

Freezing Defined Benefit Plans

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This Practice Note provides a basic overview of the implications of freezing a defined benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (IRC) and explains some of the issues that can arise after the plan is frozen.

In the current economic climate more companies are freezing their defined benefit plans. This used to be a rare event that usually involved only financially-strapped companies. However, even profitable companies have joined the chorus of those announcing freezes to their plans.

The general cause seems to be that US companies are reacting to stiff competition overseas and at home from companies that do not sponsor defined benefit plans. Many pension plan freezes are also in response to companies' growing concern that defined benefit plans have become more costly and risky, with no relief on the horizon. In view of these developments, defined benefit plan freezes are likely to continue.

Freezing a defined benefit plan may help to reduce a plan sponsor's long-term cost and the volatility of a plan sponsor's financial obligations. However, once a pension plan is frozen, the plan sponsor and the frozen pension plan's fiduciaries retain important ongoing obligations and duties under both the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (IRC). Failure to comply with these obligations and duties could have significant adverse consequences to the plan sponsor, the plan fiduciaries, plan participants and their beneficiaries. Therefore, when considering a plan freeze, a plan sponsor should carefully analyze its long-term strategies for the management and disposition of the frozen plan to avoid significant liability exposure in the future.

This Note explains:

- Some common reasons for choosing to freeze a defined benefit plan.
- The difference between freezing and terminating a defined benefit plan.
- Types of plan freezes.
- The various implications of a plan freeze.
- The process of freezing a defined benefit plan.
- Long-term strategies for frozen defined benefit plans.

REASONS FOR FREEZING A DEFINED BENEFIT PLAN

Companies cite many reasons for freezing or terminating a defined benefit plan:

- To reduce costs and enhance competitiveness.
- To reduce volatility in funding obligations due to fluctuating equities markets, plan asset values and interest rates.
- Plan financial performance can affect covenants in loan agreements and company profit and loss volatility.
- Plan assets are becoming a larger portion of companies' balance sheets.
- The plan sponsor is acquired by another company and the plans of the two companies cannot easily be merged.
- Terminating the plan is preferable but the plan sponsor cannot afford to purchase annuities from a private-sector insurer to cover benefits as required in a standard termination (see *Difference Between Terminating and Freezing a Defined Benefit Plan*).

Freezing a defined benefit plan usually results in some immediate cost savings because future benefit accruals are stopped. However, the freeze does not fix unfunded liabilities or eliminate cost volatility. Instead, the frozen plan remains subject to the interest rate, investment and demographic risks that apply to ongoing defined benefit plans. In addition, the frozen plan is still subject to all of the same minimum funding, compliance, administrative and fiduciary requirements as an ongoing defined benefit plan (see *Implications of Freezing a Defined Benefit Plan*).



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DIFFERENCE BETWEEN TERMINATING AND FREEZING A DEFINED BENEFIT PLAN

Freezing a defined benefit plan is different from terminating a defined benefit plan. Plan termination may be attractive to plan sponsors because it allows them to eliminate all management costs and risks associated with a defined benefit plan. When a defined benefit plan is terminated, the plan sponsor is relieved from the compliance, actuarial and fiduciary tasks involved in maintaining the plan after termination. In addition:

- Cash contributions are no longer required.
- Pension Benefit Guaranty Corporation (PBGC) premiums no longer need to be paid.
- Accounting expense and balance sheet liabilities are eliminated.
- No ongoing plan administration is required.

There are three types of defined benefit plan terminations:

- **Standard termination.** Title IV of ERISA allows a plan sponsor to terminate a fully funded plan on 60 days notice in a standard termination. In that event, the employer must pay out all benefits, either as a lump sum or by buying an annuity for each employee (*ERISA § 4041(b)* (29 U.S.C. 1341(b))).
- **Distress termination.** If the plan is not fully funded (also called being underfunded), the plan sponsor may terminate the plan (and transfer its liabilities to the PBGC) only by meeting certain financial distress criteria. With a few exceptions, only companies that are in bankruptcy can transfer their liabilities to the PBGC (see *Terminate the Plan in Bankruptcy*) (*ERISA § 4041(c)* (29 U.S.C. 1341(c))).
- **Involuntary termination.** The PBGC can terminate a plan on its own initiative in an involuntary termination (*ERISA § 4042(a)* (29 U.S.C. 1342(a))). For more information, see *Practice Note, Defined Benefit Plans: Distress and Involuntary Terminations* (<http://us.practicallaw.com/9-502-5005>).

To terminate a defined benefit plan voluntarily in a standard termination, the company must fully fund the plan and pay out all benefits, either by distributing lump sum payments (if permitted and elected by participants) or by purchasing annuities to secure participants' benefits. Annuity purchase prices typically include conservative or worst-case demographic assumptions, expense loads and profit charges. Therefore, the cost of annuitizing benefits on a plan termination is generally higher than fully funding the plan on an ongoing basis. In addition, the plan termination process is administratively complex and involves careful, time-sensitive coordination between plan fiduciaries, administrators and service providers (see *Process of Freezing a Defined Benefit Plan*). For these reasons, freezing a pension plan is often adopted as an alternative to terminating it.

TYPES OF DEFINED BENEFIT PLAN FREEZES

According to the PBGC, a plan can be frozen by a plan sponsor in one of several ways:

- It can be closed to new entrants while those participants already in the plan continue to accrue benefits (commonly called a soft freeze).
- It can stop benefit accruals for all active participants, but allow

benefits to increase with the growth in participants' wages (also sometimes called a soft-freeze).

- It can stop benefit accruals for some, but not all participants based on age, tenure, job classification or plant location (commonly called a partial freeze).
- It can stop service accruals for all active participants and all participants stop earning benefits. Assets remain in the plan and are paid out when participants retire or leave, but the participants' benefits do not grow with additional years of service (commonly called a hard freeze).

A plan can also be frozen using a combination of these methods.

Several restrictions apply when an employer freezes its defined benefit plan:

- **Anti-cutback rules.** Both ERISA and the IRC contain anti-cutback rules that generally prohibit a sponsoring employer from amending a plan to take away or reduce a participant's accrued benefits (*IRC § 411(d)(6)*; *ERISA § 204(g)* (29 U.S.C. 1054(g))). For more information, see *Practice Note, Protected Benefits under IRC Section 411(d)(6)* (<http://us.practicallaw.com/8-521-5906>).
- **Prohibition against retroactive changes.** Even though companies are not generally allowed to make retroactive changes, plan sponsors can make prospective changes to the benefits that participants accrue. To do so, the plan's administrator, sponsor or board of trustees simply amends the plan so that additional benefits do not accrue after a freeze.
- **Notice to participants.** Before the amendment takes effect, the plan administrator must give notice to participants and other applicable persons of the freeze (see *Process of Freezing a Defined Benefit Plan*).

IMPLICATIONS OF FREEZING A DEFINED BENEFIT PLAN

Even after a pension plan freeze, the legal requirements for the frozen plan vary little from those that applied before the freeze. The plan sponsor continues to be responsible for the day-to-day administrative and compliance duties of the plan. For example, the plan sponsor must ensure that:

- Annual actuarial valuations and pension expense calculations are performed.
- The plan complies with law changes.
- The plan is operated according to its terms.
- The appropriate people provide day-to-day plan administration.
- The plan satisfies the minimum funding requirements (see *Funding Obligations*).
- PBGC premiums continue to be paid (see *PBGC Premiums and Reporting Requirements*).
- Reporting and disclosure obligations are satisfied (see *Disclosure Obligations*).
- Fiduciary duty requirements are met (see *Other Fiduciary Obligations*).

These and other continuing obligations are some of the disadvantages of freezing a plan as opposed to terminating it.

FUNDING OBLIGATIONS

When plan sponsors elect to freeze a defined benefit plan, they often point to the need to reduce long-term financial obligations. However, an employer's legal obligation to contribute to a pension plan will not change after a pension plan freeze. Both ERISA and the IRC require employers to make minimum annual contributions to defined benefit plans. There are no exceptions for frozen plans. The amount of annual contributions required by ERISA and the IRC is determined in part by the total accrued benefit liability for which an employer is responsible. Therefore, employers are still required to make minimum contributions to plans after they are frozen, particularly if the plans are underfunded. Freezing a defined benefit plan often has little short-term financial impact.

IRC Section 436 also provides for a series of limitations on the accrual and payment of benefits under an underfunded plan, which could apply to frozen plans.

PBGC PREMIUMS AND REPORTING REQUIREMENTS

Employers sponsoring defined benefit plans must pay premiums to the PBGC to insure the plan benefits for participants. The premiums are based on the number of participants in the plan. For plan years beginning in 2014, the flat-rate employer premium is \$49 per participant for single employer plans and \$12 per participant for multiemployer plans. The flat-rate premium will continue to rise at the rate of inflation. In addition, underfunded single-employer plans generally must pay an additional annual variable-rate premium of \$14 (plans sponsored by small employers (generally fewer than 25 employees) may be subject to a lower cap) per \$1,000 of unfunded vested benefits. Because they are due regardless of whether the plan participants continue to accrue benefits, employers must continue to pay the premiums, even if the plan is frozen.

As with premium requirements, PBGC reporting requirements remain in effect for frozen pension plans. A plan sponsor still must report to the PBGC certain circumstances and events as required by Title IV of ERISA. Examples include:

- Failure to make a required minimum funding payment.
- Failure to pay benefits when due.
- Certain distributions to a substantial owner.
- Liquidation.
- Change in contributing sponsor or controlled group.
- Extraordinary dividend or stock redemption.
- Transfer of benefit liabilities.
- A loan default.

REPORTING AND DISCLOSURE OBLIGATIONS

A frozen pension plan must continue to satisfy various reporting and disclosure obligations such as:

- Filing Form 5500, Annual Return/Report of Employee Benefit Plan, until the plan is terminated. The plan sponsor must indicate on the Form 5500 if the plan is "hard-frozen"; that is, that no participants are accruing any new benefits under the plan.
- Providing updated summary plan descriptions and summary annual reports to participants.

- Providing notices to participants when the funded status of the plan is in issue, such as notice of:
 - a funding waiver request made to the IRS for a waiver of the minimum funding standards;
 - a funding failure when the plan sponsor misses an installment or payment needed to meet the minimum funding requirements; or
 - limits on distributions and benefit accruals.
- Providing pension benefit statements to participants.

For a general overview of ERISA fiduciary duties, see *Practice Note, ERISA Fiduciary Duties: Overview* (<http://us.practicallaw.com/5-504-0060>).

OTHER FIDUCIARY OBLIGATIONS

A pension plan freeze does not automatically reduce a plan fiduciary's ERISA duties. Although many functions relating to a frozen plan are actions or decisions made by the plan sponsor in a non-fiduciary role, such as the adoption of legally-required amendments, the plan fiduciaries continue to be responsible for the administration of the frozen pension plan and the investment of its assets.

Often the fiduciary of a frozen pension plan is either the plan sponsor (the company) or a plan administration committee appointed by the plan sponsor. In making fiduciary decisions, individuals serving as fiduciaries must act in the best interest of plan participants and their beneficiaries, not the financial interests of the company. Alternatively, a plan sponsor can attempt to minimize its ongoing fiduciary exposure by hiring an independent fiduciary to make fiduciary decisions for the frozen pension plan. While this approach may significantly reduce the plan sponsor's exposure for breach of fiduciary duty, the individual or entity appointing the independent fiduciary still retains fiduciary responsibility for selecting and monitoring the independent fiduciary.

Regardless of the fiduciary structure adopted by the frozen pension plan's sponsor, the plan's fiduciaries keep a number of responsibilities after a plan is frozen, including continuing to:

- Monitor the prudence of the frozen pension plan's investments and investment policies, especially as the employee population covered under the frozen pension plan gets closer to retirement age (see *Practice Notes, ERISA Fiduciary Duties: Overview: Setting Up an Investment Policy* (<http://us.practicallaw.com/5-504-0060#a634050>) and *Selecting and Hiring an Investment Manager* (<http://us.practicallaw.com/5-504-8278>)).
- Ensure that the plan complies with ERISA's reporting and disclosure obligations.
- Be responsible for interpreting plan documents and applying the plan's benefit claims procedures.

TAX QUALIFICATION REQUIREMENTS

After a defined benefit plan is frozen, it remains subject to the IRC's tax qualification requirements. These requirements have ongoing implications that must be considered at both the plan sponsor and fiduciary levels.

Plan Sponsor Duties

The plan sponsor continues to be responsible for the following requirements for a frozen defined benefit pension plan:

- The plan must be amended to reflect required legal changes to maintain the plan's tax-qualified status under the IRC.
- The plan sponsor must continue to monitor legislative and regulatory developments to determine whether they have an impact on the design or operation of the frozen plan and may require a plan amendment. This monitoring is especially important if further pension funding rules requiring plan amendments are enacted. Failure to maintain an up-to-date plan document may trigger significant adverse tax consequences for plan participants and their beneficiaries (see *Practice Note, Applying for an IRS Determination Letter: Purpose of Applying for an IRS Determination Letter* (<http://us.practicallaw.com/9-501-4610#a254818>)).
- The plan sponsor should continue to obtain a timely IRS determination regarding the tax-qualified status of the frozen plan.

Fiduciary Duties

Plan fiduciaries should continue to monitor the administration of a frozen pension plan to ensure that:

- The plan remains in compliance with the IRC's requirements (such as distribution notice and election rules, benefits rights and features rules, nondiscrimination testing rules and top-heavy rules).
- Plan operations are consistent with the plan's terms.
- All protected benefits, such as applicable grow-in rights (for example, reaching a certain age to be eligible for early retirement benefits), are preserved.

Plan fiduciaries should also be aware that when a defined benefit plan is frozen only to new hires, the plan's demographic may skew over time more to the highly compensated employees of a company. This causes a significant risk that the plan will violate the nondiscrimination rules of the IRC and this risk increases in significance for pension plans that have been frozen for a number of years. For more information on the nondiscrimination rules, see *Practice Notice, Requirements for Qualified Retirement Plans: Nondiscrimination Rules* (<http://us.practicallaw.com/3-506-6895#a788432>).

Even if the administration of a frozen defined benefit plan has been outsourced to a third party, the third party often requires that certain decisions be approved by the plan fiduciary, such as decisions made under the plan's claims procedures.

On December 14, 2014, the IRS issues Notice 2014-5, which permits certain employers that sponsor a closed defined benefit plan and a defined contribution plan to demonstrate that the aggregated plans comply with the nondiscrimination requirements of IRC Section 401(a)(4) on the basis of equivalent benefit, even if the aggregated plans do not satisfy the current conditions for nondiscrimination testing on that basis (see *Legal Update, IRS Notice 2014-5 Provides Temporary Nondiscrimination Relief for Closed Defined Benefit Plans* (<http://us.practicallaw.com/2-552-0805>)).

PLAN COSTS

Cost and investment risk are often cited as the main reasons for freezing a defined benefit plan. However, a pension plan freeze does not necessarily mitigate these concerns. From a cost perspective, freezing a pension plan does not reduce the plan's already-accrued obligations. Instead, a freeze only serves to reduce future costs, the magnitude of which depends on the type of freeze adopted. Benefits accrued before the freeze remain a plan obligation. The cost of fully funding participants' benefits to their accrued levels is likely to be significant for several years following a pension freeze.

Some plan sponsors attempt to compensate employees for eliminating their defined benefit plan accruals by enhancing 401(k) matching or profit sharing contributions. However, this results in additional cash costs because, unlike the funding obligations for defined benefit plans, which may be amortized over a period of time, contributions to defined contribution plans must generally be made in full by the due date for a plan sponsor's income tax return (including extensions).

PENSION PLAN ACCOUNTING RULES

Changes to the Financial Accounting Standards Board's ASC 715 pension plan accounting rules must also be considered. Under the rules, a plan sponsor must recognize the funded or unfunded status of the frozen pension plan on its balance sheet. This approach significantly reduces the amount of shareholder equity in companies with underfunded plans. The benefit of a pension plan freeze is that a frozen plan's potential negative impact on a company's balance sheet is likely to decline because:

- All future benefits will already be accrued.
- The ongoing flow of future contributions by the plan sponsor required under the defined benefit plan funding rules will eventually increase the funded status of the plan.

EMPLOYEE RELATIONS

A pension plan freeze could impact relations between an employer and its employees if employees' existing pension plan benefits are an important component of their total compensation. For employees whose pensions have been frozen, their total compensation is reduced unless their employer offers greatly enhanced 401(k) plan benefits. Any reduction in employees' pay packages could hurt employers' ability to retain their employees and to recruit new hires.

Where a plan sponsor only institutes a limited freeze, such as freezing the pension plan only to new hires, the net effect may be to have a divided workforce whose members have differing levels of benefits. This situation may be particularly acute in instances where only certain employees, such as those covered by collective bargaining agreements, continue to accrue benefits under a pension plan.

In addition, an employer contemplating a pension plan freeze may face a workforce in which younger workers welcome the change and older workers resist or outright oppose it. Where a freeze is accompanied by the introduction of a 401(k) plan, younger employees may applaud the move because they tend to appreciate the portability that comes with having a defined contribution plan. But for older employees, especially those approaching retirement, a pension plan freeze may not put them in as good of a financial position as they would have otherwise been.

LITIGATION RISK

A plan freeze does not shield a pension plan from litigation risk. For example, if a participant files a claim for benefits and is denied, the participant may appeal the decision. If the appeal is denied, the participant can file suit in state or federal court.

INCREASED FUNDING OBLIGATIONS RELATED TO EXECUTIVE PENSION PLANS

Often executive pension plans are designed to supplement the benefits provided to executives under broad-based pension plans. For this purpose, "executive pension plans" means nonqualified pension plans subject to IRC Section 409A that provide benefits in excess of those permitted under the IRC's tax-qualified pension plan benefit limits (for more information on IRC Section 409A, see *Internal Revenue Code Section 409A Toolkit* (<http://us.practicallaw.com/1-500-6652>)). The benefit formula under an executive pension plan is often the same as applies under the employer's broad-based pension plan, except that the tax-qualified plan benefit limitations (for example, the \$260,000 (in 2014) compensation limitation and the \$210,000 (in 2014) annual benefit limit) do not apply.

In addition, the benefit payable under an executive pension plan is sometimes offset against the benefit under the broad-based pension plan. If an employer freezes the accrual of benefits under its broad-based pension plan but does not also freeze the accrual of benefits under its executive pension plan, the employer's obligations under the executive pension plan may increase significantly because the applicable offset in the frozen pension plan no longer increases.

IRC SECTION 409A IMPLICATIONS OF UNDERFUNDED DEFINED BENEFIT PLANS

Companies are prohibited from funding executive deferred compensation plans if their defined benefit plan is in "at risk" status (generally less than 80% funded). This means that companies must immediately stop making contributions to a rabbi trust or any other funding arrangement for nonqualified deferred compensation plans established for executives and other key employees. If a company continues the contributions, it will violate IRC Section 409A causing the executives to immediately include plan benefits in their income and subject them to a 20% penalty (see *Practice Note, Section 409A: Deferred Compensation Tax Rules: Overview: Penalties for Noncompliance* (<http://us.practicallaw.com/6-501-2009#a710366>)).

Even a small underfunded plan maintained by a parent corporation's subsidiary or affiliate can implicate this rule. Therefore, companies should be aware not only of the defined benefit plans sponsored at the parent level, but also of those sponsored by subsidiaries and affiliates. Even though a defined benefit plan is frozen, its funding levels must remain high enough so that it does not become "at risk" and prevent deferred compensation plan funding.

PROCESS OF FREEZING A DEFINED BENEFIT PLAN

To freeze a defined benefit plan, the plan sponsor must take these general steps:

- **Notify participants of the plan freeze.** A written notice of an amendment providing for a significant reduction or cessation of future benefit accruals must be given to participants at least 45 days (15 days for plans with fewer than 100 participants) before

the effective date of the amendment freezing the plan. The notice must comply with the requirements in *ERISA Section 204(h)* (29 U.S.C. 1054(h)). For a sample 204(h) notice, see *Standard Document, 204(h) Notice* (<http://us.practicallaw.com/8-523-5565>). Notification may also be required through the annual funding notice since a freeze may have a material effect on plan liabilities or assets for the year.

- **Amend the plan.** The plan must be amended to provide for the freeze (for example, prohibiting new hires from becoming eligible or ceasing benefit accruals).
- **Change Actuarial Assumptions.** The assumptions used to determine the plan's funding requirements must be changed to reflect the frozen aspects of the plan (for example, the fact that benefits will no longer accrue or that no new participants will enter the plan).
- **Revise Investment Strategy.** The plan's asset investment strategy must be changed to implement the plan sponsor's long-term strategy for the frozen plan (see *Long-Term Strategies For Frozen Defined Benefit Plans*).

LONG-TERM STRATEGIES FOR FROZEN DEFINED BENEFIT PLANS

Once a pension plan is frozen, a plan sponsor should evaluate the long-term strategies for handling the frozen plan.

FULLY-FUND AND TERMINATE THE PLAN

Many plan sponsors who elect to freeze their pension plans eventually try to terminate their plans in a standard termination (see *Difference Between Terminating and Freezing a Defined Benefit Plan*). To do this, the plan's assets must be sufficient to pay out the benefits of employees and their beneficiaries under the plan, either in a lump sum (if permitted and elected by participants) or through the purchase of termination annuities that will pay out the benefits owed under the plan. Some plan sponsors elect to fund their plans to a level necessary to complete a standard termination. By doing so, their funding and fiduciary obligations cease.

The PBGC may not proceed with a standard termination if the termination violates the terms and conditions of an existing collective bargaining agreement.

TERMINATE THE PLAN IN BANKRUPTCY

An alternative option for terminating an underfunded frozen plan is through a distress termination. Distress terminations generally require the approval of the PBGC and are usually permitted only as part of the bankruptcy process or if a contributing sponsor of the plan or a member of its controlled group meet criteria demonstrating financial distress (see *Practice Note, Defined Benefit Plans: Distress and Involuntary Terminations: Distress Termination* (<http://us.practicallaw.com/9-502-5005#a239989>)).

One significant drawback of a distress termination is that the PBGC only guarantees pension benefits up to a specified level. In 2014, the maximum guaranteed annual benefit is equal to an annual single life annuity of \$59,318.16 beginning at age 65. If a terminated plan has assets in excess of the amount necessary to fund the PBGC guaranty, the excess assets will be used to provide additional benefits to participants in the plan.

As with a standard termination, the PBGC cannot proceed with a distress termination if the termination violates the terms and conditions of an existing collective bargaining agreement.

UNFREEZE THE PLAN

A plan sponsor of a frozen defined benefit plan can elect to unfreeze the plan. In light of the funding requirements and financial accounting rules (see *Funding Obligations* and *Pension Plan Accounting Rules*), many sponsors do not take this step.

However, fully funded or overfunded frozen plans can increase a plan sponsor's balance sheet. For example, many cash balance plans provide interest credits based on the 30-year Treasury bond rate of interest while the plans' assets are often invested in asset classes that are intended to return higher rates of return. Unfreezing a cash balance plan may permit a sponsor to leverage the higher rates of return while facing relatively lower ongoing annual funding obligations based on the plan's formula for interest credits. The plan sponsor can then reduce its annual out-of-pocket cash costs by using cash balance plan earnings instead of, for example, making actual cash contributions to an enhanced 401(k) plan.

USE OF EXCESS ASSETS AND REVERSIONS

A frozen pension plan's excess assets could be used for:

- Transferring excess pension plan assets to fund retiree medical benefits (see *Funding Retiree Medical Benefits*).
- Providing enhanced benefits to participants in the frozen plan.
- Terminating the plan and transferring excess assets to a qualified replacement plan (see *Transferring Excess Assets*).

Funding Retiree Medical Benefits

Under IRC Section 420, employers are allowed to make qualified transfers of excess pension assets from single-employer defined benefit plans to retiree health benefits accounts established and maintained under IRC Section 401(h). The transfer must satisfy certain requirements including vesting participants in the benefits they accrued under the defined benefit plan at the time of the transfer.

Transferring Excess Assets

Generally employers avoid terminating an overfunded defined benefit plan and receiving a reversion of any surplus assets because IRC Section 4980 imposes a 50% excise tax on the surplus assets and mandates that they be included in the employer's income. However, the excise tax is reduced to 20% if the employer transfers 25% of the surplus to a qualified replacement plan, which is generally a plan covering 95% of the employees who were active participants in the terminated plan. Under this approach, the transferred surplus will not be taxable to the employer as ordinary income and will not be subject to the excise tax.

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