

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF LONG TERM CARE RESIDENTS PROTECTION
Statutory Authority: 29 Delaware Code, Section 7903(10) (29 **Del.C.** §7903(10))

FINAL

ORDER

3325 Financial Capability Reporting

NATURE OF THE PROCEEDINGS:

The Department of Health and Social Services ("Department") / Division of Long Term Care Residents Protection (DLTCRP) initiated proceedings to establish Regulation 3325 Financial Capability Reporting.

The Department's proceedings to establish the regulation was initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 16 **Delaware Code** Section 1124 and 31 **Delaware Code** Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the April 2015 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by April 30, 2015, at which time the Department would receive information, factual evidence, and public comment to the said proposed regulations.

SUMMARY OF PROPOSED AMENDMENT

The proposal establishes Regulation 3325 Financial Capability Reporting. The proposed change will establish the regulation as required by 16 **Del.C** §1124.

Statutory Authority

- 29 **Del.C.** Ch. 79, "Department of Health and Social Services."
- 16 **Del.C** §1124, "Staff training; issuance of regulations."

Background

DLCTRP is revising these regulations pursuant to 16 **Del.C** §1124.

Summary of Proposed Amendment

The proposal establishes regulation which detail the Department of Health and Social Services' authority to monitor the financial capability of licensed long term care (LTC) providers. It details the level of information that must be provided by the licensee, or potential licensee, under various circumstances. It also defines when and in what form the Department will require the submission of audited financial statements reporting the financial position and the results of operations of facilities by independent certified public accountants.

The comments we received resulted in revisions to the proposed regulation, some of them substantive. Therefore we published these again as proposed and accepted comments on them.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGES

The Governor's Advisory Council for Exceptional Citizens ("GACEC"), the State Council for Persons with Disabilities (SCPD) and Ezra P. Smith submitted comments and suggestions. DLTCRP has considered each comment and responds as follows:

Comment: The regulations apply only to facilities with 4 or more residents. This appears appropriate. Facilities with 3 or fewer residents would be subject to less prescriptive obligations.

Response: No response required.

Response: Revised as recommended.

Comment 2: There is tension between the statute and regulations in the context of the "look-back" period.

Response: The comment cites 16 **Del. C.** §1104(d) and its requirement for the license holder to file a sworn affidavit of a "satisfactory compliance history." The comment doesn't specify the section of the regulation causing the tension. At §5.3.6.1 through §5.3.6.3 of the regulation there are requirements for the submission of 3 years of historical financial data. If this is the section the comment is addressing it should be noted that we interpret "satisfactory compliance history" in the statute as compliance with the accepted standards of practice and compliance with established statute and regulations for long term care facilities which the license holder may have been a party to. It is not a review of historical financial data as is the case in the financial review of 3 years of historical data.

Comment 3: §5.3.5 refers to "local financial institution". The term is undefined. It is unclear if it refers to an institution that operates only in Delaware, an nearby institution operating in another state (e.g. Elkton, MD, West Chester, PA, etc.) or a national institution with a local branch in Delaware (e.g. Bank of America). It would be preferable to clarify the term.

Response: Revised as recommended.

Comment 4: The commenter assumes the State of Delaware has financial safeguards and auditing protocol which cover state owned facilities. Literally they would be required to comply with all of the requirements in the regulations. The Division may wish to exempt State or DHSS-owned facilities from the regulations.

Response: Revised as recommended.

Comment 5: In §14.2 the Division could consider adding a second supporting citation, i.e., to Title 16 **Del.C.** §1104(e)

Response: Revised as recommended.

Comment 6: Much of the regulation is duplicative of 24 **Del.C.** Chapter 1 and the Board of Accountancy rules and regulation. It is suggested that the Division remove all the detailed accounting and audit rules and replace them with "All audits shall be done in accordance with the provision of 24 **Del.C.** Chapter 1 and the Board of Accountancy rules and regulations."

Response: Revised as recommended.

Comment 7: The term "Independent Accountant" does not describe a class of accountants. Rather it refers to the relationship between the auditor and a specific client.

Response: The term Independent Auditor was deleted.

Comment 8: Membership in the AICPA is not mandatory and some have chosen not to join. Also, AICPA is not primarily responsible for the discipline of members of the profession.

Response: AICPA was replaced with "the Delaware Board of Accountancy" where appropriate.

Comment 9: The flood of documents proposed in the regulation may generate a flood of documents which may burden the staff of the Division.

Response: We accept this statement as true.

Comment 10: Audits are not inexpensive. Accordingly they should not be performed more frequently than is really necessary. In many situations annually may be considered sufficient.

Response: The Division recognizes the cost of audits. However, the regulation only requires audits; at initial application; upon change of ownership and when the Department determines that financial conditions exist which threaten the health and safety of a resident(s) as detailed in §7.

Comment 11: Interim Statements add to the paperwork burden. It may be best to avoid them if possible.

Response: The Division accepts this statement as true.

Comment 12: Audits of Personal Financial Statements are unusual and perhaps best avoided.

Response: Personal Financial Statements are only required when the Controlling Organization is a closely held privately owned entity without a parent or with a parent without a financial history.

Comment 13: Interpretation of financial statements of non-profits would require special attention if they are being compared to statements of profit making entities. Perhaps the regulations could make special provisions for non-profits.

Response: Financial statements from a facility will not be compared nor measured against those of another facility. The Division recognizes that circumstances can vary greatly.

Comment 14: Sec 5.3.5 The requirement that a deposit held by a bank seems bizarre. It is doubtful that any bank would agree to assume the responsibility for notification described here.

Response: We have imposed this in the past and not met with opposition.

Comment 15: Due dates are mentioned in several places it is suggested that the Division review these provisions with the managing partner of a local firm with a large audit practice on whether these dates and timelines are practical.

Response: The dates and time lines, as set forth, have been imposed in the past and have not met with opposition

Comment 16: Small Nursing Homes I can see why their financial strength would concern the Division. However caution is suggested lest the regulations force them to operate underground.

Response: The Division is developing a separate financial review process for small nursing homes (Family Care Homes).

Comment 17: The regulation appears more restrictive that the accountancy law provides.

Response: This has been corrected by the revision to the definition of "Accountant".

Comment 18: 24 **Del.C.** Chapter 1, § provides that both Certified Public Accountants and Licensed Accountants who are not CPAs may perform audits. Non-CPAs are limited to auditing "Nonpublic Entities".

Response: This has been corrected by the revision to the definition of "Accountant".

FINDINGS OF FACT:

The Department finds that the proposed changes set forth in the April 2015 *Register of Regulations* should be adopted, subject to the modification set forth above which is not substantive.

THEREFORE, IT IS ORDERED, that the proposed changes to 3325 Financial Capability Reporting, with the modification indicated herein, is adopted and shall be final effective July 11, 2015.

3325 Financial Capability Reporting

1.0 Authority

This regulation is promulgated and adopted pursuant to 29 Del.C. §7971(d).

2.0 Purpose and Scope

- 2.1 The purpose of this regulation is to detail the Department of Health and Social Services' authority to monitor the financial capability of licensed long term care (LTC) providers. It details the level of information that must be provided by the licensee, or potential licensee, under various circumstances. It also defines when and in what form the Department will require the submission of audited financial statements reporting the financial position and the results of operations of facilities by ~~[independent certified public]~~ accountants.
- 2.2 Every facility (as defined in 16 Del.C. §1102(4)) licensed to provide care for more than three (3) residents shall be subject to this regulation[, with the exception of state owned/operated facilities]. Facilities licensed to provide care for 3 or fewer residents shall be required to submit documentation demonstrating financial capability as required by the Department.
- 2.3 This regulation shall not prohibit, preclude or in any way limit DHSS from ordering, conducting or performing examinations of facilities under the rules and regulations of the Delaware Department of Health and Social Services and the practices and procedures of its regulations.

3.0 Definitions

"Accountant" means a ~~[practitioner of accounting or accountancy, which is the measurement, disclosure or provision of assurance about financial information that helps managers, investors, tax authorities and others make decisions about allocating resources]~~ Certified Public Accountant or Public Accountant in good standing, as those terms are defined at 24 Del.C. §102].

An "Affiliate" of, or person "Affiliated" with, means a person that directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control of the facility specified.

"Audited Financial Report" means and includes those items specified in subsection 7.4 of this regulation.

"Controlling Organization" means an entity that has a majority ownership interest in the licensed facility.

"Department" means the Delaware Department of Health and Social Services (DHSS).

"Division" means the DHSS Division of Long Term Care Residents Protection (DLTCRP).

"Domicile" means the location of the headquarters of the business.

"Facility" means a long term care facility as defined in 16 Del.C. §1102(4) which is licensed under 16 Del.C. §1103 to provide care and services to more than three (3) residents.

"Financial Distress" means a finding by the Department following the analysis of an audit, complaint or data indicating that the financial condition of the facility threatens the health or safety of a resident(s) of a facility.

"Generally Accepted Accounting Principles (GAAP)" means those principles that are recognized as the standard framework of guidelines for financial accounting.

~~["Independent Certified Public Accountant" means an independent certified public accountant or accounting firm in good standing with the American Institute of Certified Public Accountants (AICPA) and in all states in which he or she is licensed to practice.]~~

["Local Financial Institution" means a bank or other institution offering financial services with headquarters or branch offices in Delaware.]

"Material Adverse Change" means a change in the financial position of the facility or the controlling organization that threatens the health or safety of a resident(s) of a facility.

4.0 Requirements for the Submission of Financial Documents Upon Application for Renewal of a License.

- 4.1 All annual applications for renewal of a license shall be submitted at least thirty (30) calendar days prior to the expiration date of the license. The application must include a transmittal letter containing:
- 4.1.1 The type of ownership for the facility as well as senior, subordinate and affiliated organizations, i.e. proprietorship, partnership, corporation, Subchapter S Corporation or Limited Liability Company and;
- 4.1.2 The place of incorporation/registration, including names and addresses for all persons/entities with a 5% or greater ownership;

- 4.1.3 Year-end financial statement(s) – balance sheet, income statement, and statement of cash flows for the facility (most-recent year at year-end). If the year-end statement that is provided is three (3) or more months old when it is received by the Department a supplemental statement through the most recent month must be submitted. If the supplemental statement(s) is not prepared by independent accountants, it is to be attested to by the treasurer and a second officer;
- 4.1.4 A list of officers with addresses;
- 4.1.5 Organization charts with names and titles (personnel – facility and controlling organization);
- 4.1.6 Organization chart (corporate structure), delineating senior, subordinate and affiliated organizations, lines of authority/ownership, and domicile;
- 4.1.7 Facility address (domicile), all aliases and E.I.N. (employer identification number);
- 4.1.8 Information on the ownership of the real estate on which the facility is located including: name of the organization, address (domicile), E.I.N and principals with 5% or greater ownership;
- 4.1.9 Name, address (domicile, and E.I.N. of the management entity involved in the operation of the facility, if any;
- 4.1.10 All items submitted separately must bear the signed certification statement: “I certify, under penalty of perjury, the attached statement is true, complete and correct”;
- 4.1.11 Information on the controlling organization to include:
 - 4.1.11.1 The most recent year-end financial statements for the controlling organization;
 - 4.1.11.2 The most recent year-end personal financial statements of the proprietors or partners if the Controlling Organization is a proprietorship or partnership; and
 - 4.1.11.3 The most recent year-end personal financial statement for guarantors of a corporate transaction if the Controlling Organization is a proprietorship or partnership.
- 4.2 Any material adverse change to the facility’s financial position must be reported to the Department by the facility in writing within five (5) business days of its occurrence or discovery.

5.0 Requirements for the Submission of Financial Documents Upon Application for New/Change of Ownership

- 5.1 All applications for a license for a new facility or for a change of ownership for an existing facility shall include with the application a transmittal letter to include all the items listed in subsection 4.1 except 4.1.3 and:
- 5.2 Transaction Documents to include:
 - 5.2.1 Sale/Purchase Agreement
 - 5.2.2 Closing Statement
 - 5.2.3 Notes (must include all terms and conditions, including but not limited to balance, payment amount, payment period, interest rate and mandated ratios)
 - 5.2.4 Mortgages (see 5.2.3)
 - 5.2.5 Leases (Complete)
- 5.3 Financial Documents to include:
 - 5.3.1 Projected statement of Revenue and Expenses for thirty-six (36) months;
 - 5.3.2 Projected statement of Revenue and Expenses converted to cash flow (for 36 months);
 - 5.3.3 Beginning Pro Forma Balance Sheet. (end of first, second and third years);
 - 5.3.4 Ending Pro Forma Balance Sheets (end of first year, second and third years);
 - 5.3.5 Any newly established Facility without a parent, or any new or newly owned facility with a newly established parent without a financial history of at least thirty-six (36) months will provide evidence of capital availability equal to four (4) months of anticipated facility expenses as evidenced on the pro forma profit and loss statement. Said capital availability shall be maintained at a local financial institution for the first twenty-four (24) months of operation of the facility and the facility will provide a copy of a letter from it to the local financial institution instructing it to notify the Department immediately if the agreed upon balance is not maintained;
 - 5.3.6 Information on the controlling organization to include:
 - 5.3.6.1 The most recent three (3) years of audited year-end financial statements for the controlling organization;
 - 5.3.6.2 The most recent three (3) years of audited personal financial statements for the proprietors or partners if the Controlling Organization is a proprietorship or partnership;
 - 5.3.6.3 The most recent three (3) years of audited personal financial statements for guarantors of a corporate transaction if the Controlling Organization is a proprietorship or partnership;

- 5.3.7 The Department may accept draft transaction documents and unaudited financial statements pending the receipt of executed transaction documents and audited financial statements and reserves the right to require the submission of additional information upon initial review; and
- 5.3.8 Additional materials which will facilitate analysis are encouraged.
- 5.4 Effective upon the date of purchase or change of ownership the facility will provide monthly financial information to DHSS as required. All in-house prepared financial information is to include the following certification signed by the Chief Financial Officer: "All financial information provided herewith is certified to be true and correct to the best of my knowledge and belief, under penalty of perjury." The information will include:
 - 5.4.1 Balance sheet;
 - 5.4.2 Profit/Loss statement;
 - 5.4.3 Statement of cash flow; and
 - 5.4.4 Current resident census.
- 5.5 Any material adverse change to the facility's cash flow or financial position must be reported to the Department by the facility in writing within five (5) business days of its occurrence or discovery.

6.0 Resident Trust Funds

- 6.1 Every facility that receives, holds or disburses funds belonging to the residents shall maintain and retain the below listed documentation. The documentation must be provided to DHSS upon request.
 - 6.1.1 Copy of the current Surety Bond covering Resident Trust Funds.
 - 6.1.2 Copies of appropriate account statements for the Fund (bank statements) for the most recent month.
 - 6.1.3 Copies of ledger account records for each resident having funds in the account corresponding to the most recent account statement.
 - 6.1.4 If reconciliations are performed, copies of the statement of reconciliation for the appropriate month.
 - 6.1.5 A record of all residents for whom the facility held funds discharged from the facility during the previous twelve (12) months. For each such discharged resident the facility shall document the following:
 - 6.1.5.1 Date of departure;
 - 6.1.5.2 Reason for departure;
 - 6.1.5.3 Resident balance in trust fund at date of departure;
 - 6.1.5.4 Date and disposition of resident funds.

7.0 Audited Financial Disclosure Requirement

- 7.1 When the Department determines that financial conditions exist which threaten the health or safety of a resident(s) in a facility, the Department may require the facility to submit certified in-house financial statements within 15 days of request and an audited financial report prepared by an ~~[Independent Certified Public]~~ accountant within 60 days. The foregoing time frames may be extended by the Department upon written request.
- 7.2 Conditions which may prompt the Department to require audited financial disclosure include but are not limited to:
 - 7.2.1 Substandard Quality of Care due to an adverse financial condition.
 - 7.2.2 A material adverse change to the facility's financial position.
 - 7.2.3 Facility/Equipment maintenance inadequacies due to an adverse financial condition.
 - 7.2.4 Repeated or frequent payroll interruptions or shortages.
 - 7.2.5 Confirmed delinquencies on invoices from suppliers or attendant court actions.
 - 7.2.6 Personnel shortages (understaffing and /or under-qualification of staff) due to an adverse financial condition.
 - 7.2.7 Delinquent tax payments.
 - 7.2.8 Bankruptcy, reorganization or closure.
- 7.3 Audits may initially be transmitted to the Department by electronic means. The electronic submission must be followed by an original, bound, signed audit, prepared by an ~~[independent certified public]~~ accountant.
- 7.4 Contents of an Audited Financial Report:
 - 7.4.1 The audited financial report shall indicate the current financial position of the facility and the results of its operations, cash flows and changes in capital. The report shall conform to GAAP practices. It shall include:
 - 7.4.1.1 Report of ~~[independent certified public]~~ accountant;
 - 7.4.1.2 Balance sheet reporting assets, liabilities, and capital;

- 7.4.1.3 Statement of operations;
- 7.4.1.4 Statement of cash flows;
- 7.4.1.5 Statement of changes in capital; and
- 7.4.1.6 Notes to financial statements. These notes shall be those required by GAAP.

8.0 Qualifications of ~~[Independent Certified Public] Accountant[s]~~

~~[8.4] In order for the Department to recognize a person or firm as a qualified [independent certified public] accountant[,] the person or firm must [meet or exceed the following qualifications: be in good standing with the Delaware Board of Accountancy.]~~

~~[8.1.1 Is in good standing with the AICPA and in all states in which the accountant is licensed to practice;~~

~~8.1.2 Has neither directly nor indirectly entered into an agreement of indemnification with respect to the audit of the facility; and~~

~~8.1.3 He or she conforms to the standards of his or her profession, as contained in the Code of Professional Ethics of the AICPA and Rules and Regulations and Code of Ethics and Rules of Professional Conduct of the Delaware State Board of Accountancy, or similar code.]~~

9.0 Consolidated Financial Statements

9.1 A facility may make written application to DHSS for approval to file consolidated financial statements in lieu of separate annual financial statements if the facility is part of a group. Consolidated statements must meet the following requirements:

9.1.1 Amounts shown on the consolidated audited financial report shall be shown on the worksheet;

9.1.2 Amounts for each separately licensed facility subject to this section shall be stated separately;

9.1.3 Non-facility operations may be shown on the worksheet on a consolidated or individual basis;

9.1.4 Explanations of consolidating and eliminating entries shall be included;

9.1.5 A reconciliation of any differences between the amounts shown in the individual facility columns of the worksheet and comparable amounts shown on the annual statements of the facilities shall be included;

9.1.6 Notes on each facility included in a consolidated financial statement will be included with the notes of the consolidation with each separate facility clearly identified; and

9.1.7 Any statements completed in excess of 30 days after the closing of the audited period will be accompanied by an in-house prepared financial statement for each separately licensed facility. The period covered by the in-house statement will be from the audit end-date through the most recent facility monthly statement. The statement will be dated and certified as correct by the signature of the Chief Financial Officer.

10.0 Scope of Audit and Report ~~[of Independent Certified Public By] Accountant~~

Financial statements furnished pursuant to subsection 7.4 shall be examined by the ~~[independent certified public] accountant. The audit of the facility's financial statements shall be conducted in accordance with generally accepted auditing standards. ~~[In accordance with AU Section 319 of the Professional Standards of the AICPA, Consideration of Internal Control in a Financial Statement Audit, the independent certified public The]~~ accountant should obtain an understanding of internal control sufficient to plan the audit.~~

11.0 Notification of Adverse Financial Condition

11.1 A facility that is required to furnish an annual audited financial report shall require the ~~[independent certified public] accountant to report, in writing, within five (5) business days to the board of directors or its audit committee any determination by the ~~[independent certified public] accountant that the facility has materially misstated its financial condition to the Department. A facility that receives a report pursuant to this paragraph shall forward a copy of the report to the Department within five (5) business days of receipt of the report accompanied by any amended or corrected audit generated as a result of the misstatement.~~~~

11.2 No ~~[independent certified public] accountant shall be liable in any manner to any person for any statement made in connection with the above paragraph if the statement is made in good faith in compliance with subsection 10.1.~~

11.3 If the accountant, subsequent to the date of the audited financial report filed pursuant to this regulation, becomes aware of facts that might have affected his or her report, the Department notes the obligation of the accountant to take such action as prescribed ~~[in Volume 1, Section AU 561 of the Professional Standards of the AICPA by the Delaware Board of Accountancy].~~

12.0 Conduct of Facility in Connection with the Preparation of Required Reports and Documents

- 12.1 No director or officer of a facility shall, directly or indirectly:
- 12.1.1 Make or cause to be made a materially false or misleading statement to an accountant in connection with any audit, review or communication required under this regulation; or
 - 12.1.2 Fail to accurately report any material fact or information to the accountant in connection with any audit or review required under this regulation; or
 - 12.1.3 Directly or indirectly coerce, manipulate, mislead or fraudulently influence any accountant engaged in the performance of an audit pursuant to this regulation that results in the submission of materially misleading financial statements.

13.0 Enforcement and Oversight Authority

- 13.1 The Department is authorized to impose the below listed actions to monitor the financial capability of a facility it has determined to be in financial distress. Noncompliance with any imposed action may result in the imposition of civil penalties or other remedies for compliance as authorized by 16 Del.C., Chapter 11, Subchapter I.
- 13.1.1 Monthly submission within thirty (30) calendar days of the end of the month of monthly financial information from the facility to include:
- 13.1.1.1 Balance Sheet, Profit and Loss Statement, Statement of Cash Flows, Census Information; and
 - 13.1.1.2 Certification by the Chief Financial or Corporate Officer with the following statement: "All financial information provided herein is certified to be true and correct to the best of my knowledge and belief, under penalty of perjury."
- 13.1.2 Submission of monthly certifications from the facility that all required licenses, taxes and insurances are paid-to-date, are current and in effect.
- 13.1.3 Attendance of facility and corporate staff at periodic meetings with the Department to discuss past performance and expectations for future performance, to include:
- Facility Administrator
 - Regional/Corporate CFO/Controller
 - Regional Administrator
- 13.1.4 Requirement of a written plan from the facility indicating how it will return to profitability.
- 13.1.5 Reclassification of the facility license from annual to provisional status.
- 13.1.6 Requirement that the Controlling Organization (if any) of the facility provide a written assurance to the Department that the Controlling Organization will step in to provide financial support to ensure that the residents continue to receive quality care. The written assurance is to include text as provided by the Department.
- 13.1.7 Query courts of local jurisdiction for pending or past legal actions or judgments against the facility by suppliers and/or government agencies
- 13.1.8 Notification to The Centers for Medicare and Medicaid Services of the facility's financial difficulty (federally certified facilities).
- 13.1.9 The issuance of an emergency order temporarily transferring the management of the facility to another qualified entity in cases where the physical health or safety of a resident(s) is in imminent risk.
- 13.1.9.1 The terms and conditions of the emergency order including costs of implementation are to be determined by the Department. The terms and conditions of the emergency order are effective until the Department conducts an administrative hearing to determine the facility management's ongoing licensure status, which hearing must be conducted within 60 days from the date of the issuance of the order unless the facility requests a continuance of the hearing date. At the conclusion of the hearing the Department will make a final determination regarding the costs of implementation of such management and the facility's ongoing licensure status.
- 13.1.10 Require written notification from the facility, to each individual resident and, if known, a family member or legal representative that the financial capability of the facility is under review by the Department. The notification must be written in a language and manner that is easily understood by the individual resident and/or individual resident's representative.
- 13.1.10.1 Provide a copy of the notice to the DHSS; the State Long Term Care Ombudsman; managed care organization (MCO), as appropriate; any Departmental DHSS agency involved in the resident placement in the facility, including Adult Protective Services; and the protection and advocacy agency as defined in 16 Del.C. §1102 if the resident is an individual with a developmental disability or mental illness.

14.0 Confidentiality of Facility Financial Records

- 14.1 The Department shall maintain the financial documents submitted by facilities in a secure and confidential manner.
- 14.2 The Department will consider financial documents submitted pursuant to these regulations as exempt from public disclosure consistent with 29 **Del.C. §10002(l)(2)** [and 16 **Del.C. §1104(e)**].

15.0 Severability Provision

If any section or portion of a section of this regulation or its applicability to any person or circumstance is held invalid by a court, the remainder of the regulation or the applicability of the provision to other persons or circumstances shall not be affected.

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