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FCA PROPOSALS FOR REVISIONS TO THE SAFEGUARDING REGIME FOR PAYMENTS FIRMS

The Financial Conduct Authority (FCA) is consulting in CP24/20 on a package of near- and long-term changes to the safeguarding regime for UK payments institutions, e-money institutions and credit unions that issue e-money. The consultation closes on 17 December 2024. The FCA's planned changes aim to ensure greater protection of customer funds and their quicker return if firms fail. The FCA will introduce significantly stronger compliance obligations for payments firms, culminating in a new safeguarding regime based on the CASS model. In this briefing we outline the proposals and give our thoughts on some of the potential impacts.

BACKGROUND

Payment Institutions, e-money institutions and credit unions that issue e-money (together, Payments Firms) provide services to a wide range of business and consumer clients, generally charging a fixed or percentage fee per transaction. Businesses may rely on Payments Firms to accept and process card payments, while some consumers use e-money accounts in lieu of bank current accounts to receive salaries or pay household bills. Payment services provided include money remittance, services related to the issuance and use of e-money, and merchant acquiring to enable merchants to accept payment by credit and debit cards.

For all Payments Firms, the requirements for safeguarding of customer funds are crucial. For payment institutions, holding of customer funds is of a transactional nature - these firms typically hold customer funds for relatively short periods to facilitate transactions. On the other hand, e-money firms may hold customer funds for extended periods (in e-wallets or similar accounts). As such, Payments Firms have significant responsibility to protect the funds they hold.

Safeguarding obligations are set out in the Payment Services Regulations 2017 (PSRs) and Electronic Money Regulations 2011 (EMRs) and additionally all Payments Firms are subject to Principle 10 of the FCA's Principles for Businesses - the requirement to arrange adequate protection for clients' assets when they are responsible for them. Under the current safeguarding

Key issues

- The FCA's proposals will apply to Authorised Payments Institutions (APIs), Electronic Money Institutions (EMIs), Small EMIs and credit unions that issue e-money under the PSRs and EMRs.
- Small Payments Institutions will continue to be able to opt-in to comply with safeguarding requirements on a voluntary basis.
- In the interim stage the PSRs and EMIs will continue to apply, subject to significant enhancements designed to improve compliance. A six-month transitional period will apply.
- The FCA aims to finalise its policy for the interim stage in H1 2025.
- An 'end-state' statutory trust (for both cash and investments) will be introduced when revocation of the safeguarding provisions of the PSRs and EMRs takes place. A 12-month transitional regime will apply.
- Under the 'end-state' statutory trust, funds (or assets) safeguarded for payment services can be pooled with funds (or assets) safeguarded for the issue of electronic money.
- FCA's 'end-state' policy will include new rules for when a Payments Firm fails or where a third-party used for safeguarding purposes fails.

requirements in the PSRs and EMRs, firms may safeguard relevant funds by either segregating them or protecting them through an insurance policy or comparable guarantee. Segregation is used by more than 95% of firms.

The FCA has provided guidance on how firms should meet the safeguarding obligations in its Approach Document[1].

A general expansion in the payments sector has steadily increased the number of consumers and businesses using Payments Firms, meaning there is a high potential for harm to consumers if a failing firm has not safeguarded customer funds adequately, especially as Payments Firms are not covered by the Financial Services Compensation Scheme (FSCS).

FCA'S LONGSTANDING CONCERNS ABOUT SAFEGUARDING

The FCA has issued a range of previous communications to Payments Firms on compliance with their safeguarding and other arrangements:

- In 2019, the FCA sent a 'Dear CEO' letter[2] to non-bank payment service providers, highlighting issues around identification of relevant funds, delays in segregation, poor reconciliation processes, poor documentation of the rationale for arrangements and inadequate monitoring or review of those arrangements. The FCA also noted that firms undergoing rapid growth and evolution were not adapting their safeguarding arrangements to keep pace.
- In 2020, the FCA sent a Portfolio Strategy letter[3] to payment services and e-money firms, highlighting six core widespread issues: safeguarding, prudential risk management, financial crime risk management, financial promotions, records/record-keeping, and inadequate governance/oversight (which it called the 'root cause' of firms' other failings).
- Most recently, in March 2023, the FCA sent a further letter to the CEOs of Payments Firms[4] highlighting where firms commonly go wrong on safeguarding, and among other things again highlighting that firms' governance arrangements, risk procedures and controls may not be comprehensive or proportionate to their business.

In CP 24/20, the FCA notes that, for firms that became insolvent between Q1 2018 and Q2 2023, there was on average a shortfall of 65% in funds owed to clients (i.e. the difference between funds owed and funds actually safeguarded).

The FCA also notes that, in 2023, it opened supervisory cases in relation to around 15% of firms that carry out safeguarding due to continuing concerns with their arrangements.

TWO-STAGE APPROACH

Under the Smarter Regulatory Framework programme, the PSRs and EMRs will be revoked and replaced with FCA Handbook Rules. The revocation will

[1] Payment Services and Electronic Money – Our Approach (November 2021, version 5)
[2] Non-bank payment service providers – requirements for safeguarding of customer funds (July 2019).
[3] Portfolio strategy letter for payment services firms and e-money issuers (July 2020).
[4] FCA Priorities for Payments Firms (March 2023).

require HM Treasury to make regulations under the Financial Services and Markets Act 2023 (FSMA 2023). FSMA 2023 has also empowered[5] the FCA to make the replacement rules for Payments Firms.

The FCA proposes to create a new chapter 15 in its Client Assets sourcebook (CASS 15), where the majority of the new rules will be located. Other amendments are proposed to the CASS 10 Chapter and to the Supervision Manual.

During the 'interim state' (first stage), the PSRs and EMRs will continue to apply, with a number of enhancements. The 'end state' (second stage) begins when the safeguarding requirements in the PSRs and EMRs will be revoked, and the new safeguarding regime takes effect.

SCOPE OF THE PROPOSALS

The new CASS 15 rules will apply, during the interim state, with respect to the provision of payment services or issuance of electronic money within the scope of the PSRs and EMRs. Funds received that are outside the scope of the PSRs and EMRs do not need to be safeguarded and, where the safeguarding institution uses the segregation method, such funds must be kept separate from relevant funds (as defined in the PSRs and EMRs).

In the end-state, references to the scope of the PSRs and EMRs will fall away and be replaced with references to CASS 15.

The territorial scope of CASS 15 is set out in the draft CASS 15.1.3R to be introduced at the interim stage (and unchanged for the end-state). New proposed guidance highlights that one of the effects of CASS 15.1.3R is that CASS 15 does not apply where payment services are being provided to both the payer and the payee from outside of the UK (eg, a transfer between an account operated by a payment services provider (PSP) from a branch in Japan to an account operated by another PSP in Hong Kong). Funds received for these transactions should not be mixed with relevant funds, even if funds are routed through a correspondent PSP in the UK.

PROPOSALS FOR THE INTERIM STATE

The interim state proposals are intended by the FCA to supplement and enhance the current safeguarding rules and FCA guidance. Following publication of the FCA's finalised policy (expected in the first half of 2025), firms will have a six-month period to implement the changes.

These interim proposals cover three broad areas: improving firms' books and records; enhancements to monitoring and reporting; and strengthening some elements of safeguarding practices.

Improvements to books and records

The FCA is introducing much more prescription in rules to address widespread inadequacies it has found in the past around firms' record-keeping, reconciliations and documentation practices. Firms will need to review and

[5] Electronic Money, Payment Card Interchange Fee and Payment Services (Amendment) Regulations 2023.

may need to alter their operational procedures to ensure compliance. Specifically firms would be required to:

- Establish, implement and maintain adequate policies and procedures to help ensure compliance with the safeguarding provisions.
- Maintain accurate records and accounts to enable them to distinguish (at any time and without delay) between relevant funds and other funds.
- Perform internal and external reconciliations at least once each business day and in line with the method set out in the proposed rules. Internal relevant funds reconciliations are to be based on the values contained in their internal records and ledgers, rather than in the records they get from third parties such as banks. External relevant funds reconciliation would help firms to ensure the accuracy of their internal records and accounts.
- Follow up to determine the reason for any discrepancy identified by reconciliations and ensure that, by the end of the business day, any shortfall is paid into a relevant funds bank account or any excess is withdrawn by the end of the business day. Where a discrepancy is identified by an external reconciliation, it must be investigated and resolved.
- Notify the FCA in writing and without delay if records are out of date, if they are unable to perform a reconciliation or remedy any discrepancies, or if there is a material difference between the amount of safeguarded funds and the amount they should have been safeguarding. This is a new notification requirement in addition to existing notification requirements to which firms are subject, such as incident reporting.
- Maintain a resolution pack (and, under the proposed rules, specified documents must be able to be retrieved within 48 hours).

Enhancements to monitoring and reporting

Firms would be required to:

- Appoint an independent auditor[6] to carry out a safeguarding audit and submit an annual report (in a prescribed format) to the FCA. In selecting an auditor, a firm must take all reasonable steps to ensure the auditor has the required skill, resources and experience. An auditor can be appointed for a firm if it fails to appoint one within 28 days of being required to do so. The FCA intends that these rules will apply as guidance for small payment institutions or credit unions that issue e-money.
- Appoint a director or senior manager to have oversight of the firm's safeguarding compliance and make reports to the firm's governing body.
- Submit a new monthly regulatory return electronically giving comprehensive information about safeguarded funds.

[6] This is an extension of existing requirements to all Payments Firms. Currently, paragraph 10.71 of the FCA's Approach Document provides that FCA only expects firms to arrange specific annual audits assessing their compliance with the safeguarding requirements under the PSRs and EMRs where they are required to arrange statutory audits of their accounts under the Companies Act 2006. Auditors are required to make certain notifications to the FCA but are not required to submit their audits to the FCA for review.

Enhancements to safeguarding practices

- Exercise due skill, care and diligence when appointing, and periodically review the use of, third parties that:
  - provide designated safeguarding accounts (where relevant funds or assets are either received or deposited);
  - manage relevant assets (as newly defined[7]); or
  - provide insurance or comparable guarantees.
- Consider whether to diversify their use of these third parties.
- Consider how to ensure relevant funds not held in designated safeguarding accounts are clearly identifiable, with the word 'safeguarding' used in the account name when possible.
- Request acknowledgement letters which put the bank or custodian on notice that they are holding relevant funds or assets and how they should be treated.
- Promptly allocate relevant funds to individual consumers.
- Where safeguarding by investing relevant funds in secure, liquid assets, ensure that (i) there is a suitable spread of investments; (ii) assets are selected in line with an appropriate liquidity strategy and credit risk policy; and (iii) any foreign exchange risks are prudently managed.[8]
- Where safeguarding by using the insurance guarantee method, decide whether to renew or extend the policy at least three months prior to its expiry and ensure there are no conditions on prompt payment. Firms using this method should also consider issues of operational risk, such as whether restrictions on access to funds, held outside a safeguarding account, could adversely impact the institution's short-term liquidity.

PROPOSALS FOR END-STATE RULES

The FCA proposes end-state rules in two areas: imposition of a statutory trust; and further strengthening of safeguarding practices. Firms would have twelve months from the date of the FCA's finalised policy to implement the requirements.

Statutory Trust

The proposed rules would impose a statutory trust over:

- relevant funds;
- secure, liquid assets that relevant funds are invested in;
- the rights and proceeds under insurance policies and guarantees; and

[7] The FCA proposes a new Glossary definition. At interim stage the term covers: 'assets held by a safeguarding institution for the purposes of regulation 21(2)(b) of the Electronic Money Regulations or regulation 23(6)(b) of the Payment Services Regulations.' This definition will change at end-state to replace references to the EMRs and PSRs to CASS 15.6.2R, and is also subject to further change following an upcoming FCA consultation on the rules relating to secure, liquid assets.
[8] Note, the FCA does not propose changes at the interim stage to the range of assets in which firms are permitted to invest.

- cheques and other payable instruments received for the execution of a payment transaction or purchase of electronic money.

The FCA is of the view in CP24/20 that, albeit that imposition of the statutory trust is a significant change to the existing regime, it would not require firms to make significant changes to the way that they protect funds. Some respondents to the consultation may wish to contradict the FCA on this point.

Further strengthening of safeguarding practices

The FCA proposes to build on some of the interim state rules and to introduce some new rules on issues that were not addressed in the interim phase:

- ***Segregation*** - Payments Firms that safeguard through the segregation method would be required to receive relevant funds directly into a designated safeguarding account with an approved bank or the Bank of England[9], unless: (i) the firm receives relevant funds as cash; or (ii) relevant funds are received either through a merchant acquirer or into an account that is held only to participate in a payment system. Unlike under the PSRs and EMRs, even if a Payments Firm does not hold relevant funds after the end of the business day following the day on which they were received, any such funds must be received directly into a designated safeguarding account, or, if received in an account with an acquirer or payment system, must be promptly, and no later than the end of the business day following the day the funds were credited to such account, paid into a designated safeguarding account.
- ***Template acknowledgement letters*** - Payments Firms would need to obtain/update acknowledgement letters to refer to the statutory trust and would be unable to hold cash or investments with the relevant bank/custodian unless a signed copy of the acknowledgment letter is provided by the relevant bank/custodian.
- ***Prudent segregation*** - Payments Firms would be permitted to pay their own funds into a designated safeguarding account to prevent a shortfall in relevant funds. These funds would become relevant funds subject to the trust.
- ***Unallocated relevant funds*** – The safeguarding rules require prompt allocation of relevant funds to individual clients, but where a Payments Firm is unable to identify whether funds belong to its consumers, it would be able treat those funds as relevant funds, marked as 'unallocated relevant funds' in its books and records. These funds would be subject to the trust.
- ***Unclaimed relevant funds*** – Payments Firms would still be required to safeguard unclaimed balances for at least 6 years but the terms of the statutory trust would give firms the option to gift unclaimed balances to charity[10] so long as certain conditions are met (and firms must unconditionally undertake to repay relevant funds over £25 for clients falling within the definition of 'customer' or £100 for other clients).

[9] Note: Payments Firms will still be able to have accounts with approved foreign credit institutions, including those in an OECD member state.
[10] Note that, unlike the rules relating to unclaimed client money, payment to a dormant assets fund is not currently possible - this would first require an amendment to the Dormant Assets Act 2022.

- ***Relevant funds*** - single asset pool – Where e-money firms are providing payment services unrelated to the issue of e-money, the FCA proposes to replace the existing requirement in the PSRs and EMRs that such firms hold funds relating to issuing e-money separately from those received for unrelated payment services. Instead, firms may safeguard funds in a single relevant funds bank account, subject to the diversification requirement introduced in the interim stage.
- ***Investing relevant funds in secure liquid assets*** – Assets purchased with relevant funds would be included in the statutory trust. Payments Firms investing in secure liquid assets would need to ensure they have necessary permissions to do so. Likely permissions needed would include: (i) permission to manage investments: (ii) permission to safeguard and administer investments – and compliance with CASS 6 Custody rules - if holding the assets; (iii) permissions relating to dealing in or arranging deals in investments. It is not clear yet whether the end state rules will amend the range of assets firms are able to invest in – the FCA plans a further consultation.
- ***Agents and distributors*** – A Payments Firm that has agents and distributors, and uses segregation, would be required either: (i) to receive relevant funds directly into its designated safeguarding account; or (ii) to conduct so-called 'agent and distributor segregation', by segregating an amount of its own funds, based on historical transaction data, equal to the maximum estimated value of relevant funds that would be held by agents or distributors (electronically or as cash). Funds segregated in this way would be relevant funds subject to the trust.

OUR INITIAL THOUGHTS ON THE PROPOSALS

For all Payments Firms, the consultation provides a window of opportunity to conduct a thorough review of their safeguarding practices to establish weaknesses and plan to remediate them. The implications of the FCA's proposals will vary widely across the sector, which the FCA notes now numbers more than 1,000 firms. We set out below our thoughts on some of the more interesting, challenging or impactful elements of the proposals, as well as aspects we think need more clarity from the FCA.

The statutory trust and protection of assets on insolvency

The FCA states that the imposition of the statutory trust will impose fiduciary duties on Payments Firms as trustees. Any funds, assets, or rights that are within the trust would fall outside the Payments Firm's general estate and so would not be available to other creditors on the firm's insolvency. The FCA considers that any shortfall could be made good through the well-established principles of tracing, rather than relying on the 'novel' approach set out in the judgment of the Court of Appeal in the case of *Ipagoo LLP*.[11]

The FCA is silent, beyond discussion of fiduciary duties, about other results of imposing a trust. Once the statutory trust is imposed, the institution holding relevant funds/assets would, as a trustee, be subject to general English law

[11] Ipagoo LLP [2022] EWCA Civ 302.

obligations applicable to a trustee and fiduciary, except to the extent limited by contract.

The proposal to impose a statutory trust on non-cash is extremely novel. The existing client money rules only impose a statutory trust over cash. Under the existing client money rules, even where client money is permitted to be invested in qualifying money market funds, any units in such funds are held under CASS 6 rather than under a statutory trust.

A statutory trust is not the only method to protect assets on insolvency, as determined by the Court of Appeal in *Ipagoo LLP*. Insolvency practitioners may well disagree that imposition of the statutory trust would necessarily have the effect of reducing costs and timing, not least as they have recently been provided with new tools in the form of the Payment and E-Money Special Administration Regime (PESAR) which was introduced in 2021[12] and has similar objectives of speeding up distribution to clients and reducing costs.

In CP24/20, the FCA acknowledges that use of the PESAR could provide such benefits and its cost benefit analysis (CBA) (which does not include the effects of the PESAR) may lead to the benefits in that analysis being over estimated. In some recent PESAR cases, for example, the main cause of delays has been attributable to problems relating to the identity of clients rather than the recovery of funds (e.g. *Xpress Money Services [2023]* EWHC 1120 (Ch), where customer details were limited to names and mobile phone numbers) and a pre-administration tracing exercise resulted in a reduction of almost 50% of the relevant $1m fund.

Statutory trust – status for anti-money laundering purposes

It is unclear from the consultation whether the statutory trust imposed under the new end-state CASS 15 will be registrable under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs), or whether it would be categorised as an exempt trust under Schedule 2 of the MLRs.

CASS 15 – Opt-outs

The proposed new CASS 15 chapter, while based on the existing CASS client money rules (with adaptations for the business of Payments Firms), does not provide any ability for firms to agree an opt-out from the rules for professional clients (as currently exists for non-MiFID business).

Acknowledgement letters

Firms would need to conduct a repapering exercise firstly to reflect the changes in the interim state and then to refer to the statutory trust at the end-state. In its CBA in CP24/20 the FCA considers that the cost of this would be 'negligible'. However, depending on the size of the firm, this exercise could easily be both time consuming and costly.

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[12] The Payment and Electronic Money Institution Insolvency (England and Wales) Rules 2021

Audit requirements

In CP24/20 the FCA proposes extension of the obligation to obtain a safeguarding audit report to all Payments Firms. The FCA notes that it did consider whether to exempt small EMIs from the requirement given the costs of the audits. However, it has decided against an exemption with the aim of maintaining parity across the sector and embedding a standardised approach to auditing requirements. An audit standard will be produced by the Financial Reporting Council and auditors would be required to specify which standard and guidance was used to carry out the audit.

One concern is how the rapidly expanding payments sector will all manage to obtain access to auditors that meet the requirements for the required skill resources and expertise, and whether audit costs would increase. This resembles issues previously faced by some cryptoasset firms in finding suitably knowledgeable firms to approve their financial promotions.

Individual accountability

The new requirement for Payments Firms to appoint a named individual responsible for safeguarding can be seen as one step closer to the roll out of the FCA's Senior Managers and Certification Regime (SM&CR) to Payments Firms, which would introduce new accountability and conduct requirements for individuals in key roles. Payments Firms are already required to have other accountable individuals – namely an MLRO and a Consumer Duty Champion. Whilst in CP24/20 the FCA does not discuss a full roll out of SM&CR to the payments sector, this is something it has previously indicated it is considering[13]. More recently, HM Treasury has also suggested extending SM&CR to financial market infrastructures (including payment systems)[14].

Investing in Secure Liquid Assets

Payments Firms will need to consider carefully whether they wish to incur the costs of applying for regulatory permissions for management and custody of investments, as well as for dealing or arranging deals in investments, and whether they wish to meet the ongoing administrative challenges of complying with regulatory obligations to maintain those permissions as FSMA-regulated firms.

The FCA notes in the CBA in CP24/20 that it considered whether investment activities carried out by Payments Firms should be exempt from the usual FSMA regime, but decided that this was not appropriate on the basis that the same activities should be subject to the same regulatory requirements.

As currently drafted, there seems to be some confusion in the sections of CP 24/20 and the draft end-state rules concerning a Payments Firm's holding of securities in which relevant funds are invested. It is suggested that as an alternative to a Payments Firm obtaining regulatory permission to safeguard and administer such securities, the Payments Firm could hold the securities with a custodian which has the necessary permission, but this is of course incorrect. Even if a Payments Firm were to delegate the holding of securities,

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[13] See FCA Perimeter Report 2020/2021 and FCA Perimeter Report 2022.

[14] See Senior Managers & Certification Regime: Financial Market Infrastructures: consultation response (June 2022).

the Payments Firm would continue to be the firm holding the securities under the statutory trust (albeit holding through its delegate), and would require necessary regulatory permissions to do so.

Diversification requirements

The FCA proposes stronger rules on diversification of third parties with which the firm holds, deposits, insures or guarantees relevant funds, as well as due diligence requirements. While due diligence and diversification should reduce the risk of shortfalls caused by a third party by ensuring that relevant funds are held at an appropriate institution, meeting these requirements could prove challenging at least for smaller Payments Firms, who may struggle to find providers. This problem could be compounded by the FCA's intention, as part of the end-state proposals, to limit (to designated safeguarding account providers) the range of firms that can provide safeguarding accounts.

The FCA provides guidance in Chapter 16 of its Approach document that FCA regulated credit institutions are required to comply with the provisions of regulation 105 of the PSRs, and provide PSPs with access to payment accounts services on an objective, non-discriminatory and proportionate basis.

However, in CP 24/20, the FCA notes, "*Some Payments Firms continue to experience difficulties accessing safeguarding accounts with credit institutions. This is in part due to the risk appetite of credit institutions. As a result, these Payments Firms may rely more on safeguarding through investing in secure liquid assets.*"

Diversification requirements for non-cash investments

It could be argued that the requirement to consider diversification for non-cash investments should be limited to assets above a certain threshold, to remove this obligation (and related administrative burden) where amounts held are relatively small. It is also unclear how firms should demonstrate that they have complied with the requirement to "consider" diversification if in practice they decide against diversifying.

Commingling of relevant funds in the Single Asset Pool

It is unclear whether the proposal that e-money firms may use a single designated safeguarded account for relevant funds arising from payment services as well as from e-money issuance could expose holders of e-money to greater risk of loss resulting from shortfalls in the asset pool.

Implications for cash management

Payments Firms may need to review their cash management practices to ensure that they align with the stricter segregation rules. Additionally, compliance with the enhanced rule set may require greater resource to be deployed to meet the stricter reconciliations and record-keeping obligations.

Finally, the requirements for investment of relevant funds in secure, liquid assets (which would then be subject to the statutory trust) constrains the types of investments firms can make, impacting their overall cash management strategies. Whilst there is no change of position at interim stage, firms will

need to be alert to any change following the outcome of the FCA's planned review of the range of secure liquid assets in which firms can invest.

Implications for existing payment flows

The FCA's end-state proposal for institutions to receive funds directly into a safeguarded account seems reasonable, since it resolves current potential confusion in the PSRs/EMRs regarding requirements for initial segregation prior to safeguarding. But this may impact existing payment flows, so will need to be considered carefully by relevant institutions.

CONCLUSION

It is clear that the FCA's proposals arise from a concern to ensure that funds underlying the payment obligations of Payments Firms are properly protected, but the new rules are based on the FCA's client money rules, which are themselves not entirely straightforward, and have developed over time in relation to a somewhat different context. It is therefore important that Payments Firms consider carefully how their current processes and business models will be affected by the proposals in CP 24/20 for both the interim state rules, and the end state rules, and make any concerns known to the FCA in as much detail as possible.

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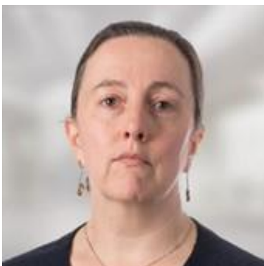

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