  
13 width of eight feet or a length of forty feet constructed to  
14 be towed on its own chassis and designed to be installed with  
15 or without a permanent foundation;

16 O. "initial use" or "initially used" means the  
17 first employment for the intended purpose and does not include  
18 the following activities:

19 (1) observation of tests conducted by the  
20 performer of services;

21 (2) participation in progress reviews,  
22 briefings, consultations and conferences conducted by the  
23 performer of services;

24 (3) review of preliminary drafts, drawings  
25 and other materials prepared by the performer of the services;

1 (4) inspection of preliminary prototypes  
2 developed by the performer of services; or

3 (5) similar activities;

4 P. "research and development services" means an  
5 activity engaged in for other persons for consideration, for  
6 one or more of the following purposes:

7 (1) advancing basic knowledge in a recognized  
8 field of natural science;

9 (2) advancing technology in a field of  
10 technical endeavor;

11 (3) the development of a new or improved  
12 product, process or system with new or improved function,  
13 performance, reliability or quality, whether or not the new or  
14 improved product, process or system is offered for sale, lease  
15 or other transfer;

16 (4) the development of new uses or  
17 applications for an existing product, process or system,  
18 whether or not the new use or application is offered as the  
19 rationale for purchase, lease or other transfer of the  
20 product, process or system;

21 (5) analytical or survey activities  
22 incorporating technology review, application, trade-off study,  
23 modeling, simulation, conceptual design or similar activities,  
24 whether or not offered for sale, lease or other transfer; or

25 (6) the design and development of prototypes

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1 or the integration of systems incorporating advances,  
2 developments or improvements included in Paragraphs (1)  
3 through (5) of this subsection;

4 Q. "local option gross receipts tax" means a tax  
5 authorized to be imposed by a county or municipality upon the  
6 taxpayer's gross receipts and required to be collected by the  
7 department at the same time and in the same manner as the  
8 gross receipts tax; "local option gross receipts tax" includes  
9 the taxes imposed pursuant to the Municipal Local Option Gross  
10 Receipts Taxes Act, Supplemental Municipal Gross Receipts Tax  
11 Act, County Local Option Gross Receipts Taxes Act, Local  
12 Hospital Gross Receipts Tax Act, County Correctional Facility  
13 Gross Receipts Tax Act and such other acts as may be enacted  
14 authorizing counties or municipalities to impose taxes on  
15 gross receipts, which taxes are to be collected by the  
16 department;

17 R. "prescription drugs" means insulin and  
18 substances that are:

19 (1) dispensed by or under the supervision of  
20 a licensed pharmacist or by a physician or other person  
21 authorized under state law to do so;

22 (2) prescribed for a specified person by a  
23 person authorized under state law to prescribe the substance;  
24 and

25 (3) subject to the restrictions on sale



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1 contained in Subparagraph 1 of Subsection (b) of 21 USCA 353;  
2 [~~and~~]

3 S. "construction material" means tangible personal  
4 property that becomes or is intended to become an ingredient  
5 or component part of a construction project, but "construction  
6 material" does not include a replacement fixture when the  
7 replacement is not construction or a replacement part for a  
8 fixture;

9 T. "food" means any food or food product for home  
10 consumption that meets the definition of food in 7 USCA  
11 2012(g)(1) for purposes of the federal food stamp program; and

12 U. "retail food store" means an establishment that  
13 sells food for home preparation and consumption that meets the  
14 definition of retail food store in 7 USCA 2012(k)(1) for  
15 purposes of the federal food stamp program, whether or not the  
16 establishment participates in the food stamp program. "

17 Section 7. Section 7-9-4 NMSA 1978 (being Laws 1966,  
18 Chapter 47, Section 4, as amended) is amended to read:

19 "7-9-4. IMPOSITION AND RATE OF TAX--DENOMINATION AS  
20 "GROSS RECEIPTS TAX".--

21 A. For the privilege of engaging in business, an  
22 excise tax equal to five and one-fourth percent of gross  
23 receipts is imposed on any person engaging in business in New  
24 Mexico.

25 B. The tax imposed by this section shall be

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1 referred to as the "gross receipts tax". "

2 Section 8. Section 7-9-7 NMSA 1978 (being Laws 1966,  
3 Chapter 47, Section 7, as amended) is amended to read:

4 "7-9-7. IMPOSITION AND RATE OF TAX--DENOMINATION AS  
5 "COMPENSATING TAX". --

6 A. For the privilege of using tangible property in  
7 New Mexico, there is imposed on the person using the property  
8 an excise tax equal to five and one-fourth percent of the  
9 value of tangible property that was:

10 (1) manufactured by the person using the  
11 property in the state;

12 (2) acquired outside this state as the result  
13 of a transaction that would have been subject to the gross  
14 receipts tax had it occurred within this state; or

15 (3) acquired as the result of a transaction  
16 which was not initially subject to the compensating tax  
17 imposed by Paragraph (2) of this subsection or the gross  
18 receipts tax but which transaction, because of the buyer's  
19 subsequent use of the property, should have been subject to  
20 the compensating tax imposed by Paragraph (2) of this  
21 subsection or the gross receipts tax.

22 B. For the purpose of Subsection A of this  
23 section, value of tangible property shall be the adjusted  
24 basis of the property for federal income tax purposes  
25 determined as of the time of acquisition or introduction into

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1 this state or of conversion to use, whichever is later. If no  
2 adjusted basis for federal income tax purposes is established  
3 for the property, a reasonable value of the property shall be  
4 used.

5 C. For the privilege of using services rendered in  
6 New Mexico, there is imposed on the person using such services  
7 an excise tax equal to five and one-fourth percent of the  
8 value of the services at the time they were rendered. The  
9 services, to be taxable under this subsection, must have been  
10 rendered as the result of a transaction which was not  
11 initially subject to the gross receipts tax but which  
12 transaction, because of the buyer's subsequent use of the  
13 services, should have been subject to the gross receipts tax.

14 D. The tax imposed by this section shall be  
15 referred to as the "compensating tax". "

16 Section 9. A new section of the Gross Receipts and  
17 Compensating Tax Act, Section 7-9-92 NMSA 1978, is enacted to  
18 read:

19 "7-9-92. [NEW MATERIAL] DEDUCTION--GROSS RECEIPTS--SALES  
20 OF FOOD AT RETAIL FOOD STORE.--Receipts from the sale of food  
21 at a retail food store may be deducted from gross receipts.  
22 The deduction provided by this section shall be taken after  
23 all other applicable deductions have been taken and shall be  
24 separately stated by the taxpayer. "

25 Section 10. Section 7-12-3 NMSA 1978 (being Laws 1971,

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1 Chapter 77, Section 3, as amended) is amended to read:

2 "7-12-3. EXCISE TAX ON CIGARETTES--RATES.--

3 A. For the privilege of selling, giving or  
4 consuming cigarettes in New Mexico, there is levied an excise  
5 tax at the rate of [~~one and five hundredths cents (\$.0105)~~]  
6 two and three-tenths cents (\$.023) for each cigarette sold,  
7 given or consumed in this state.

8 B. The tax imposed by this section shall be  
9 referred to as the "cigarette tax". "

10 Section 11. EFFECTIVE DATE.--The effective date of the  
11 provisions of Sections 1, 2, 4 and 5 of this act is February  
12 1, 2003. The effective date of the provisions of Sections 3,  
13 6, 7, 8, 9 and 10 of this act is January 1, 2003.

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