

Product Liability - USA

New Law Expands Consumer Product Safety Regulation

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Introduction

In August 2008 President George Bush signed the Consumer Product Safety Improvement Act of 2008 into law. It is the most sweeping revision of consumer product safety law since 1972, when the original Consumer Product Safety Act (CPSA) came into force. The new act is Congress's response to a wave of product recalls in 2007, the most highly publicized of which involved recalls of imported toys containing lead paint. The act focuses on children's products, but also goes beyond the regulation of children's toys and products. Virtually all consumer products made in, imported into or exported from the United States are affected. This update highlights some of the act's most important provisions.

The Consumer Product Safety Commission is the independent federal agency charged with protecting the public from unreasonable risks of harm involving over 15,000 types of consumer product. 'Consumer products' are defined in the Consumer Product Safety Act as any article or component part that is produced or distributed for sale to a consumer for use in or around a household, residence, school or in recreation. Consumer products do not include:

- tobacco products;
- motor vehicles or motor vehicle equipment;
- pesticides;
- firearms and ammunition;
- aircraft;
- boats;
- drugs;
- medical devices;
- cosmetics; or
- food.(1)

The act expands the commission's authority and resources and affects manufacturers, importers, distributors and sellers of consumer products by:

- expanding the commission's jurisdiction and affording it new powers to enforce the requirements of the act;
- increasing both civil and criminal penalties for violations;
- allowing the seizure and destruction of non-compliant products; and
- allowing states to file civil actions enforcing consumer product safety law.

Some provisions were effective immediately when the act came into force on August 14 2008. Other requirements are self-executing and became effective soon after enactment without commission action. Still other requirements are dependent upon commission rulemakings or other action. Congress has mandated an aggressive and

expedited schedule with which the commission must comply. Much commission activity implementing the act will take place in the 12 months following the enactment.

Both the self-executing provisions and the commission-initiated actions affect everyone conducting business with consumer products. The act expands the range of regulated products in several sections beyond products that are subject to consumer product safety rules under the Consumer Product Safety Act to products that are subject to a similar rule, ban, standard or regulation under any other commission-enforced act.⁽²⁾ Children's products are subject to even more strenuous regulation and require independent third-party testing, permanent tracking labels and other mandatory actions. The maximum penalties for committing a prohibited act have increased to \$100,000 for a single violation and to \$15 million for a related series of violations. Criminal penalties now include up to five years in prison, increased fines and forfeiture of assets. Finally, Congress has authorized significantly increased funding to allow the commission to enforce these powerful provisions against non-compliant manufacturers, importers and others.

Scope

The act's primary focuses are improving the safety of children's products and enhancing the commission's effectiveness.

Title I of the act sets out requirements involving children's products. Title II expands the commission's scope, resources and enforcement tools to fulfil the aims of the act. The act is expansive and the commission's acting chairman describes it as "incredibly complex". Manufacturers, importers, distributors and retailers of consumer products will need to understand the act, its implementing regulations and how they apply to consumer products.

Title I: Children's Product Safety

Title I targets safety issues relating to children's toys and products. The act defines a 'children's product' as a consumer product designed or intended primarily for children aged 12 or younger.⁽³⁾ The commission takes into account several factors when deciding whether a product is deemed a children's product, including:

- the age of the intended user, as determined by the manufacturer;
- the age of the consumers to whom the product is marketed;
- the common consumer understanding of the product's intended age use; and
- the age determination guidelines used by the commission's staff.

Key features of Title I include:

- bans on lead and phthalates⁽⁴⁾ in children's toys and childcare articles;
- mandatory third-party testing and certification for children's products;
- permanent tracking labels on children's products;
- expanded requirements for the advertising of certain toys and games on the Internet and in the printed media; and
- adoption of an ASTM (American Society for Testing and Materials) voluntary toy safety standard as a mandatory consumer product safety rule.

Lead limitations

Section 101 of the act creates new limitations on the amount of lead contained in children's products, as well as the amount of lead in paint applied to those products. This section treats any children's product containing more than 600 parts per million (ppm) of lead as a banned, hazardous substance under the Federal Hazardous Substances Act. The 600ppm limit will come into effect without further commission action on February 10 2009. The limit is automatically reduced to 300ppm on August 14 2009. It is finally reduced to 100ppm on August 14 2011, unless the commission determines that this limit is not technologically feasible for a product or product category.

The act excludes from the ban component parts of children's products where the lead is 'inaccessible'. A component part will be considered inaccessible if it is sealed by a covering or case that prevents physical exposure through a child's foreseeable use and abuse of the product (ie, whether the lead in a product is biologically available). Within a year of enactment the commission will effect a rule on what component parts may be considered inaccessible. The act also directs the commission to consider whether it is technologically feasible for certain electronic devices, including those that contain batteries, to comply with the lead limitations. The commission is required to issue related regulations in this regard.

The limits on lead in paint applied to children's products are even more restrictive. On August 14 2009 the permissible limits of lead in paint will be reduced from 0.06% to 0.009%. These limits may be reduced further if the commission determines that a

lower amount of lead is technologically feasible.⁽⁵⁾ Restrictions on lead and lead in paint apply retroactively to all products in inventories or on store shelves on February 10 2009, not just to products manufactured after that date.⁽⁶⁾

Mandatory certification and independent testing

Section 102 requires certification of independent third-party testing for any children's product that is subject to a children's product safety rule. Manufacturers and private labellers of such products must submit representative samples to independent laboratories. Based on this testing, the manufacturer or private labeller must certify that the product complies with all applicable children's product safety rules.

Either the commission or an independent, commission-appointed accreditation organization must have previously accredited the testing laboratory. The laboratory is referred to in the act as a 'third-party conformity assessment body'. It must be independent and neither affiliated with nor unduly influenced by the manufacturer or government body. A manufacturer may use its own in-house testing facilities for certification if the commission finds that the facility has established the appropriate procedures to protect against undue influence by the manufacturer, private labeller or other interested party.

The commission must first accredit third-party laboratories before dates for required certification can be set. Usually the commission will publish notice of the requirements for the accreditation of testing bodies 90 days before third-party testing is required. For example, the act required the commission to publish accreditation procedures for the testing of lead paint by September 2008. Third-party testing of lead paint was then required 90 days later, in December 2008.⁽⁷⁾ The schedule for third-party testing requirements is expedited. It is expected that certification and independent testing will be required as follows:

- for cribs and pacifiers in January 2009;
- for small parts that present choking a hazard in February 2009;
- for children's metal jewellery in March 2009; and
- for baby bouncers, walkers and jumpers in June 2009.

In addition to the third-party testing requirements for children's products, Section 102 mandates a general conformity certification for manufacturers, private labellers and importers⁽⁸⁾ of consumer products. The general conformity certification requirement applies to all products that are subject to any consumer product safety rule under the Consumer Product Safety Act. It also applies to products subject to any similar rule, ban, standard or regulation under another commission-enforced act and that are imported for consumption or warehousing, or distributed in commerce. The general conformity certification need not be based on third-party testing. However, each manufacturer, private labeller or importer of a consumer product covered by Section 102 must certify that the product has been tested or is subject to a reasonable testing programme and complies with all applicable consumer product safety rules.⁽⁹⁾

Section 102 is expansive, but must be complied with by November 12 2008. Under the general conformity requirement, manufacturers and others must determine what bans, rules, standards and regulations apply to their products, then implement a reasonable testing programme to ensure compliance. Finally, they must produce a certificate that meets the requirements of the act.

The certificate must identify the manufacturer or private labeller issuing the certificate, as well as the testing laboratory upon whose testing the certificate depends. The certificate must include at least the date and place of manufacturing and testing and contact information for the individual responsible for maintaining test result records. The certificate must be in English, but may contain the same content in another language.

The commission views the certification requirements as potent tools for enforcement. If a product has no certificate, it may not enter or move in commerce within the United States within the United States. Both imported and domestically manufactured products may be halted if they have no appropriate certifications. A certificate must accompany each product or shipment of the same product. Although one certificate can be used for a container of the same product, if that container is broken up into separate shipments, it is likely that a separate certificate will have to accompany each shipment of the product to each distributor and retailer. The act requires that a copy of the certificate be furnished to each distributor or retailer of the product. A certificate must be available to US customs agents or commission agents upon request. If they are uniquely identifiable and meet all necessary requirements, electronic certificates can be used to satisfy the act's requirements.

Tracking labels

By August 14 2009 manufacturers of children's products must have permanently labelled their products and packaging with identifying information for use in case of a recall. Under Section 103 manufacturers will be required to label all children's products

so that the manufacturer and the purchaser can identify the location and date of the item's production, including the batch, run number or other identifying characteristic.

The act limits the labelling requirement by including the phrase "to the extent practicable". Congress has recognized that it may be impractical to record a permanent marking on small toys or other small products manufactured without individual packaging. The commission will likely address practical labelling issues, including available size, type of permanent marking and use of codes, through rulemaking or other guidance. However, the requirement for tracking labels is self-executing. All children's products must have tracking labels by August 14 2009, regardless of whether commission rulemaking is completed.

This provision is broad in scope and powerful in application. The requirement for tracking labels applies to all children's products, such as clothing and shoes, not just to toys and other regulated products. The commission plans to use the tracking label not only for recalls, but also for enforcement purposes. If a children's product lacks a tracking label, importation of the product could be stopped.

Advertising requirements

The act expands the warnings about choking hazards that must appear in advertising for children's toys and games. Section 105 mandates that choking warnings required by the Federal Hazardous Substances Act be included in all Internet-based advertising of these products by December 12 2008. The warnings are also required to appear in advertisements in the printed media by February 10 2009. The warnings must appear if the advertisement provides a "direct means for the purchase or order of the product". This applies to both internet-based and printed media advertisements.

The preparation and publication of catalogues poses significant challenges for businesses regulated under this section. Catalogues are normally prepared and printed months in advance of their distribution. The last-minute addition of cautionary statements on choking hazards may be difficult or impossible for some publishers to effect. Thus, the act allows the commission to grant a grace period of up to 180 days during which distribution of non-compliant catalogues will not be considered a violation of this section.⁽¹⁰⁾ Publishers should be aware that 180 days is the maximum grace period that the act will allow.

Section 105 also requires communication between retailers and those providing the product to retailers. Manufacturers, importers, distributors or private labellers that provide covered products to retailers must inform the retailers if a precautionary statement is required. Retailers must also ask the manufacturer, importer, distributor or private labeller if a precautionary statement is required for a particular product. A retailer that requests such information and receives false or no information is not liable under the act.

Toy safety standards

Section 106 designates the ASTM International Standard⁽¹¹⁾ as the mandatory consumer product safety standard for toy safety issued by the commission. Manufacturers and others regulated by the act should understand that whatever the ASTM standard requires (with certain specified exemptions) will now become a mandatory consumer product safety standard. ASTM F963-07 is a detailed standard that relates to a number of possible hazards that may occur with the normal use or foreseeable abuse of a toy. By incorporating the ASTM International Standard in total (with discreet exceptions), the act will now require toy manufacturers to test their products for conformity with all the requirements in the ASTM International Standard. For example, as the ASTM standard bars paint that contains compounds such as arsenic, barium, cadmium, mercury and other heavy metals, toy manufacturers will soon have to test for these materials before certification under the general conformity provisions of the act. The effective date of this provision is February 10 2009.

Phthalate ban

Section 108 of the act bans the sale of children's toys or childcare articles that contain phthalates. This will be effective from February 10 2009. No children's toy or childcare article (ie, a consumer product designed or intended to facilitate sleep or the feeding of children aged three or younger, or to help such children with sucking or teething) may be manufactured for sale, offered for sale, distributed commercially or imported if it contains more than 0.1% of di-(2-ethylhexyl) phthalate, dibutyl phthalate or benzyl butyl phthalate. Effective from February 10 2009 and pending further study, childcare articles or children's toys that can be placed in a child's mouth and contain more than 0.1% of diisononyl phthalate, diisodecyl phthalate or di-n-octyl phthalate will be banned.

In recognition of the complexity of this issue, a commission-appointed Chronic Hazard Advisory Panel will examine the use of phthalates in children's toys and childcare articles. The panel will undertake a comprehensive examination of the use and effects of phthalates on health. The study is expected to take over two years to complete.

Title II: Consumer Product Safety Commission Reform

Funding

In the past, the commission's critics have claimed that the agency has ineffectively protected consumers due to inadequate funding. The act mandates increased funding and requires that the commission increase its number of full-time employees over the next five years. The act further mandates that personnel shall be assigned to US entry ports and to inspect overseas manufacturing facilities.⁽¹²⁾ This will result in stricter commission enforcement, especially at US borders.

Commission activity

Between August 14 2008 and August 14 2009 the act allows for two members of the five-member commission to constitute a quorum for the transaction of business, unless the two commissioners are affiliated with the same political party. In the past, the failure to obtain a quorum has hobbled the commission. This provision solves that immediate problem. As a result, the commission can be expected to initiate and implement a number of far-reaching regulations and rulemakings on an expedited basis.

The act allows the commission to develop a product safety rule without first commencing an advance notice of proposed rulemaking. The commission may thus move directly into rulemaking with no such notice. Congress has instructed the commission to issue a number of rulemakings affecting a variety of consumer products in a short timeframe. Considering the provisions that have streamlined the commission's regulatory process, as well as the wide range of actions the commission must complete in a short time, manufacturers, importers, distributors and retailers must carefully monitor the commission's actions during the coming year. The opportunity to comment on and potentially influence commission rulemakings will require diligence by manufacturers, importers and others affected by these regulations.

Recall provisions

Section 214 makes several revisions to the Consumer Product Safety Act. The first expands the scope of the key self-reporting provisions under Section 15(b). Previously, this section required manufacturers and others to inform the commission when a consumer product:

- failed to comply with a consumer product safety rule or standard;
- contained a defect that could create a substantial product hazard; or
- created an unreasonable risk of serious injury or death.

As with other provisions in the act, the scope of mandated self-reporting now includes all consumer products that fail to comply with any rule, regulation, standard or ban under the Consumer Product Safety Act or other commission-enforced act. This provision became effective on October 13 2008.

The commission can also (following an administrative hearing) order a manufacturer, distributor or retailer to:

- give public notice of the product defect;
- mail notice to each manufacturer, distributor or retailer of the product;
- mail notice to all persons to whom the product was known to be delivered or sold;
- cease distribution of the product;
- order all persons that transport, store, distribute or otherwise handle the product (or to whom the product has been transported) immediately to cease distribution of the product; and
- notify appropriate state and local public health officials.

Section 214 allows the commission to order these actions with no prior hearing if it deems a product to be "imminently hazardous"⁽¹³⁾ and has both notified the manufacturer and filed a district court action under Section 12 of the Consumer Product Safety Act.

Furthermore, a manufacturer, distributor or retailer may be required to post a "clear and conspicuous notice" on its website and any other website on which the product has been placed for sale. The commission may order announcements on the radio and television in languages other than English if the commission determines that a substantial number of affected consumers may not be reached otherwise.

The act eliminates the right of a party responsible for a defective product to choose whether it will repair the defect in the product, replace the product or offer a refund. The commission can order whichever corrective action it deems to be in the public interest. The act also requires that a plan for the corrective action be submitted to the commission for approval.

Section 214 imposes specific requirements for recall notices. Unless the commission deems it unnecessary, a recall notice must contain:

- detailed product information:

- a photograph of the product; and
- specific information with respect to the recall's cause and scope.

The commission is mandated to establish specific guidelines on what information will be helpful to consumers in identifying the product being recalled, understanding the hazard involved and understanding what remedy is available to the consumer. The commission must promulgate these guidelines by February 10 2009.

Information Provisions

Information sharing

Section 207 amends the previous law by allowing the commission to share commission-obtained information (ie, information that is identifiable to a particular manufacturer or private labeller) with any "federal, state, local or foreign government agency" upon agreement that such agency will maintain the material in confidence and use it only for official purposes. However, the commission cannot disclose to manufacturers or others information obtained from a foreign government agency or consumer complaints from a foreign source if the foreign agency or source has requested confidential treatment of the material. The act makes exceptions for confidential information where Congress requests it or a US court order its production.

Public Consumer Product Safety Database

A major change affecting consumers, manufacturers and others is the creation of a Public Consumer Product Safety Database. Section 212 establishes a database that will be publicly available, searchable and accessible through the commission's website. The database will include reports of harm relating to the use of consumer products regulated under the Consumer Product Safety Act and other products regulated by the commission. These reports may come from:

- consumers;
- local, state or federal government agencies;
- healthcare professionals;
- child service providers; or
- public safety entities.

The information may be submitted to the database electronically, by telephone or in hard copy. Each report must include:

- a description of the consumer product concerned;
- an identification of the manufacturer or private labeller of the consumer product;
- a description of the harm relating to the use of the product;
- contact information for the person submitting the report; and
- a verification by the person submitting the information that it is true and accurate to the best of the person's knowledge.

Within five days of the commission receiving a report, it will, "to the extent practicable", transmit the report to the manufacturer or private labeller for review. This allows the manufacturer or private labeller to locate any inaccuracies, as well as to identify any confidential information contained in the report. The manufacturer or private labeller may then request that the commission include its comments in the database or request that portions of the report be designated confidential. If the commission determines that the designated information is a trade secret, the commission will edit the information before the report enters the database. If the commission disagrees with the confidentiality request, it will notify the manufacturer or private labeller and include the information in the database. The manufacturer or private labeller then has the option of bringing an action in a federal court to seek removal of the information from the database. Ordinarily, comments will be included in the database at the same time as the underlying report is made available.

The timeframes in this section are compressed and require extreme diligence on the part of manufacturers to prevent either the inclusion of inaccurate information in the database or the publication of confidential information or trade secrets. The commission is required to make the report available on the database no later than 10 business days after the commission transmits it to the manufacturer. Manufacturers and private labellers should put in place procedures that will allow for the timely review of reports, thus preventing the distribution of inaccurate or confidential information on the Internet.

The commission must also correct erroneous information already in the database. If the commission determines that existing information (eg, a report or comment) in the database is "materially inaccurate or duplicative of information", the commission has seven business days to remove, amend or add information to correct the inaccuracies.

The commission has until February 10 2009 to submit to Congress a detailed plan for

establishing and maintaining the database. The commission will include plans for the database's operation and content, as well as plans for a public awareness campaign about the database. The database must be established no later than 18 months after the date on which the commission submits its plans to Congress.

Penalties

Increased civil penalties for violations of the act are now available to the commission. The penalty for individual violations is increased from \$8,000 to a maximum of \$100,000. The ceiling on civil penalties for a related series of violations is increased from \$1.825 million to \$15 million. The increases are effective on August 14 2009, or when the commission issues final regulations regarding factors to be used in assessing civil penalties.⁽¹⁴⁾

Criminal penalties for knowing and willful violations of the act, as well as the Federal Hazardous Substances Act and Flammable Fabrics Act, are increased from no more than one year's imprisonment to no more than five years' imprisonment. Criminal fines are also increased. Criminal penalties may now include forfeiture of assets associated with the violation. Directors, officers or agents no longer need to have knowledge of notice of non-compliance received by the corporation from the commission in order to be subject to criminal penalties.

Enforcement beyond the Commission

State attorneys general are now allowed to enforce the act through civil litigation and whistleblower protection is expanded for employees who report employers' violations of the act.

State attorneys general

As of August 14 2008 the state attorneys general are authorized to initiate civil actions against any manufacturer, distributor or entity violating the act. State attorneys general may seek injunctive relief to stop the sale of products that:

- violate commission-issued safety standards;
- are banned hazardous substances under the act; or
- are violations of other designated prohibited acts under Section 19 of the CPSA.

Before filing a lawsuit, the state must give the commission at least 30 days' notice, unless (i) the commission consents to an earlier initiation of the civil action, or (ii) the state determines that an immediate action is necessary because of a "substantial product hazard".⁽¹⁵⁾ The state cannot file a suit duplicative of an action filed by the commission except in limited circumstances.⁽¹⁶⁾

Whistleblower protection

Employees who provide information regarding a violation of the act (or related rules or regulations) or who testify or assist in a government proceeding are protected from dismissal or other forms of job discrimination. Section 219 permits an aggrieved employee to file a complaint with the secretary of labour, who may order reinstatement, compensatory damages, costs or other relief. The act also allows the complainant to file an action for the secretary of labour to review in an appropriate district court. The court may award injunctive relief and compensatory damages, including reinstatement with seniority, back pay with interest and special damages including costs and reasonable attorney fees. This section is effective from August 14 2008.

Import and Export Provisions

The commission has noted that the number of consumer products imported into the United States has doubled over the last decade and that imports account for a disproportionate number of recalls. Persons or entities engaged in the import or export of consumer products are now subject to significant regulation and scrutiny under various sections of the act. These provisions are in addition to the earlier referenced sections concerning labelling and certification, which apply to importers of consumer products into the United States.

Stockpiling

Stockpiling is defined as the manufacturing or importing of a consumer product in advance of the effective date of a new consumer product safety rule at a rate greater than the rate at which the product was produced or imported before the promulgation of that rule. This is prohibited under the Consumer Product Safety Act.⁽¹⁷⁾ As with other sections of the new act that expand the Consumer Product Safety Act's scope, Section 213 extends the prohibition against stockpiling to any rule under the Consumer Product Safety Act or similar rule, regulation, standard or ban under any other commission-enforced act.

Supply chain

Section 215 regulates the identification of manufacturers, importers, retailers and distributors in the supply chain. This section is likely the result of previous recalls of

defective products involving non-compliant subcontractors and others in the supply chain. In some cases, manufacturing work is subcontracted out to such a degree that the root manufacturer loses oversight of the manufacturing process. Manufacturers will need to enhance their due diligence when subcontracting work to comply with this provision. Section 215 requires that, upon the commission's request, every importer, retailer or distributor of a consumer product shall identify the manufacturer of the product by name, address or other requested identifying information to the extent that such information is known or can be readily determined. In addition, every manufacturer, upon the commission's request, must identify each retailer or distributor to which the manufacturer directly supplied a consumer product, as well as each subcontractor involved in the production of the product or from which the manufacturer obtained a component.

Exports

Section 221 permits the commission to prohibit the export from the United States of any consumer product not in conformity with an applicable consumer product safety rule, unless the importing country gives the commission appropriate notice of acceptance of the product. This section also includes a similar provision barring the export of fabric or related material that does not conform to the provisions of the Flammable Fabrics Act.

Product destruction

Section 223 mandates the destruction of non-compliant imported products. Products refused admission into the United States shall be destroyed unless, upon application of the owner, consignee, or importer of record, the secretary of the treasury permits the export of the product instead of destruction. The owner, consignee or importer of record has 90 days after such approval to export the product or it will be destroyed. This provision became effective on September 13 2008.

Comment

The new act has a broad and far-reaching scope. Due to the enhanced civil and criminal penalties and other potent enforcement tools, persons or entities that do not understand or carefully follow the provisions of the act may be subject to action by the commission. Manufacturers, distributors, sellers and importers of a wide range of consumer products must be cognizant of the provisions that relate to their products and take the appropriate steps to comply with this powerful new law.

Endnotes

(1) 15 USC 2052.

(2) In addition to the Consumer Product Safety Act, the commission enforces provisions under the Federal Hazardous Substances Act, the Flammable Fabrics Act and the Poison Prevention Packaging Act.

(3) Section 235(a).

(4) Phthalates are chemicals that, among other things, are used in plastics to make them more flexible.

(5) Section 101(f).

(6) In an advisory opinion dated September 12 2008, the commission's general counsel concluded that "products that contain lead above the limits set in the Consumer Product Safety Act cannot be sold from inventory or on store shelves after February 10 2009". Regardless of when they were manufactured, such products cannot be sold after the effective date of February 10 2009.

(7) The date from which third-party testing will be required depends on the date on which the commission publishes the accreditation rule in the *Federal Register*. Publication in the *Federal Register* is the official starting date for beginning the 90-day period, after which testing will be required. The commission published the accreditation procedure for lead paint in the Federal Register on September 22 2008. Third-party testing for lead paint is therefore required after December 21 2008.

(8) The CPSA defines the term 'manufacturer' to include any person who manufactures or imports a consumer product (15 USC 2052).

(9) The certification must specify each rule, ban, standard or regulation applicable to the product. It is insufficient to use generic language such as 'all applicable standards'.

(10) On October 6 2008 the commission published a preliminary finding in the Federal Register that a grace period of 180 days is warranted.

(11) F963-07, Consumer Safety Specifications for Toy Safety.

(12) Section 202.

(13) An 'imminently hazardous consumer product' is one that presents imminent and unreasonable risk of death, serious illness or severe personal injury (15 USC 2061).

(14) Section 217.

(15) In such circumstances a state can file a complaint "immediately after notifying the commission of the State's determination" (Section 218(b)(2)(c)).

(16) Section 218.

(17) 15 USC 2068(a)(7).

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