
ENGROSSED SUBSTITUTE SENATE BILL 5096

State of Washington

67th Legislature

2021 Regular Session

By Senate Ways & Means (originally sponsored by Senators Robinson, Hunt, Nguyen, and Wilson, C.; by request of Office of Financial Management)

READ FIRST TIME 02/18/21.

1 AN ACT Relating to investing in Washington families and creating
2 a more progressive tax system in Washington by enacting an excise tax
3 on the sale or exchange of certain capital assets; adding a new
4 section to chapter 82.04 RCW; adding a new chapter to Title 82 RCW;
5 creating new sections; and prescribing penalties.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 **Part I**

8 **Capital Gains Tax**

9 NEW SECTION. **Sec. 101.** (1) The legislature recognizes that a
10 tax system that is fair, balanced, and works for everyone is
11 essential to help all Washingtonians grow and thrive. But
12 Washington's tax system today is the most regressive in the nation
13 because it asks those making the least to pay the most as a
14 percentage of their income. Middle-income families in Washington pay
15 two to four times more in taxes, as a percentage of household income,
16 as compared to top earners in the state. Low-income Washingtonians
17 pay at least six times more than do our wealthiest residents. To
18 begin to rebalance the tax code, the legislature intends to enact an
19 excise tax on the sale of certain capital assets.

1 (2) The excise tax on capital gains is a tax on the one-time,
2 voluntary sale or exchange of a capital asset, not a tax on ownership
3 of the asset itself. This excise tax is paid only by those
4 individuals who engage in voluntary sales or exchanges of Washington
5 capital assets, either directly or indirectly through their ownership
6 interest in an entity that engages in voluntary sales or exchanges of
7 Washington capital assets, and is measured by the realization of
8 significant net gain on the aggregate of such transactions during the
9 taxable year. In order to protect against further regressive impacts
10 of the tax system, encourage the everyday investments that
11 Washingtonians of all income levels strive for, and support our
12 economy, this excise tax will not apply to capital gains realized by
13 certain sales and transfers.

14 (3) To help meet the state's obligations to its people, the
15 legislature dedicates the first \$350,000,000 in revenue collected
16 from this excise tax to the state's education legacy trust account.
17 This funding is critically needed to provide support for education,
18 especially early learning and child care, and to provide for the
19 economic security of low-income households who are struggling to
20 afford quality child care and preschool. Furthermore, the legislature
21 finds that increasing taxes on the wealthiest residents is only one-
22 half of the effort to rebalance the tax code. In an effort to both
23 reduce the tax burden on those earning the least and to account for
24 anticipated volatility in revenue collections from the capital gains
25 excise tax, revenue received above base levels will be deposited into
26 the taxpayer fairness account. Revenues deposited in this account
27 will be used to offset existing tax burdens via policies such as
28 funding of the working families' tax exemption.

29 NEW SECTION. **Sec. 102.** The definitions in this section apply
30 throughout this chapter unless the context clearly requires
31 otherwise.

32 (1) "Adjusted capital gain" means federal net long-term capital
33 gain:

34 (a) Plus any amount of long-term capital loss from a sale or
35 exchange that is exempt from the tax imposed in this chapter, to the
36 extent such loss was included in calculating federal net long-term
37 capital gain;

38 (b) Plus any amount of long-term capital loss from a sale or
39 exchange that is not allocated to Washington under section 108 of

1 this act, to the extent such loss was included in calculating federal
2 net long-term capital gain;

3 (c) Plus any amount of loss carryforward from a sale or exchange
4 that is not allocated to Washington under section 108 of this act, to
5 the extent such loss was included in calculating federal net long-
6 term capital gain;

7 (d) Less any amount of long-term capital gain from a sale or
8 exchange that is not allocated to Washington under section 108 of
9 this act, to the extent such gain was included in calculating federal
10 net long-term capital gain; and

11 (e) Less any amount of long-term capital gain from a sale or
12 exchange that is exempt from the tax imposed in this chapter, to the
13 extent such gain was included in calculating federal net long-term
14 capital gain.

15 (2) "Capital asset" has the same meaning as provided by Title 26
16 U.S.C. Sec. 1221 of the internal revenue code and also includes any
17 other property if the sale or exchange of the property results in a
18 gain that is treated as a long-term capital gain under Title 26
19 U.S.C. Sec. 1231 or any other provision of the internal revenue code.

20 (3) "Federal net long-term capital gain" means the net long-term
21 capital gain reportable for federal income tax purposes determined as
22 if Title 26 U.S.C. Secs. 55 through 59, 1400Z-1, and 1400Z-2 of the
23 internal revenue code did not exist.

24 (4) "Individual" means a natural person.

25 (5) "Internal revenue code" means the United States internal
26 revenue code of 1986, as amended, as of the effective date of this
27 section, or such subsequent date as the department may provide by
28 rule consistent with the purpose of this chapter.

29 (6) "Long-term capital asset" means a capital asset that is held
30 for more than one year.

31 (7) "Long-term capital gain" means gain from the sale or exchange
32 of a long-term capital asset.

33 (8) "Long-term capital loss" means a loss from the sale or
34 exchange of a long-term capital asset.

35 (9) "Real estate" has the same meaning as in RCW 82.45.032,
36 except that real estate does not include an individual's ownership
37 interest or beneficial interest in an entity which itself owns an
38 interest in real property located in this state for the purposes of
39 this chapter.

40 (10)(a) "Resident" means an individual:

1 (i) Who is domiciled in this state during the taxable year,
2 unless the individual (A) maintained no permanent place of abode in
3 this state during the entire taxable year, (B) maintained a permanent
4 place of abode outside of this state during the entire taxable year,
5 and (C) spent in the aggregate not more than 30 days of the taxable
6 year in this state; or

7 (ii) Who is not domiciled in this state during the taxable year,
8 but maintained a place of abode and was physically present in this
9 state for more than 183 days during the taxable year.

10 (b) For purposes of this subsection, "day" means a calendar day
11 or any portion of a calendar day.

12 (c) An individual who is a resident under (a) of this subsection
13 is a resident for that portion of a taxable year in which the
14 individual was domiciled in this state or maintained a place of abode
15 in this state.

16 (11) "Taxable year" means the taxpayer's taxable year as
17 determined under the internal revenue code.

18 (12) "Taxpayer" means an individual subject to tax under this
19 chapter.

20 (13) "Washington capital gains" means an individual's adjusted
21 capital gain less \$250,000, as adjusted annually under section 115 of
22 this act, for each return filed under this chapter.

23 NEW SECTION. **Sec. 103.** (1) Beginning January 1, 2022, an excise
24 tax is imposed on the sale or exchange of long-term capital assets.
25 Only individuals are subject to payment of the tax, which equals
26 seven percent multiplied by an individual's Washington capital gains.

27 (2) If an individual's Washington capital gains are less than
28 zero for a taxable year, no tax is due under this section and no such
29 amount is allowed as a carryover for use in the calculation of that
30 individual's adjusted capital gain, as defined in section 102(1) of
31 this act, for any taxable year. To the extent that a loss
32 carryforward is included in the calculation of an individual's
33 federal net long-term capital gain and that loss carryforward is
34 directly attributable to losses from sales or exchanges allocated to
35 this state under section 108 of this act, the loss carryforward is
36 included in the calculation of that individual's adjusted capital
37 gain for the purposes of this chapter. An individual may not include
38 any losses carried back for federal income tax purposes in the

1 calculation of that individual's adjusted capital gain for any
2 taxable year.

3 (3) (a) The tax imposed in this section applies to the sale or
4 exchange of long-term capital assets owned by the taxpayer, whether
5 the taxpayer was the legal or beneficial owner of such assets at the
6 time of the sale or exchange. The tax applies when the Washington
7 capital gains are recognized by the taxpayer in accordance with this
8 chapter.

9 (b) For purposes of this chapter:

10 (i) An individual is considered to be a beneficial owner of long-
11 term capital assets held by an entity that is a pass-through or
12 disregarded entity for federal tax purposes, such as a partnership,
13 limited liability company, S corporation, or grantor trust, to the
14 extent of the individual's ownership interest in the entity as
15 reported for federal income tax purposes.

16 (ii) A nongrantor trust is deemed to be a grantor trust if the
17 trust does not qualify as a grantor trust for federal tax purposes,
18 and the grantor's transfer of assets to the trust is treated as an
19 incomplete gift under Title 26 U.S.C. Sec. 2511 of the internal
20 revenue code and its accompanying regulations. A grantor of such
21 trust is considered the beneficial owner of the capital assets of the
22 trust for purposes of the tax imposed in this section and must
23 include any long-term capital gain or loss from the sale or exchange
24 of a capital asset by the trust in the calculation of that
25 individual's adjusted capital gain, if such gain or loss is allocated
26 to this state under section 108 of this act.

27 NEW SECTION. **Sec. 104.** This chapter does not apply to the sale
28 or exchange of:

29 (1) All real estate;

30 (2) A controlling interest in an entity only to the extent that
31 any long-term capital gain or loss from such sale or exchange is
32 directly attributable to the entity's interest in real property and
33 the sale or exchange was subject to tax under chapter 82.45 RCW. The
34 department is not bound by the parties' agreement as to the
35 allocation of consideration or fair market value, if such allocation
36 or fair market value does not reflect the fair market value of the
37 real property. For purposes of this subsection (2), "controlling
38 interest" has the same meaning as in RCW 82.45.033;

1 (3) Assets held under a retirement savings account under Title 26
2 U.S.C. Sec. 401(k) of the internal revenue code, a tax-sheltered
3 annuity or custodial account described in Title 26 U.S.C. Sec. 403(b)
4 of the internal revenue code, a deferred compensation plan under
5 Title 26 U.S.C. Sec. 457(b) of the internal revenue code, an
6 individual retirement account or individual retirement annuity
7 described in Title 26 U.S.C. Sec. 408 of the internal revenue code, a
8 Roth individual retirement account described in Title 26 U.S.C. Sec.
9 408A of the internal revenue code, an employee defined contribution
10 program, an employee defined benefit plan, or a similar retirement
11 savings vehicle;

12 (4) Assets pursuant to, or under imminent threat of, condemnation
13 proceedings by the United States, the state or any of its political
14 subdivisions, or a municipal corporation;

15 (5) Cattle, horses, or breeding livestock if for the taxable year
16 of the sale or exchange, more than 50 percent of the taxpayer's gross
17 income for the taxable year, including from the sale or exchange of
18 capital assets, is from farming or ranching;

19 (6) Property depreciable under Title 26 U.S.C. Sec. 167(a)(1) of
20 the internal revenue code, or that qualifies for expensing under
21 Title 26 U.S.C. Sec. 179 of the internal revenue code;

22 (7) Timber, timberland, or the receipt of Washington capital
23 gains as dividends and distributions from real estate investment
24 trusts derived from gains from the sale or exchange of timber and
25 timberland. "Timber" means forest trees, standing or down, on
26 privately or publicly owned land, and includes Christmas trees and
27 short-rotation hardwoods. The sale or exchange of timber includes the
28 cutting or disposal of timber qualifying for capital gains treatment
29 under Title 26 U.S.C. Sec. 631(a) or (b) of the internal revenue
30 code; and

31 (8) Goodwill received from the sale of an auto dealership
32 licensed under chapter 46.70 RCW whose activities are subject to
33 chapter 46.96 RCW.

34 NEW SECTION. **Sec. 105.** The tax imposed under this chapter is in
35 addition to any other taxes imposed by the state or any of its
36 political subdivisions, or a municipal corporation, with respect to
37 the same sale or exchange, including the taxes imposed in, or under
38 the authority of, chapter 82.04, 82.08, 82.12, 82.14, 82.45, or 82.46
39 RCW.

1 NEW SECTION. **Sec. 106.** In computing tax, there may be deducted
2 from the measure of tax amounts that the state is prohibited from
3 taxing under the Constitution of this state or the Constitution or
4 laws of the United States.

5 NEW SECTION. **Sec. 107.** (1) In computing tax under this chapter
6 for a taxable year, a taxpayer may deduct from the measure of tax the
7 amount of adjusted capital gain derived in the taxable year from the
8 sale of substantially all of the fair market value of the assets of,
9 or the transfer of substantially all of the taxpayer's interest in, a
10 qualified family-owned small business, to the extent that such
11 adjusted capital gain would otherwise be included in the taxpayer's
12 Washington capital gains.

13 (2) For purposes of this section, the following definitions
14 apply:

15 (a) "Assets" means real property and personal property, including
16 tangible personal property and intangible property.

17 (b) "Family" means the same as "member of the family" in RCW
18 83.100.046.

19 (c) (i) "Materially participated" means an individual was involved
20 in the operation of a business on a basis that is regular,
21 continuous, and substantial.

22 (ii) The term "materially participated" must be interpreted
23 consistently with the applicable treasury regulations for Title 26
24 U.S.C. Sec. 469 of the internal revenue code, to the extent that such
25 interpretation does not conflict with any provision of this section.

26 (d) "Qualified family-owned small business" means a business:

27 (i) In which the taxpayer held a qualifying interest for at least
28 eight years immediately preceding the sale or transfer described in
29 subsection (1) of this section;

30 (ii) In which either the taxpayer or members of the taxpayer's
31 family, or both, materially participated in operating the business
32 for at least five of the eight years immediately preceding the sale
33 or transfer described in subsection (1) of this section, unless such
34 sale or transfer was to a qualified heir; and

35 (iii) That had worldwide gross revenue of \$10,000,000 or less in
36 the 12-month period immediately preceding the sale or transfer
37 described in subsection (1) of this section. The worldwide gross
38 revenue amount under this subsection (2)(d)(iii) shall be adjusted
39 annually as provided in section 115 of this act.

1 (e) "Qualified heir" means a member of the taxpayer's family.

2 (f) "Qualifying interest" means:

3 (i) An interest as a proprietor in a business carried on as a
4 sole proprietorship; or

5 (ii) An interest in a business if at least:

6 (A) Fifty percent of the business is owned, directly or
7 indirectly, by any combination of the taxpayer or members of the
8 taxpayer's family, or both;

9 (B) Thirty percent of the business is owned, directly or
10 indirectly, by any combination of the taxpayer or members of the
11 taxpayer's family, or both, and at least:

12 (I) Seventy percent of the business is owned, directly or
13 indirectly, by members of two families; or

14 (II) Ninety percent of the business is owned, directly or
15 indirectly, by members of three families.

16 (g) "Substantially all" means at least 90 percent.

17 NEW SECTION. **Sec. 108.** (1) For purposes of the tax imposed
18 under this chapter, long-term capital gains and losses are allocated
19 to Washington as follows:

20 (a) Long-term capital gains or losses from the sale or exchange
21 of tangible personal property are allocated to this state if the
22 property was located in this state at the time of the sale or
23 exchange. Long-term capital gains or losses from the sale or exchange
24 of tangible personal property are also allocated to this state even
25 though the property was not located in this state at the time of the
26 sale or exchange if:

27 (i) The property was located in the state at any time during the
28 taxable year in which the sale or exchange occurred or the
29 immediately preceding taxable year;

30 (ii) The taxpayer was a resident at the time the sale or exchange
31 occurred; and

32 (iii) The taxpayer is not subject to the payment of an income or
33 excise tax legally imposed on the long-term capital gains or losses
34 by another taxing jurisdiction.

35 (b) Long-term capital gains or losses derived from intangible
36 personal property are allocated to this state if the taxpayer was
37 domiciled in this state at the time the sale or exchange occurred.

38 (2) (a) A credit is allowed against the tax imposed in section 103
39 of this act equal to the amount of any legally imposed income or

1 excise tax paid by the taxpayer to another taxing jurisdiction on
2 capital gains derived from capital assets within the other taxing
3 jurisdiction to the extent such capital gains are included in the
4 taxpayer's Washington capital gains. The amount of credit under this
5 subsection may not exceed the total amount of tax due under this
6 chapter, and there is no carryback or carryforward of any unused
7 credits.

8 (b) As used in this section, "taxing jurisdiction" means a state
9 of the United States other than the state of Washington, the District
10 of Columbia, the Commonwealth of Puerto Rico, any territory or
11 possession of the United States, or any foreign country or political
12 subdivision of a foreign country.

13 NEW SECTION. **Sec. 109.** (1)(a) Except as otherwise provided in
14 this section or RCW 82.32.080, taxpayers owing tax under this chapter
15 must file, on forms prescribed by the department, a return with the
16 department on or before the date the taxpayer's federal income tax
17 return for the taxable year is required to be filed.

18 (b)(i) Except as provided in (b)(ii) of this subsection (1),
19 returns and all supporting documents must be filed electronically
20 using the department's online tax filing service or other method of
21 electronic reporting as the department may authorize.

22 (ii) The department may waive the electronic filing requirement
23 in this subsection for good cause as provided in RCW 82.32.080.

24 (2) In addition to the Washington return required to be filed
25 under subsection (1) of this section, taxpayers owing tax under this
26 chapter must file with the department on or before the date the
27 federal return is required to be filed a copy of the federal income
28 tax return along with all schedules and supporting documentation.

29 (3) Each taxpayer required to file a return under this section
30 must, without assessment, notice, or demand, pay any tax due thereon
31 to the department on or before the date fixed for the filing of the
32 return, regardless of any filing extension. The tax must be paid by
33 electronic funds transfer as defined in RCW 82.32.085 or by other
34 forms of electronic payment as may be authorized by the department.
35 The department may waive the electronic payment requirement for good
36 cause as provided in RCW 82.32.080. If any tax due under this chapter
37 is not paid by the due date, interest and penalties as provided in
38 chapter 82.32 RCW apply to the deficiency.

1 (4) The department may by rule require that certain individuals
2 and other persons file, at times and on forms prescribed by the
3 department, informational returns for any period.

4 (5) If a taxpayer has obtained an extension of time for filing
5 the federal income tax return for the taxable year, the taxpayer is
6 entitled to the same extension of time for filing the return required
7 under this section if the taxpayer provides the department, before
8 the due date provided in subsection (1) of this section, the
9 extension confirmation number or other evidence satisfactory to the
10 department confirming the federal extension. An extension under this
11 subsection for the filing of a return under this chapter is not an
12 extension of time to pay the tax due under this chapter.

13 (6) (a) If any return due under subsection (1) of this section,
14 along with a copy of the federal income tax return, is not filed with
15 the department by the due date or any extension granted by the
16 department, the department must assess a penalty in the amount of
17 five percent of the tax due for the taxable year covered by the
18 return for each month or portion of a month that the return remains
19 unfiled. The total penalty assessed under this subsection may not
20 exceed 25 percent of the tax due for the taxable year covered by the
21 delinquent return. The penalty under this subsection is in addition
22 to any penalties assessed for the late payment of any tax due on the
23 return.

24 (b) The department must waive or cancel the penalty imposed under
25 this subsection if:

26 (i) The department is persuaded that the taxpayer's failure to
27 file the return by the due date was due to circumstances beyond the
28 taxpayer's control; or

29 (ii) The taxpayer has not been delinquent in filing any return
30 due under this section during the preceding five calendar years.

31 NEW SECTION. **Sec. 110.** (1) If the federal income tax
32 liabilities of both spouses are determined on a joint federal return
33 for the taxable year, they must file a joint return under this
34 chapter.

35 (2) Except as otherwise provided in this subsection, if the
36 federal income tax liability of either spouse is determined on a
37 separate federal return for the taxable year, they must file separate
38 returns under this chapter. State registered domestic partners may

1 file a joint return under this chapter even if they filed separate
2 federal returns for the taxable year.

3 (3) In any case in which a joint return is filed under this
4 section, the liability of each spouse or state registered domestic
5 partner is joint and several, unless:

6 (a) The spouse is relieved of liability for federal tax purposes
7 as provided under Title 26 U.S.C. Sec. 6015 of the internal revenue
8 code; or

9 (b) The department determines that the domestic partner qualifies
10 for relief as provided by rule of the department. Such rule, to the
11 extent possible without being inconsistent with this chapter, must
12 follow Title 26 U.S.C. Sec. 6015.

13 NEW SECTION. **Sec. 111.** Except as otherwise provided by law and
14 to the extent not inconsistent with the provisions of this chapter,
15 chapter 82.32 RCW applies to the administration of taxes imposed
16 under this chapter.

17 NEW SECTION. **Sec. 112.** (1) Any taxpayer who knowingly attempts
18 to evade payment of the tax imposed under this chapter is guilty of a
19 class C felony as provided in chapter 9A.20 RCW.

20 (2) Any taxpayer who knowingly fails to pay tax, make returns,
21 keep records, or supply information, as required under this title, is
22 guilty of a gross misdemeanor as provided in chapter 9A.20 RCW.

23 NEW SECTION. **Sec. 113.** A new section is added to chapter 82.04
24 RCW to read as follows:

25 (1) To avoid taxing the same sale or exchange under both the
26 business and occupation tax and capital gains tax, a credit is
27 allowed against taxes due under this chapter on a sale or exchange
28 that is also subject to the tax imposed under section 103 of this
29 act. The credit is equal to the amount of tax imposed under this
30 chapter on such sale or exchange.

31 (2) The credit may be used against any tax due under this
32 chapter.

33 (3) The credit under this section is earned in regards to a sale
34 or exchange, and may be claimed against taxes due under this chapter,
35 for the tax reporting period in which the sale or exchange occurred.
36 The credit claimed for a tax reporting period may not exceed the tax
37 otherwise due under this chapter for that tax reporting period.

1 Unused credit may not be carried forward or backward to another tax
2 reporting period. No refunds may be granted for unused credit under
3 this section.

4 (4) The department must apply the credit first to taxes deposited
5 into the general fund. If any remaining credit reduces the amount of
6 taxes deposited into the workforce education investment account
7 established in RCW 43.79.195, the department must notify the state
8 treasurer of such amounts monthly, and the state treasurer must
9 transfer those amounts from the general fund to the workforce
10 education investment account.

11 NEW SECTION. **Sec. 114.** (1) All taxes, interest, and penalties
12 collected under this chapter shall be distributed as follows:

13 (a) The first \$350,000,000 collected each fiscal year shall be
14 deposited into the education legacy trust account created in RCW
15 83.100.230;

16 (b) The next \$100,000,000 collected each fiscal year shall be
17 deposited into the general fund; and

18 (c) Any remainder collected each fiscal year shall be deposited
19 into the taxpayer fairness account hereby created in the state
20 treasury.

21 (2) The amounts specified under subsection (1)(a) and (b) of this
22 section shall be adjusted annually as provided under section 115 of
23 this act.

24 NEW SECTION. **Sec. 115.** (1) Beginning December 2023 and each
25 December thereafter, the department must adjust the applicable
26 amounts by multiplying the current applicable amounts by one plus the
27 percentage by which the most current consumer price index available
28 on December 1st of the current year exceeds the consumer price index
29 for the prior 12-month period, and rounding the result to the nearest
30 \$1,000. If an adjustment under this subsection (1) would reduce the
31 applicable amounts, the department must not adjust the applicable
32 amounts for use in the following year. The department must publish
33 the adjusted applicable amounts on its public website by December
34 31st. The adjusted applicable amounts calculated under this
35 subsection (1) take effect for taxes due and distributions made, as
36 the case may be, in the following calendar year.

37 (2) For purposes of this section, the following definitions
38 apply:

- 1 (a) "Applicable amounts" means:
2 (i) The threshold exclusion under section 102(13) of this act;
3 (ii) The worldwide gross revenue amount under section 107 of
4 this act; and
5 (iii) The distribution amounts provided in section 114 of this
6 act.
7 (b) "Consumer price index" means the consumer price index for all
8 urban consumers, all items, for the Seattle area as calculated by the
9 United States bureau of labor statistics or its successor agency.
10 (c) "Seattle area" means the geographic area sample that includes
11 Seattle and surrounding areas.

12 **Part II**
13 **Miscellaneous Provisions**

14 NEW SECTION. **Sec. 201.** The provisions of RCW 82.32.805 and
15 82.32.808 do not apply to this act.

16 NEW SECTION. **Sec. 202.** Sections 101 through 112, 114, and 115
17 of this act constitute a new chapter in Title 82 RCW.

18 NEW SECTION. **Sec. 203.** (1) If a court of competent
19 jurisdiction, in a final judgment not subject to appeal, adjudges
20 section 103 of this act unconstitutional, or otherwise invalid, in
21 its entirety, section 113 of this act is null and void in its
22 entirety. Any credits previously claimed under section 113 of this
23 act must be repaid within 30 days of the department of revenue's
24 notice to the taxpayer of the amount due.

25 (2) If the taxpayer fails to repay the credit by the due date,
26 interest and penalties as provided in chapter 82.32 RCW apply to the
27 deficiency.

28 NEW SECTION. **Sec. 204.** If any provision of this act or its
29 application to any person or circumstance is held invalid, the
30 remainder of the act or the application of the provision to other
31 persons or circumstances is not affected.

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