

# Развитие фидуциарных обязанностей членов совета директоров в соответствии с новым Законом КНР о компаниях

## Substantial Strengthening of Fiduciary Duties of Directors, Supervisors, and Senior Management and Collaborative Governance under the New Company Law

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**Аннотация.** Фидуциарная обязанность, являясь ключевым компонентом фидуциарных обязательств, по сути, регулирует конфликты интересов между компаниями и их директорами, руководителями и высшим руководством, формируя незыблемую основу корпоративного управления. Несмотря на продолжающиеся усилия по обеспечению соблюдения нормативных требований, нарушения фидуциарных обязанностей директорами, супервайзерами и высшим руководством остаются постоянной проблемой управления. По своей сути, эта проблема связана не только с присущими ей недостатками, такими как размытое различие между фидуциарными обязательствами и обязательством по уходу, а также нечеткие определения сделок со связанными сторонами и самостоятельных сделок, но и с неэффективностью механизмов подотчетности из-за фрагментации правовой системы. В статье основное внимание уделяется изменениям в понимании обязанности проявлять лояльность в соответствии с новым Законом о компаниях.

**Ключевые слова:** директор, супервайзер и высшее руководство; фидуциарные обязанности; сделки, в совершении которых имеется заинтересованность

**Abstract.** Fiduciary duty, as the core component of fiduciary obligations, essentially regulates conflicts of interest between companies and their directors, supervisors, and senior management, forming an inviolable bottom line in corporate governance. Despite ongoing regulatory enforcement efforts, violations of the fiduciary duty by directors, supervisors, and senior management remain a persistent governance challenge. At its core, this issue stems not only from inherent flaws such as the blurred distinction between fiduciary and duty of care obligations, and unclear definitions of related-party transactions and self-dealing, but also from the failure of accountability mechanisms due to the fragmentation of the legal system. This article focuses on the changes in the connotation of the duty of loyalty under the new Company Law. By deconstructing the current situation, analyzing legislative loopholes, proposing a systematic improvement path, and ultimately constructing an organic unified

*system of the duty of loyalty based on the substantive norms of the Company Law and the implementation link of procedural coordination.*

**Keywords:** directors, supervisors, and senior management; fiduciary duties; related party transactions

## 1. The Current Status of Judicial Application of Fiduciary Duties of Directors, Supervisors, and Senior Management under the New Company Law

### 1.1. The implementation of civil and criminal laws has not been ideal

Although Article 182 of the Company Law<sup>1</sup> and Article 169 of the Criminal Law<sup>2</sup> establish a dual civil and criminal liability system for directors, supervisors, and senior management who violate their fiduciary duties, practical data reveals a serious dilemma of rule suspension. In the civil remedy domain, since the establishment of the cause of action for disputes involving liability for harm to corporate interests under the 2005 Company Law nearly two decades ago, the Wolters Kluwer database has recorded only 2,866 related judgments. Among these, cases involving public companies are limited to two instances — Yingli Media and Jinyitong — both of which resulted in the company's defeat. The criminal liability domain is even more barren: Since the addition of the crime of breach of trust causing harm to the interests of listed companies in 2006, only six cases nationwide have resulted in convictions. This dual failure of both civil and criminal systems exposes a deep disconnect between legal texts and their implementation effectiveness.

At its core, systemic evidentiary barriers constitute the primary obstacle. In civil cases, directors, supervisors, and senior management of listed companies

control key evidence such as financial data and transaction documents. However, the entities authorized to file lawsuits under Article 151 of the Company Law lack both the authority to conduct compulsory investigations and the professional expertise to gather evidence, making it difficult to effectively identify and address covert infringements such as asset misappropriation and unauthorized guarantees. Criminal cases face even more complex enforcement coordination barriers: securities regulatory authorities focus their investigations on violations of information disclosure requirements, which do not align with the elements required for the crime of breach of trust, such as “improper related-party transactions” and “conflict of interest,” resulting in a low rate of administrative leads being transferred to criminal justice. Once law enforcement agencies become involved, challenges such as the destruction of evidence and corrective actions taken by the perpetrators further hinder investigative progress.

### 1.2. Administrative disclosure accountability, breach of trust, and mismatch of validity

The current securities regulatory framework for regulating violations of fiduciary duties by directors, supervisors, and senior management of listed companies has fallen into a structural dilemma of responsibility path dependence. Although Article 4 of the Listed Company Governance Guidelines<sup>3</sup> and the State Council's Opinions on Further Improving the Quality of Listed Companies prohibit acts<sup>4</sup> such as fund occupation and illegal guarantees in principle,

<sup>1</sup> Article 182 of the Company Law of the People's Republic of China (revised in 2023): Directors, supervisors, and senior management personnel who directly or indirectly enter into contracts or conduct transactions with the company shall report matters related to the conclusion of contracts or the conduct of transactions to the board of directors or the shareholders' meeting, and shall obtain the approval of the board of directors or the shareholders' meeting in accordance with the provisions of the company's articles of association.

<sup>2</sup> Article 169 of the Criminal Law of the People's Republic of China: Directly responsible managers of state-owned companies, enterprises, or their superior authorities who abuse their power for personal gain by converting state-owned assets into shares at low prices or selling them at low prices, thereby causing significant losses to national interests, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; those who cause particularly significant losses to national interests shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years.

<sup>3</sup> Article 4 of the Listed Company Governance Guidelines (2018 revision): Shareholders, actual controllers, directors, supervisors, and senior management of listed companies shall exercise their rights and fulfill their obligations in accordance with laws, administrative regulations, departmental rules, normative documents (hereinafter collectively referred to as laws and regulations), and self-regulatory rules, and shall safeguard the interests of listed companies. Directors, supervisors, and senior management shall continue to learn, continuously improve their ability to perform their duties, and perform their duties faithfully, diligently, and prudently.

<sup>4</sup> Opinion of the State Council on Further Improving the Quality of Listed Companies (State Council Document No. 14 [2020], issued on October 5, 2020).

the lack of corresponding penalties forces regulatory authorities to apply information disclosure violation rules to pursue responsibility. This “forcing a square peg into a round hole” enforcement logic distorts the fiduciary duty — a core responsibility of corporate governance — into a subsidiary obligation of information disclosure, giving rise to systemic defects in both precision and effectiveness.

First, the misalignment of liability subjects leads to secondary harm. Liability for information disclosure violations primarily rests with the listed company, while directors, supervisors, and senior management only bear joint liability; however, the essence of breaching fiduciary duties is the active harm caused by directors, supervisors, and senior management to the company’s interests, with the company itself being the victim. If liability is pursued based on disclosure violations, it will force the victimized company to bear compliance costs such as administrative fines, which essentially both condones the true infringers and further erodes the already damaged interests of minority shareholders. This inversion of responsibility completely deviates from the original intent of the fiduciary duty system to protect company assets.

Second, there is a fundamental conflict in the logic of behavioral determination. Disclosure obligations focus on “truthfulness, accuracy, and completeness,” while breaches of fiduciary duty emphasize the behavioral essence of “conflicts of interest and improper gain.” In practice, if the company has already disclosed the facts of fund occupation in its regular reports, regulatory authorities will lose the basis for investigation due to “the behavior being publicly disclosed.” This effectively equates procedural compliance with substantive immunity, indirectly encouraging directors, supervisors, and senior management to use formal disclosures to conceal substantive infringements.

## 2. Issues with the Fiduciary Duties of Directors, Supervisors, and Senior Management under the New Company Law

### 2.1. Confusion between fiduciary duty and duty of care

The conflation of the duty of loyalty and the duty of diligence in judicial practice has severely undermined the effectiveness of the liability distinction under the new Company Law. This tendency to conflate obligations was particularly evident in the “Wang Siyong v. Shandong Liao Yan Seed Industry

Technology Co., Ltd.” case<sup>5</sup>. In this case, the court characterized Wang Siyong and others’ use of personal accounts to receive company funds as both a violation of the fiduciary duty for failing to prioritize company interests and a violation of the duty of care for failing to fulfill capital supervision responsibilities. At its core, this stems from the legislature’s failure to establish clear criteria for distinguishing between the two: the duty of loyalty regulates subjective malice in scenarios of conflicting interests, such as Wang Siyong’s use of personal accounts to receive company funds, which fundamentally prioritizes personal interests over those of the company; the duty of care focuses on the reasonable level of attention during decision-making processes, such as failing to verify the authenticity of capital contributions, emphasizing the assessment of the prudence of such duties. The two obligations differ fundamentally in terms of the nature of the conduct, with intentional conduct involving active harm and negligent conduct involving passive negligence. The scope of liability also differs substantially, with intentional conduct potentially resulting in full recovery of gains and negligent conduct potentially resulting in proportionate compensation based on the degree of negligence. However, current judicial practice blurs the basis for liability by applying both standards, not only allowing such malicious conduct to be subject to only the lighter liability under the duty of diligence but also causing the focus of evidence presentation to be scattered when the company files a lawsuit. It is imperative to interpret Article 180 of the Company<sup>6</sup> Law through judicial interpretations to narrow its scope, requiring courts to prioritize reviewing whether the behavior involves conflicts of interest and improper gain — core aspects of the fiduciary duty — to end the current misaligned judicial logic of dual characterization of a single act.

### 2.2. Unclear definition of related party transactions and self-dealing

The regulatory challenges surrounding the fiduciary duties of directors, supervisors, and senior management under the new Company Law are most notably manifested in the confusion between the concepts of related-party transactions and self-dealing, as well as the lack of focus in review standards. Taking the “Jiangyin New Company Case”<sup>7</sup> as an example, Zhong Company, as the controlling shareholder of An Company, engaged in three typical behaviors: first, it manipulated An Company to transfer 30 million yuan of registered capital to its related party, Qidong Zhong Company, and illegally occupied over 100 million yuan of funds for an extended period; sec-

<sup>5</sup> Judgment of the Intermediate People’s Court of Liaocheng City, Shandong Province (2024) Lu 15 Min Zhong 3192.

<sup>6</sup> Article 180 of the Company Law of the People’s Republic of China (2023 revised edition): Directors, supervisors, and senior management personnel owe a duty of loyalty to the company and shall take measures to avoid conflicts between their own interests and those of the company. They shall not use their authority to obtain improper benefits.

<sup>7</sup> Intermediate People’s Court of Wuxi City, Jiangsu Province (2024) Su 02 Min Zhong 5370.

ond, it transferred 18 million yuan of net assets of An Company for a consideration of 1.8 million yuan, retaining only the construction qualifications; Third, it arbitrarily adjusted the 43.15 million yuan debt owed by Qidong Zhong Company to An Company into its own accounts receivable. These actions essentially constitute self-dealing by the controlling shareholder exploiting its controlling position, yet due to the lack of clear legislative distinction between related-party transactions and self-dealing, they were broadly categorized as ordinary related-party transactions. The court's reasoning clearly exposes the flaws of the ambiguous definition: on the one hand, it replaced the "fairness of the transaction review" with a "financial independence review," concluding that there was no commingling of assets solely because the financial transactions were recorded and the audit report did not flag any abnormalities (as stated in the "Accounting Expertise Special Report"); On the other hand, the court avoided making a judicial judgment on the substantive fairness of the transaction. For example, in the case of an obviously unfair transaction where 1.8 million yuan was used to transfer 18 million yuan worth of assets, the court merely accepted the shareholder's defense that "the company's losses were consistent with commercial logic" and failed to review the fairness of the pricing based on the fiduciary duty. This judicial approach of "procedural compliance exempts liability" effectively dissolves self-dealing — the most strictly regulated breach of fiduciary duty — into the formal review of general related-party transactions, indirectly encouraging "compliance arbitrage through financial record-keeping to conceal interest transfers". At its core, while Article 182 of the new law requires related-party transactions to meet both "procedural compliance and substantive fairness," it does not classify self-dealing by directors, supervisors, and senior management as an independent category with stricter review standards<sup>8</sup>. This has allowed core breaches of fiduciary duty, such as the misappropriation of company assets and improper transfer of benefits, to evade liability under the fiduciary duty.

### 2.3. The legal system governing fiduciary duties is in urgent need of improvement

Although the new Company Law has made progress in refining the duty of loyalty, the lack of cross departmental legal coordination and supporting rules has made it difficult to form institutional synergy. At the legislative level, although Articles 180—184 of the Company Law expand substantive obligations, they have not established a corresponding relationship with the administrative liability provisions of the Securities Law, nor have they activated the long-standing dormant Article 169 of the Criminal Law for breach of trust. At the level of rule config-

uration, the lack of supporting rules for the exemption procedure of the "relative prohibition obligation" added by the new law has led to the suspension of key operational mechanisms such as shareholder meeting voting avoidance rules and interest disclosure standards; However, the "Code of Corporate Governance for Listed Companies"<sup>8</sup> relied upon by regulatory agencies is unable to fill the above-mentioned loopholes due to its low level of effectiveness. What is even more severe is the lack of implementation mechanism: the rules for reversing the burden of proof in civil cases have not been established for a long time, administrative regulatory departments lack the power to conduct compulsory investigations in cases of non fiduciary duty, and the rigid measurement standards for "significant losses" in criminal proceedings ignore intangible damages such as company reputation, resulting in legal loopholes becoming channels for avoiding responsibility.

## 3. The Improvement Path of Loyalty Obligations of Directors, Supervisors and Senior Officials under the New Company Law

### 3.1. Clarify the boundaries between fiduciary duty and duty of care

Under the revised framework of the new Company Law, it is imperative to clarify the boundaries between the fiduciary duty of directors, supervisors, and senior management and their duty of care in order to establish a scientific mechanism for determining liability. Trace the typological disputes over directors' duties, and you'll find that academic circles in various countries have proposed the "monistic theory," which asserts that fiduciary duties only include fiduciary duties; the "dualistic theory," which asserts that fiduciary duties encompass both fiduciary duties and duties of care; and the "trinitarian theory," which asserts that the duty of good faith should be classified separately from duties of care and fiduciary duties. China's current law adopts a dual structure, incorporating both the duty of loyalty and the duty of diligence into the scope of fiduciary duties. However, the two differ fundamentally in terms of their core values, behavioral requirements, and liability logic, and their blurred boundaries in practice often lead to confusion in application. The core of the duty of loyalty lies in regulating conflicts of interest among directors, supervisors, and senior management. Its essence is a rigid constraint on professional ethics — requiring directors to prioritize the company's interests as the highest standard of conduct, prohibiting the use of authority to seek personal gain, or engaging in acts such as self-dealing or appropriating company

<sup>8</sup> Listed Company Governance Guidelines (Revised in 2018, CSRC Announcement [2018] No. 29, issued and implemented on September 30, 2018).

opportunities that harm the company's interests. This duty focuses on the purity of behavioral motives and the company-centric nature of outcomes, incorporating dual review standards of procedural fairness and outcome fairness. Violations typically involve direct intent and reflect a fundamental betrayal of fiduciary duties. The duty of care emphasizes requirements for the competence and diligence of directors, supervisors, and senior management, focusing on whether they exercise reasonable care, conduct prudent investigations, and make professional judgments during decision-making processes. Its evaluation criteria are process-oriented, allowing for reasonable variations in managerial capabilities and adopting a relatively lenient attitude toward decision outcomes; Violations of this duty often stem from negligence or lack of capability, with significantly lower subjective malice than breach of fiduciary duty. The distinction between the two is deeply reflected in the legal expectations for directors: operational capabilities may vary in strength, but professional ethics must be flawless — a breach of the fiduciary duty constitutes an erosion of the company's trust foundation and inevitably leads to harm to interests; the assessment of the duty of care must be combined with the business judgment rule, considering the information basis and rationality of the decision-making process. The inherent tension in the current dual framework lies in the fact that certain behaviors, such as “deliberately inducing the company to violate the law,” should be classified under the fiduciary duty category according to Professor Eisenberg's good faith theory,<sup>9</sup> yet there is controversy over their classification under current law. If the boundaries are unclear, it may lead to judicial practice improperly exempting malicious behavior under the lenient standards of the duty of care, or overly harshly penalizing operational mistakes under the strict liability of the duty of loyalty. Therefore, the path to improving the new Company Law must establish clear criteria for distinguishing between the two at the legislative level: using whether there is a conflict of interest or improper gain as the red line for identifying the duty of loyalty, and using whether reasonable care and prudent decision-making have been exercised as the benchmark for measuring the duty of care. Only by doing so can a tiered liability system be established to prevent the misuse of the duty of care to reduce liability or the overreach of the duty of loyalty to capture operational risks, ultimately achieving a precise balance between punishing malicious conduct and protecting innovation.

### 3.2. Clarify the relationship between related party transactions and self-dealing transactions

The prerequisite for coordinating related-party transactions and self-dealing transactions is to clarify the relationship between related-party transactions and self-dealing transactions, and then to ensure consistency between the relevant provisions. The primary improvement measure is to further refine the criteria for determining “related parties” and “interests” at the legislative or judicial interpretation level. While current regulations do address this issue, the complexity of practical scenarios far exceeds the scope of the provisions. A more inclusive and dynamic identification framework should be established, taking into account the substance of the transaction, influence pathways, and potential risks of improper benefit transfers. This framework should explicitly include “de facto related parties” who may exert improper influence through channels such as relatives, proxy holdings, concerted action, or other covert means, while avoiding overly broad application that could hinder normal business activities. Second, a differentiated review standard and procedural requirements centered on the “degree of conflict of interest” should be established. Self-dealing transactions, due to their direct nature and high degree of conflict of interest, should in principle be subject to the strictest “absolute prohibition plus special exemption” model, and may only be conducted under stringent conditions such as full disclosure of information, strict approval by a decision-making body not involved in the transaction, and the transaction being clearly fair to the company. For non-typical related-party transactions, under the premise of enhanced information disclosure transparency and independent review, more flexible “fairness review” pathways can be explored, allowing such transactions to proceed under the conditions of procedural fairness and substantive fairness. Finally, mechanisms for liability determination and enforcement must be improved. Differentiated legal liabilities corresponding to violations of different types of transaction rules should be clearly defined, including liability principles, scope of compensation, and allocation of the burden of proof, to ensure the rules have deterrent and enforceable effects. Additionally, the limited applicability of the business judgment rule after compliance procedures are fulfilled should be considered to balance the strictness of fiduciary duties with the legitimate risks of business decisions. Through the systematic integration of these measures, the boundaries between related-party transactions and self-dealing can be effectively delineated, enabling directors, supervisors, and senior management to balance their fiduciary duties in preventing conflicts of interest and promoting legitimate corporate operations, thereby providing a solid rule-based foundation for the effective implementation of relevant provisions in the new Company Law.

<sup>9</sup> *Melvin A. Eisenberg*. The Duty of Good Faith in Corporate Law // 31 Delaware Journal of Corporate Law 1-75 (2005).

### 3.3. Interdepartmental legal cooperation to build a legal system of fiduciary duty

To break through the fragmented legal framework surrounding fiduciary duties and achieve a systemic transformation, it is necessary to use the new Company Law as the institutional foundation, while simultaneously advancing cross-departmental legal integration, multi-level rule construction, and reforms to the coordination mechanisms between public and private law. At the legislative integration level, Article 182 of the new Company Law establishes substantive review standards for related-party transactions, while Article 184<sup>10</sup> prohibits directors, supervisors, and senior management from seeking commercial opportunities, providing core anchor points for the coordination of departmental laws. Through amendments to the Company Law, guiding provisions should be added to clarify that the “disclosure penalty provisions” under Article 197 of the Securities Law must be aligned with the related-party transaction procedures under Article 182 and the duty of non-competition under Article 184 of the new Company Law. Additionally, the criminal regulation of malicious violations of fiduciary duties under Article 169 of the Criminal Law should be activated to form a closed-loop chain of “civil liability — administrative sanctions-criminal liability” closed-loop chain. At the rule-making level, relying on the authorization of Article 179 of the new Company Law for the State Council to formulate specific regulations for the supervision of listed companies, promote the issuance of the “Regulations on the Supervision and Administration of Listed Companies,”<sup>11</sup> “and elevate core provisions such as related-party

transaction reviews and independent director supervision from the “Listed Company Governance Guidelines” to administrative regulations with mandatory penalties; simultaneously authorize the China Securities Regulatory Commission (CSRC) to formulate the “Operational Guidelines for Non-Disclosure-Related Fiduciary Duties,”<sup>12</sup> detailing the criteria for determining “seeking business opportunities for the company” under Article 184 of the new law, the triggering conditions for the “shareholders’ meeting voting recusal rules,” and the technical standards for “disclosure of related party relationships,” thereby filling the operational vacuum under the principle-based provisions of the new law. At the implementation level, Article 191<sup>13</sup> of the new law strengthens the liability of directors, supervisors, and senior management for compensation, requiring the establishment of a coordinated public and private law evidence and procedure linkage mechanism: introducing the “preponderance of evidence principle” in civil litigation to reduce the burden of proof on companies for covert transfer of benefits, and clarifying that evidence obtained by the China Securities Regulatory Commission (CSRC) through special investigations conducted under Article 252<sup>14</sup> of the new law can be directly used in civil claims; Establish an “administrative enforcement prior determination” system, whereby administrative penalties for violations of Articles 182 and 184 of the new law have presumptive effect in civil litigation, and criminal proceedings may directly adopt key data chains such as fund flows verified through administrative enforcement. Thus, by taking the substantive rules of the new Company Law as the foundation, admin-

<sup>10</sup> Article 184 of the Company Law of the People’s Republic of China (revised in 2023): Directors, supervisors, and senior management personnel shall not engage in self-employment or operate businesses similar to those of the companies they work for on behalf of others without reporting to the board of directors or shareholders’ meeting and obtaining approval from the board of directors or shareholders’ meeting in accordance with the provisions of the company’s articles of association.

<sup>11</sup> The Regulations on the Supervision and Administration of Listed Companies (hereinafter referred to as the “Regulations”) are currently still in the preparatory stage of the “State Council Legislation Plan” and have not yet been formally promulgated and implemented. However, the legislative framework, core content, and spirit of the Regulations have been disclosed on multiple occasions through public consultations, legislative explanations, and supporting rules.

<sup>12</sup> The “Guidelines on Fiduciary Duties Not Subject to Disclosure” (commonly referred to as the ‘Guidelines’) are not an independent administrative regulation, but rather a collective term for the operational consensus and compliance requirements formed by regulatory authorities, self-regulatory organizations, and judicial practice regarding “fiduciary duties that do not require external disclosure but must still be fulfilled.” Its core lies in translating the “negative prohibitions” regarding fiduciary duties stipulated in Article 180, Article 184 of the Company Law, and the Listed Company Governance Guidelines into actionable internal control processes and accountability standards.

<sup>13</sup> Article 191 of the new Company Law (revised in 2023): If directors or senior management cause damage to others in the performance of their duties, the company shall bear liability for compensation; if directors or senior management act with intent or gross negligence, they shall also bear liability for compensation.

<sup>14</sup> New Company Law Article 252 (2023 Revision): If the promoters or shareholders of a company make false contributions, fail to deliver, or fail to deliver on time the monetary or non-monetary assets contributed as capital, the company registration authority shall order them to rectify the violation and may impose a fine of between RMB 50,000 and RMB 200,000; in serious cases, a fine of between 5% and 15% of the amount of the false contribution or the unpaid capital shall be imposed; and the directly responsible managers and other directly responsible personnel shall be fined between RMB 10,000 and RMB 100,000.

istrative regulations as the reinforcing vehicle, and the coordination of public and private procedures as the implementation engine, we can thoroughly bridge the gaps between departmental laws and the hierarchical disconnect in rules, and build a legal ecosystem of fiduciary duty that spans “transaction review-liability pursuit-system prevention.”

#### 4. Conclusion

The new Company Law’s institutional restructuring of the fiduciary duties of directors, supervisors, and senior management marks a paradigm shift in China’s corporate governance from formal compliance to substantive fairness. This article addresses key issues in judicial practice, such as the confusion between the duty of care and the duty of loyalty, and the unclear definition of related-party transactions and

self-dealing. By analyzing specific cases, it proposes a layered framework for identifying obligations based on “conflicts of interest” and establishes a tiered review rule of “prohibition-exemption” to precisely target covert infringements. Ultimately, through three pathways — interdepartmental legal responsibility coordination (activating the crime of breach of trust), multi-level rule reinforcement (administrative regulations empowering penalties), and public-private law evidence coordination (the principle of preponderance of evidence) — this paper promotes the transition of the duty of loyalty from textual norms to governance practice. Only by taking corporate law substantive rules as the foundation and procedural coordination as the link can we put an end to the chaos of “compliance arbitrage,” achieve a balance between preventing moral hazards and respecting commercial autonomy, and establish a legal barrier for protecting corporate assets.

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