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Giving Notice: Publication of Government Activities in the Internet Age

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GIVING NOTICE: PUBLICATION OF GOVERNMENT ACTIVITIES IN THE INTERNET AGE

Governmental entities in Wisconsin, both state and local, are required to “publish” various types of legal notices. These items are typically printed in an “official” newspaper or other newspaper of general circulation in the area served by the governmental entity. However, certain municipalities may opt to physically post certain legal notices in lieu of publication in a newspaper, and some governmental units are required or permitted to post certain notices on an Internet site.

With most people now having ready access to public information through electronic devices such as computers and “smart” cellular telephones, and the decline of newspaper circulation numbers, some have questioned the value of continuing to require the traditional model of printing public notices, with the attendant costs. One recently enacted law permits municipalities to increase the use of the Internet when posting public notices, and another permits the Wisconsin Supreme Court to place the bulk of proposed rule changes on the Internet instead of in a newspaper.

This report examines the issue of publication of government legal notices, summarizes current Wisconsin law, and discusses relevant legislation in this and other states in the midst of an ever-changing communications environment.

WISCONSIN LAW

The general rule regarding giving public notice, as provided in Section 985.02, Wisconsin Statutes, is that except as otherwise provided by law, “a legal notice shall be published in a newspaper likely to give notice in the area or to the person affected.” Whenever the law requires publication in a newspaper, but there is no newspaper published in the municipality or area, the publication is to be made in a newspaper likely to give notice.

Providing adequate public notice of government activities has been a concern since the beginning of statehood. The second legislative act of the new state, Chapter 2, Laws of 1848, provided for the public posting of printed notices to solicit bids for legislative printing work. Later that session, Chapter 103 provided for publishing notices of public business in a newspaper:

The secretary of state is hereby authorized and required within two weeks of the close of every regular session of the legislature to advertise for four weeks successively in four different papers published in different sections of the state for sealed proposals for doing the printing of the legislature and the several state departments.

Official State Newspaper. Certain legal notices and documents have long been required to be published in an official state newspaper. Chapter 240, Laws of 1860, provided that “The *Wisconsin State Journal*, published at Madison, the capital of the State of Wisconsin, is hereby declared the ‘official state paper,’ in which shall be officially published all the laws, advertisements, proclamations, and communications of every nature, now required to be published, or that may hereafter be required to be published, in a paper at the seat of government.”

Chapter 657, Laws of 1911, changed the procedure for designating the official state newspaper. It provided that the Printing Board, which consisted of the secretary of state, the state treasurer, and the attorney general, would file a written order in the office of the secretary of state to designate as “official” some newspaper published in the state. The board consisted of the secretary of state, the state treasurer, and the attorney general. Until a designation was made by the Printing Board, the law stated that the *Wisconsin State Journal* would continue to be the official state newspaper.

The legislature was again charged with designating the official state newspaper by Chapter 58, Laws of 1915. Chapter 58 also declared the *Evening Wisconsin* of Milwaukee as the official newspaper. The *Milwaukee Sentinel* was designated by Chapter 4, Laws of 1919; the *Sheboygan Press* by Chapter 21, Laws of 1933; and the *Wisconsin State Journal* by Chapter 3, Laws of 1941.

The procedure for designating the state newspaper, in Section 985.04, Wisconsin Statutes, was again altered by Chapter 34, Laws of 1979, to provide that the Joint Committee on Legislative Organization, composed of the key leaders of the majority and minority parties in the senate and the assembly, recommend the designation of the official newspaper to the legislature in the form of a joint resolution. If the resolution is adopted by the legislature, a designation continues in effect until changed by a subsequent resolution. 1983 Enrolled Joint Resolution 46 changed the state newspaper to the *Milwaukee Sentinel*. After the consolidation of the *Milwaukee Journal* and the *Milwaukee Sentinel* newspapers in April 1995, the *Milwaukee Journal Sentinel* was designated the state newspaper by 1995 JR-8. However, 1995 JR-26 again designated the *Wisconsin State Journal* as the official state newspaper, and it maintains that status today.

Local Government Publication. Section 985.06, Wisconsin Statutes, requires cities to designate an official newspaper for publication of legal notices and proceedings. This requirement has existed since at least 1889, when Chapter 326, Laws of 1889, required that a common council “designate one or more newspapers printed in the city, in which shall be published, all ordinances, notices and other proceedings required by law to be published.” Counties with a population of 250,000 or more must contract for newspaper printing of notices and advertisements, but may decide to separately print the records of its proceedings in pamphlet form and may provide for further or additional publication of notices in appropriate trade mediums. Counties with a population of less than 250,000 are not required to designate an official newspaper and may print their own proceedings. However, a county may not, in lieu of publication in a printed newspaper or posting on a physical bulletin board, post its legal notices on its official website.

Other municipalities, such as villages, are not required to have an official newspaper, but the governing body may designate an eligible newspaper as its official newspaper or use the same for specific notices. School boards may choose to publish proceedings of their meetings within 45 days after the meeting in a newspaper published in the district, if any, alternatively publicized. If there is no newspaper published in the school district, the proceedings shall be posted or published as the school board directs.

Posting in Lieu of Publication. Section 985.05 (1), Wisconsin Statutes, generally permits municipalities other than cities to post official notices in at least three public places likely to give notice to persons affected as a substitute for newspaper publication. In accordance with Section 985.02 (2), Wisconsin Statutes, posting notice of the act or event requiring prior notice must occur no later than the time specified for newspaper publication. When notice about an act or event that has already taken place is required to be publicized, the notice must be posted in the three public places within one week.

However, posting in lieu of newspaper publication may not be used for notices or proceedings relating to the following: tax redemptions or sales of land acquired for delinquent taxes, charges, or assessments; civil annexation; detachments; consolidations or incorporations; legal notices directed to specific individuals; school board elections; or town ordinances imposing forfeitures.

Wisconsin Newspapers Website. Section 985.02 (3), Wisconsin Statutes, requires that any newspaper that publishes a legal notice must, in addition to newspaper publication, place an electronic copy of the legal notice, at no additional cost to the governmental unit, on the Wisconsin Newspapers Legal Notice Website (<http://www.wisconsinpublicnotices.org>). This requirement was created by 2011 Wisconsin Act

228. The website, maintained by the Wisconsin Newspaper Association, was established in 2005 and is available to all users free of charge. Notices are searchable by keyword, date, newspaper name, and city and county, and the archive includes items required to be published in the official state newspaper.

State Procurements Website. If the Wisconsin Department of Administration (DOA) determines that competitive sealed proposals, rather than competitive sealed bids, are a more practical and advantageous process to use in a particular procurement effort for goods or services, it may choose to publish the notice of the request either in the state newspaper or on the DOA's website (<http://publicnotices.wi.gov>). Section 16.75 (2m) (b) 3., Wisconsin Statutes, was created by 2001 Wisconsin Act 16. The website may also be used to post other notices such as press releases, meeting notices, and meeting minutes, but not in lieu of required public posting or publication.

Qualifications of Newspapers. Section 985.03, Wisconsin Statutes, generally provides that in order for a newspaper to be eligible to publish legal notices it has to have been published regularly and continuously for at least two of the previous five years in the applicable location; have had a bona fide paid circulation that has constituted at least half of its total circulation; and have had actual subscribers of at least 1,000 copies in first- and second-class cities, or 300 copies if in third- and fourth-class cities, villages, or towns. The substance of these requirements has existed since at least the enactment of Chapter 319, Laws of 1899.

In order to qualify as an eligible newspaper, a newspaper must be published at regular intervals and at least once a week. It must also contain reports of happenings of recent occurrence of a varied character, such as political, social, moral, and religious subjects, designed to inform the general reader. Also eligible is a daily newspaper published in a county having a population of 500,000 or more that is devoted principally to business news and publishing of records and that has been used for at least six months by the courts of record of the county for publication of legal notices. According to an opinion of the Wisconsin Attorney General (71 Op. Att'y Gen. 177, 1982), a "shopper" type publication does not meet the qualifications. Newspapers currently certified to publish legal notices are listed by DOA at http://vendornet.state.wi.us/vendornet/wais/bulldocs/3042_7.pdf.

Penalty for Failure to Properly Publish Notices. Section 985.03 (2), Wisconsin Statutes, provides that if a responsible person fails to properly cause a legal notice to be published, or publishes a notice in an ineligible newspaper, he or she may be fined not more than \$100 for each offense. Each day in which a legal notice should have been but was not published as required by law constitutes a separate offense.

Fees for Publishing. The maximum rates that eligible Wisconsin newspapers may charge to publish legal notices required by Wisconsin Statutes are set by DOA (§ 985.08). The standard rates are reviewed annually, and any adjustments needed to reflect cost changes in the newspaper publishing industry are made effective on January 1 of each year. Publishers may increase allowable fees a certain amount based on circulation figures. The current rates for 2015 are available at http://vendornet.state.wi.us/vendornet/wais/bulldocs/1589_4.PDF.

Classes and Frequency of Legal Notices. Section 985.07, Wisconsin Statutes, generally provides for three classes of legal notices, distinguished by the number of "insertions," which is the number of times a notice must be published in the relevant newspaper. A Class 1 notice must be inserted or published once, at least a week before the applicable act or event takes place. A Class 2 notice must be published for two consecutive weeks, the second of which must be at least one week before the occurrence of the act or event about which notice is being given. A Class 3 notice requires three insertions, in three consecutive weeks, the final of which must be at least a week before the act or event. The designated number of

insertions is the minimum required by law, and the frequency may be increased at the discretion of the governmental agency.

Election Notice Forms and Publishing. Section 10.01, Wisconsin Statutes, requires the Ethics Commission to prescribe standardized formats for the various types of election notices. The commission also provides county clerks with information about offices and candidates that will appear on national and state ballots. Type A notices are titled “Notice of Election,” and they include the date of the election, each office to be filled, and information on the incumbent, length and expiration of the term, and candidacy and nomination filing requirements. Type A notices are to be published once by the applicable clerk. For example, on the second Tuesday in the April preceding a partisan primary and general election, the county clerk publishes a Type A notice based on the notice received from the commission for all national and state offices to be filled at the election by any electors voting in the county and incorporating county offices.

Type B notices include relevant facsimile ballots and the relevant portions of voting instructions to electors for each office or referendum and specify the date of the election. Type B notices are published once, on the day preceding each primary and other election.

Type C notices are titled “Notice of Referendum” and must include the date of the referendum, the entire text of the question, and the proposed enactment, if any, as well as an explanatory statement of the effect of either a “yes” or a “no” vote. For state questions, the statement is prepared by the attorney general. For county questions, the statement is prepared by the corporation counsel. For other questions, the statement shall be prepared by the attorney for the jurisdiction in which the question is submitted. Type C notices are generally to be published at the same time as Type B notices and are to be printed in the newspaper as close as possible to that portion of the Type B notice showing the facsimile referendum ballot.

Type D notices state the hours the polls will be open and the polling places to be used at the election or include a concise statement of how polling place information may be obtained. For example, municipal clerks must publish a Type D notice on the Monday preceding a general election.

Type E notices relate to absentee voting, such as the qualification of electors, procedures for obtaining absentee ballots, and applicable voting hours and deadlines. Municipal clerks must publish a Type E notice on the fourth Tuesday preceding each primary and general election.

EXAMPLES OF REQUIRED PUBLISHED NOTICES

There are numerous instances in the Wisconsin Statutes that require the state or a local governmental body or agency to publish a legal notice. The definition of “legal notice” in Section 985.01 (2), Wisconsin Statutes, includes “Every publication of laws, ordinances, resolutions, financial statements, budgets and proceedings intended to give notice in an area.” Some common, familiar, or noteworthy ones are summarized below.

Acts of the Legislature. The Legislative Reference Bureau (LRB) is required to publish every act of the legislature on its date of publication on the Internet in one or more electronic file formats (§ 35.095 (3) (a)). Prior to the enactment of Chapter 372, Laws of 1981, the full text of each act of the legislature was required to be published in the official state newspaper, and 2015 Wisconsin Act 55 eliminated a requirement that the secretary of state publish a short notice about each act in the official state newspaper.

City and Village Ordinances. All ordinances enacted by city common councils or village boards of trustees must generally either be published in their entirety or in notice form, as a Class 1 newspaper notice. In the case of cities, notice is to occur within 15 days of passage. Ordinances take effect the day after publication unless a later date is prescribed. If there is no newspaper published in the village, the village board may, in lieu of newspaper publication, have copies of the ordinances and bylaws posted in at least three public places in the village, and proof of posting must be filed and recorded by the village clerk (§§ 61.50 (1) and 62.11 (4) (a)).

Meetings of Governmental Bodies. Every meeting of a governmental body is required to be preceded by public notice. Public notice of every meeting is generally required to be given at least 24 hours prior to the commencement of the meeting. However, if circumstances make 24 hours of notice impossible or impractical, shorter notice may be given. However, notice must generally be provided at least two hours in advance of the meeting. The notice requirements apply to meetings of the Wisconsin Legislature and its committees, subcommittees, and other subunits, unless a rule of the senate or assembly or a joint rule of the legislature provides other authorization. The requirement may generally be satisfied by a communication, such as an e-mail, from the chief presiding officer of a governmental body that or that person's designee to the public to those news media who have filed a written request for such notice and to the designated official newspaper. If there is no official newspaper, then notice may be given to any news medium likely to give notice in the area. Every public notice of a meeting of a governmental body must list the time, date, place, and subject matter of the meeting, including information about matters that may be considered at a contemplated closed session, in such form as is reasonably likely to adequately inform members of the public and the news media (§§ 19.83 (1), 19.84, and 19.87).

Proceedings of Local Government Meetings. The proceedings of city council, village board, and school board meetings must all be published as Class 1 notices. The proceedings must include the substance of every official action taken by the local governing body. "Substance" under the law means "an intelligible abstract or synopsis of the essential elements of the official action taken by a local governing body, including the subject matter of a motion, the persons making and seconding the motion and the roll call vote on the motion." If there is no newspaper published in a village, the proceedings may be published in a newspaper having general circulation in the village, posted in several public places, or publicized in some other fashion as the village board directs. If there is no newspaper published in a school district, publication may be accomplished by a school-district-wide distribution or posted or published as the school board directs (§§ 62.11 (4) (a), 61.32, 120.11, 985.01 (4) and (6)).

School District Annual Meeting. The school district clerk shall publish a Class 2 notice of the time and place of the annual meeting, the last insertion to be not more than 8 days nor less than one day before the annual meeting (§ 120.08 (1) (c)).

Public Improvement Bonds Referendum. The municipal clerk must publish a Class 2 notice containing a statement of the purpose of the referendum, giving the amount of the bonds proposed to be issued and the purpose for which they will be issued and stating the time and places of holding the election and the hours during which the polls will be open (§ 66.0619 (2m) (c)).

Board of Review Session. At least 15 days before the board of review will first meet in a taxing district, the board must publish a Class 1 notice, place a notice in at least three public places, and place a notice on the door of the town hall, the village hall, the council chambers, or the city hall stating the time and place of the first meeting of the board. If the clerk fails to properly publish the notice, a taxpayer may file a claim relating to an excessive property tax assessment (§ 70.47 (2)).

Testing of Electronic Voting System Automatic Tabulating Equipment. Municipalities that use an electronic voting system must, in an exercise open to the public, test the equipment not more than 10 days prior to the election day. The test must be advertised at least 48 hours prior to the test by publication of a Class 1 notice in one or more newspapers published in the municipality or in a newspaper of general circulation (§ 5.84 (1)).

DOA Advertising for Proposals. To promote adequate competition, DOA must inform potential bidders of state projects by soliciting proposals via publication of a Class 1 notice in the official state newspaper. Similar notices may be placed in publications likely to inform potential bidders of the project (§ 16.855 (2) (a)).

Hospital Rate Increase. A hospital must publish a Class 1 notice at least 10 days prior to instituting a rate increase (§ 153.08 (4)).

Agency Rule Making and Other Notices. The *Wisconsin Administrative Register* is the primary publication for providing required notices of administrative rule making and certain other actions taken by state agencies. Some agencies also use it to provide notice of certain program changes and other matters. The LRB publishes both the *Wisconsin Administrative Register* and *Wisconsin Administrative Code* (§ 35.93 (2) and (3)), and 2013 Wisconsin Act 20 eliminated printing of the register and code in favor of more frequent, electronic publications. A few exceptions remain to the laws that now provide for online publication of agency administrative rules and rule making, including a requirement that emergency rules be published in the official state newspaper before going into effect (§ 227.24 (1) (c) and (d)) and another that the legislature's Joint Committee for Review of Administrative Rules publish a Class 1 notice of its suspension of a rule in the official state newspaper and give any other notice it considers appropriate (§ 227.26 (2) (e)).

Publication of Application for Alcoholic Beverage License. The municipal clerk must generally publish in a newspaper, prior to issuance, each application for a Class "A," Class "B," "Class A," "Class B," or "Class C" license (§ 125.04 (3) (g)).

Establishing a Neighborhood Improvement District. When a local legislative body votes to adopt the proposed initial operating plan for a neighborhood improvement district, it must publish a Class 2 notice regarding the meeting at which it will vote on whether to adopt the plan. In addition, before publication, a copy of the notice must be sent by certified mail to all owners of real property within the proposed neighborhood improvement district (§ 66.1110 (3) (e)).

PROPOSED RULES AND PUBLISHING ON A WEBSITE IN LIEU OF, OR IN ADDITION TO, PUBLISHING A NEWSPAPER NOTICE

Air Pollution Source Construction Permit. The Department of Natural Resources (DNR) must publish a Class 1 notice and publish notice on its website announcing the opportunity for written public comment and the opportunity to request a public hearing on the analysis and preliminary determination regarding an air pollution source construction permit. In addition, the department must provide, when requested by interested persons, notice through an electronic notification system (§ 285.61 (5) (c)).

Notice of Feasibility Report and Preliminary Environmental Impact Statement Decision Regarding a Solid Waste Facility. In addition to being published as a Class 1 notice in the area of the proposed facility, the relevant notice must be published on the DNR's website (§ 289.25 (3)).

GAB Modifications to the State Election Administration Plan. GAB may adopt the state election administration plan and any modifications only after publishing a Class 1 notice or posting a statement

describing the proposed plan or modification on its website and receiving public comment thereon (§ 5.05 (10)).

Certain University of Wisconsin Construction Projects. Public notice about certain University of Wisconsin building projects are to be provided by posting on a publicly accessible computer site (§ 16.855 (22)).

Application to DNR to Use Natural Waters in Conjunction with a Fish Farm. DNR must post notice of every application submitted on the DNR's website (§ 29.733 (1m)).

Full Value Property Assessment. Each taxation district is required to assess property at full value at least once in every five-year period, and a city, village, or town must post prior notice of a revaluation on its municipal Internet site. If it has no Internet site, the information must be posted in at least three public places within the taxing jurisdiction (§ 70.05 (5) (b)).

RECENT WISCONSIN LEGISLATION

2015 Wisconsin Act 79, relating to "publication of certain legal notices on an Internet site maintained by a municipality," was enacted on November 11, 2015. Prior to the enactment of Act 79, certain municipalities were allowed to opt to post certain legal notices in lieu of publishing the notices in a newspaper if the municipality met statutory requirements regarding timing and placement of the notices. The municipality was required to post the notice in at least three public places likely to give notice to persons affected, and to post a notice that would be published before the act or event requiring notice no later than the time specified for the first newspaper publication or, if the notice would be published after the act or event requiring notice, to post the notice within one week after the act or event. Act 79 allows a municipality that opts to post a legal notice to, instead of posting the notice in three public places, post the notice in one public place and also publish the notice on the municipality's Internet site.

2015 Wisconsin Act 69, relating to "publication of certain proposed rules and changes to existing rules," was also enacted on November 11, 2015. Prior to the enactment of Act 69, the Wisconsin Supreme Court was required to publish notice of public hearings relating to proposed rules changes and the text of the proposed rules in a newspaper. Act 69 allows the Wisconsin Supreme Court to publish notice of proposed rule changes by publishing notice of the hearings related to the proposed changes and a summary of the proposed changes in a newspaper and placing the full text of the proposed rules on an Internet site.

LEGISLATION IN OTHER STATES

Illinois. According to an article in the *Springfield State Journal-Register*, published on March 12, 2015, 2015 House Bill 261, which failed to pass, proposed eliminating the requirement for local governments to post public notice in local newspapers. Instead, it would have required governments to post notices only on their Internet sites.

Georgia. 2015 Senate Bill 186, which failed to pass, proposed allowing local governmental entities to opt to publish required legal notices entirely on government Internet sites, eliminating print publication requirements. According to a March 9, 2015, editorial appearing in the *Rome News-Tribune*, the bill provided that governments that chose the electronic publication method would be required to create an Internet site, an index, a repository for paper copies, an index for that repository, and provide an ongoing service of advertisements by mail or electronic mail to anyone who requests the service.

Michigan. 2014 House Bill 5560, which passed the House of Representatives on December 4, 2014, but failed in the Michigan Senate, proposed repealing, over a 10-year phase-out period, the general

requirement that local governments publish certain legal notices in local newspapers. Instead, they would publish the notices on their own Internet sites.

Maryland. 2013 House Bill 1136, which failed to pass, proposed authorizing a county or municipality to satisfy the requirement to publish legal notices in a newspaper of general circulation by posting the notices on its Internet site. Notices would be required to be conspicuously displayed and easily accessible, and a specified mail service would have been required to be offered to those who requested it.

ARGUMENTS

Supporters of shifting the posting of government legal notices from print media to the Internet argue that in this increasingly connected age, most people can easily electronically access governmental materials and that there is a significant cost associated with print publication. Many newspapers are gradually losing circulation, and some newspapers and magazines no longer publish in print formats, instead becoming entirely digital publications. Michigan State Representative Amanda Price, the sponsor of a 2014 bill to shift publication of legal notices to government Internet sites, was quoted in the May 20, 2014, *Watchdog Wire – Michigan* on how publishing is transitioning from print to digital publication: “The sources people use to find information have shifted. More and more of them are going online. Many people who are under the age of 30 never read newspapers. With this bill we are looking to ensure that public notices remain widely accessible.” In the December 17, 2014, edition of the *Traverse City Record-Eagle*, Kay Schumacher, the township clerk of Garfield, Michigan, commented on the expense of print publication: “It’s very costly to publish...these legal documents and it just seems with the Internet and websites people can look on our website or call to get copies of it.”

On the other hand, even in this increasingly connected era of information technology, not all people have ready access to convenient, affordable Internet service. In addition, unlike print media, Internet sites may be subject to undetectable alteration or “hacking,” and there is no assurance that all digital archives will be permanently preserved. In the *Watchdog Wire – Michigan* piece previously mentioned, Lisa McGraw, public affairs manager for the Michigan Press Association, stated: “The Michigan Press Association opposes this bill because we feel it would eliminate due process for citizens by eradicating the permanent, legal, independent notices that have been provided in print by Michigan’s newspapers for over 150 years.” News media organizations assert that publishing legal notices in print enhances government transparency by allowing the press to serve as a critically important third party between governmental units and taxpayers. Editorializing on legislation in Illinois that proposed eliminating print publication of legal notices, the *Shelbyville Daily Union* opined on May 12, 2015, “Notice of publication in newspapers provides the proven and necessary verification, certification and archiving solution that ensure individuals and taxpayers [sic] rights are protected and preserved.” In addition, as the Internet draws advertising dollars away from print publications, the publishing of legal notices is an important source of revenue for newspapers, particularly local papers with smaller circulations.

Beth Bennett, executive director of the Wisconsin Newspaper Association, in a July 31, 2015, electronic message, provided a one-word summary of why newspaper publication of public notices remains vital: “accountability.” She elaborated by stating that “Public notice is a vital public service provided by the government. The newspaper industry has always been the conduit by which the information is conveyed. The main and most obvious reason for this is the fact that newspapers provide the necessary third party oversight needed to guarantee that government is providing the notice that it is statutorily required to provide to the public. Additionally, and of no less importance, is the fact that no other medium—electronic or print—has the ability and the readership numbers to reach the targeted audience of the notice in the way that the local newspaper can.”

A May 15, 2015, *Wisconsin State Journal* editorial contained an encapsulation of the arguments in favor of continuing print publication requirements:

The Wisconsin Legislature wisely requires publication of government notices — in ink, on paper, in newspapers — to best keep the public informed about the public’s business. Even in the Internet age, this must continue.

That’s because print publication of government notices provides irrefutable proof of whether a city commission, town board or legislative body properly informed the public about a pending government action as required. Legal notices in newspapers are often key evidence in court cases when concerned citizens allege violations of open meetings law. Unlike websites, newspapers can’t be updated or altered once they’ve reached thousands of front doors in the communities they serve.

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