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Regulation: Killing Opportunity

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Abstract

During its first five years, the Obama Administration aggressively exploited regulation to get its way. Issuing 157 new major rules at a cost to Americans approaching $73 billion annually, this Administration is very likely the most regulatory in U.S. history. And there are many more regulations to come; agencies have identified 120 additional major rules they intend to work on, including dozens linked to the Dodd–Frank financial regulation law and Obamacare. Of particular concern is that the Federal Communications Commission has launched yet another attempt to regulate Internet traffic. Congress—which shares much of the blame for enabling this flood of red tape—must stem it.

Key Points

- During its first five years, the Obama Administration issued 157 new major rules—at a cost to American taxpayers approaching $73 billion *annually*. This Administration is likely the most regulatory in U.S. history.
- Congress is also a major culprit. Much of the red tape of the past five years has been driven by "independent" agencies, such as the SEC and the FCC, which are not under direct presidential control.
- Many more regulations are to come; agencies have identified 120 additional major rules they intend to work on, including dozens linked to the 2010 Dodd–Frank financial regulation law and Obamacare.
- Reforms of the regulatory process are critical: Congressional approval should be required for any new major regulation, regulatory consequences of all proposed legislation must be analyzed before a vote is held, all major regulations must have sunset deadlines, and "independent" agencies must be included in the presidential regulatory review process.

In his January 2014 State of the Union address, President Barack Obama vowed to wield his executive powers when faced with congressional resistance to his legislative agenda: "America does not stand still—and neither will I," he said. "So wherever and whenever I can take steps without legislation ... that's what I am going to do."[1]

This provocative declaration was startling in its bluntness, but it was hardly a new policy. During its first five years, the Obama Administration aggressively exploited regulation to get its way. Issuing 157 new major rules at a cost to Americans approaching $73 billion *annually*, this Administration is very likely the most regulatory in U.S. history.

Of course, preceding Administrations also have increased regulation, albeit to a lesser degree. And regulatory overreach by the executive branch is only part of the problem. Congress, too, is a major culprit. Much of the red tape imposed over the past five years has been driven by "independent" agencies, such as the Securities

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and Exchange Commission (SEC) and Federal Communications Commission (FCC), which are outside direct presidential control. From finance to telecommunications, these agencies have added to the regulatory tide swamping American businesses and families.

And there are many more regulations to come; agencies have identified 120 additional major rules they intend to work on, including dozens linked to the 2010 Dodd–Frank financial regulation law and Obamacare. Of particular concern is that the FCC has launched yet another attempt to regulate Internet traffic.

Reforms of the regulatory process are critically needed. Among these: requiring congressional approval before any new major regulation takes effect, requiring analyses of the regulatory consequences of all proposed legislation before a vote by Congress is held, setting sunset deadlines in law for all major regulations, and including "independent" agencies in the White House regulatory review process.

Measuring the Red Tape

Unlike federal taxation and spending, there is no official accounting of total regulatory costs. Estimates range from hundreds of billions of dollars to more than $2 trillion each year. However, the number and cost of *new* regulations can be tracked, and both are growing unabated.

The most comprehensive source of data on new regulations is the Federal Rules Database maintained by the Government Accountability Office (GAO). According to GAO data, 15,794 new rules were published in the *Federal Register* in the five years following President Obama's inauguration in 2009. Of these, 403 were classified as "major," essentially defined as having an expected economic impact of at least $100 million per year.

Most of these major rules were administrative or budgetary in nature, such as Medicare payment rates and hunting limits on migratory birds. But a total of 157 were "prescriptive" regulations, meaning they imposed burdens on private-sector activity. This compares to 62 such rules imposed during George W. Bush's first five years.

Only 15 rule changes adopted during the first five years of the Obama Administration decreased regulatory burdens. This compares to 20 such "deregulatory" actions during President Bush's first five years.

The cost of the new mandates and restrictions imposed by the Obama Administration now nears $73 billion annually, based on analyses performed by the regulatory agencies. The $73 billion in total annual costs is more than triple the estimated $22 billion in annual costs imposed at the same point in the George W. Bush Administration.[2] Agencies also reported some $13 billion in one-time implementation costs for new rules over the past five years.

No one is talking about eliminating airline safety rules or allowing contaminated meat to be sold deceptively to consumers. But there are volumes of rules lacking rational justification, ranging from the trivial to the potentially catastrophic.

While regulatory growth has accelerated under President Obama, it did not start with his Administration. According to the Office of Management and Budget, the regulatory burden imposed on Americans and the U.S. economy has grown in each of the past 30 years. Total regulatory costs have not declined since 1982. Thus, regulatory growth is a long-term, persistent problem.

Not all regulations are unwarranted, of course. Many rules are justified. No one is talking about eliminating airline safety rules or allowing contaminated meat to be sold deceptively to consumers. But there are volumes of rules lacking rational justification, ranging from the trivial (requiring railroads to paint an "F" on locomotives to indicate the front) to the potentially catastrophic (the FCC regulating the Internet). This constant increase in regulatory bur-

1. "Full Transcript: Obama's 2014 State of the Union Address," *The Washington Post*, January 28, 2014, http://www.washingtonpost.com/politics/full-text-of-obamas-2014-state-of-the-union-address/2014/01/28/e0c93358-887f-11e3-a5bd-844629433ba3_story.html (accessed September 18, 2014).
2. James L. Gattuso and Diane Katz, "Red Tape Rising: Five Years of Regulatory Expansion," Heritage Foundation *Backgrounder* No. 2895, March 26, 2014, http://www.heritage.org/research/reports/2014/03/red-tape-rising-five-years-of-regulatory-expansion.

dens is taking its toll on the economy at a time when the nation can ill afford it.

Where are the new regulations coming from? The single most prolific generator of new rules in 2013 was the SEC, which was tasked with issuing literally dozens of new regulations under the Dodd–Frank Wall Street Reform and Consumer Protection Act. But the costliest rules come from the Environmental Protection Agency (EPA), which has imposed almost $40 billion in new annual costs on Americans since 2009—more than all other agencies combined.

The actual cost of new regulations is undoubtedly much higher than the totals reported by the agencies and cited here. As a first matter, the numbers include only "major" regulations. No cost-benefit analysis is typically performed for the thousands of non-major rules issued each year, although the cumulative costs are certainly substantial.

But the costs of even major rules often go unquantified. In 2013 alone, regulators failed to provide quantified costs for seven of the 26 major prescriptive regulations issued; another eight lacked cost data for key components of the rules.

The lack of analysis is a particular problem for independent agencies, such as the FCC, that are not required—as are executive branch agencies—to analyze costs and benefits of proposed regulation.[3] Thus, many of the rules lacking quantified costs involve financial regulation or communications technology. For example, the Consumer Financial Protection Bureau failed to quantify the costs of its 2013 "Loan Originator" rules, which established stricter registration and licensing requirements on mortgage lenders, and imposed new restrictions on mortgage fees—burdens that directly affect the availability of credit. Likewise, costs were not quantified by the Federal Deposit Insurance Corporation for its 2013 "Regulatory Capital Rules," which revised capital requirements for supervised institutions.

The executive branch agencies also fall short of the requirements to weigh costs and benefits. For example, the Department of Energy reported the annual paperwork burden for its 2013 cybersecurity rule as $56 million, but failed to quantify the substantial costs of materials, equipment and labor that will be necessary to comply.[4]

Some costs are impossible to quantify, such as the value of lost innovation or violations of personal liberty. What cost, for instance, should be ascribed to the Department of Health and Human Services' requirement (now partially blocked in the courts) that all insurance plans cover contraceptive services, regardless of an individual's moral convictions?

But often the problem is simply inadequate or incomplete analysis. And the gatekeeper charged with ensuring thorough analyses—the White House Office of Information and Regulatory Affairs (OIRA)—is outmanned and outgunned by the regulators. With a staff of 50, OIRA is reviewing the work of agencies with a combined total of 282,000 employees, a personnel ratio of more than 5,600:1.[5] This would be a difficult job even with the support of the President. It is all the harder under the present Administration, which has not made controlling regulatory costs a priority.

The costs of the new regulations are felt in a variety of ways, including inhibiting economic growth, curtailing innovation, and impeding job creation. The employment effects, while difficult to measure, can be substantial. A recent EPA rule on boilers, for example, threatens some 71,000 jobs related to the paper and pulp industry alone. Other proposed rules would hit the economy more broadly. One study forecast that adoption of "net neutrality" rules by the FCC could reduce employment by hundreds of thousands of jobs.[6] An EPA rule on ozone could reduce employment by 7.3 million by 2020, according to a report by the Manufacturer's Alliance.[7]

3. Erica Smith, "D.C. Circuit Faults SEC on Cost-Benefit Analysis of Proxy Access, Vacates Rule 14a-11," Bloomberg Law, July 29, 2011, http://about.bloomberglaw.com/law-reports/d-c-circuit-faults-sec-on/ (accessed September 18, 2014).
4. "Department of Energy: Version 5 Critical Infrastructure Protection Reliability Standards," *Federal Register*, Vol. 78 (December 3, 2013), p. 72755, https://www.federalregister.gov/articles/2013/12/03/2013-28628/version-5-critical-infrastructure-protection-reliability-standards (accessed September 18, 2014).
5. Susan Dudley and Melinda Warren, "Sequester's Impact on Regulatory Agencies Modest: An Analysis of the U.S. Budget for Fiscal Years 2013 and 2014," Regulatory Studies Center, George Washington University and Weidenbaum Center, Washington University in St. Louis, July 2013, http://wc.wustl.edu/files/wc/imce/2014_regulators_budget_0.pdf (accessed September 18, 2014).
6. Charles M. Davidson and Bret T. Swanson, "Net Neutrality, Investment & Jobs: Assessing the Potential Impacts of the FCC's Proposed Net Neutrality Rules on the Broadband Ecosystem," Advanced Communications Policy and Law Institute, New York University, June 2010.
7. Donald A. Norman, "Economic Implications of EPA's Proposed Ozone Standard," Manufacturer's Alliance Economic Report, September 2010.

Small businesses bear more of the burden of regulation, since it is harder for them to absorb the costs. But even rules on larger, established firms are ultimately paid for by consumers. Moreover, the interests of small businesses are not necessarily the same as those of consumers as a whole. Regulations that artificially protect small businesses can be as harmful to Americans as those that hinder small businesses. In fact, many of the most heated controversies in regulatory policy have involved rules that limit competition faced by politically well-connected small businesses—ranging from insurance agents to car dealers to law firms—at the expense of consumers. The goal of policymakers should be to eliminate unnecessary barriers on all firms, rather than provide regulatory advantage to a particular class of enterprise.

Lack of analysis is a particular problem for independent agencies, such as the FCC, that are not required—as are executive branch agencies—to analyze costs and benefits of proposed regulation.

Distorted Benefits

The Obama Administration defends its regulatory record by touting the projected benefits of the rules. But the cost of regulation is a concern independent of benefits. Regulatory costs are like federal spending: Even if the benefits of a particular program exceed its costs, it is still important to track how much is being spent.

Moreover, benefit estimates—as calculated by the agencies—need to be considered with skepticism. Neither costs nor benefits can be perfectly quantified. But while regulators have an incentive to minimize the costs of regulations, they have an incentive to inflate their benefits.

A particularly egregious example is the Department of Energy's calculation of benefits for its energy conservation standards for microwave ovens.[8] The rule imposes limits on the amount of energy a microwave oven can consume when it is in standby mode or turned off (to keep the clock running and keypad lit, for example).

In attempting to justify the new standard, the Energy Department cited the benefits of preventing the damages supposedly associated with carbon dioxide emissions from electricity use. Evidently desperate to rationalize the regulation, and without public notice or comment, Energy Department officials doubled the purported "social cost of carbon" that had been applied in previous rules, thereby vastly inflating the claimed benefits. The new number also is likely to be used to justify stricter mandates on all manner of other appliances.[9]

Agencies also increasingly rely on "private benefits," roughly defined as benefits that are paid for by the consumers who receive them. For example, the microwave regulation treats energy efficiency as a benefit to consumers—regardless of whether a consumer would choose to pay extra for a more efficient model or buy a less expensive oven and use the savings for a benefit of his own choosing. Whenever government mandates such "benefits" through regulation, individuals lose the ability to choose for themselves whether the benefit is worth the cost. That loss of consumer choice carries a very steep cost.[10]

More in the Works

Hundreds of other costly regulations are also in the works. The most recent Unified Agenda—a semi-annual compendium of planned regulatory actions by agencies—lists 120 "economically significant" rules in the "proposed" or "final" stages.[11]

8. "Department of Energy: Energy Conservation Program: Energy Conservation Standards for Standby Mode and Off Mode for Microwave Ovens; Final Rule," *Federal Register*, Vol. 28, No. 116 (June 17, 2013), p. 36319, http://www.gpo.gov/fdsys/pkg/FR-2013-06-17/pdf/2013-13535.pdf (accessed September 18, 2014).
9. David Kreutzer and Kevin Dayaratna, "Scrutinizing the Social Cost of Carbon: Comment to the Energy Department," The Daily Signal, September 16, 2013, http://blog.heritage.org/2013/09/16/scrutinizing-the-social-cost-of-carbon-comment-to-the-energy-department/.
10. Susan E. Dudley, "OMB's Reported Benefits of Regulation: Too Good to Be True?" *Regulation* (Summer 2013), http://research.columbian.gwu.edu/regulatorystudies/sites/default/files/u41/Dudley_OMB_BC_Regulation-v36n2-4.pdf (accessed September 18, 2014).
11. Office of Management and Budget, "Unified Agenda and Regulatory Plan Search Criteria," http://www.reginfo.gov/public/do/eAgendaAdvancedSearch (accessed September 24, 2014).

Among these are dozens of Dodd–Frank rulemakings. Despite the prodigious output of financial service regulators since 2010, there is still a backlog of rules waiting to be written. As of September 2, 2014, a total of 280 Dodd–Frank rulemaking deadlines had passed, but more than 40 percent of these deadlines were missed. Regulators had not yet released proposals for about a quarter of the rules.[12]

Rulemaking for Obamacare is also ongoing, including a menu-labeling requirement,[13] for which compliance will require an estimated 10 million hours of work by private-sector firms. As proposed, chain restaurants and vending machine operators will be required to disclose "in a clear and conspicuous manner" myriad specific nutrition information for each of their offerings—including the buffet.

Officials of the Occupational Safety and Health Administration intend to complete rulemaking on a new exposure standard for crystalline silica (fine particles of sand common to mining, manufacturing, and construction). One industry analysis submitted to OIRA estimated compliance costs of $5.5 billion annually, as well as the loss of 17,000 "person-years" of employment and $3.1 billion of economic output each year.[14]

Danger of Internet Regulation

Perhaps the most worrisome new rule on the horizon is being developed by the FCC. Its proposed new rules would require Internet carriers to deliver all online content in a "neutral" fashion.

Defining such neutrality is, of course, easier said than done, and doing so without harm to the Internet is virtually impossible. For instance, advocates of "net neutrality" are urging the FCC to ban outright the "paid prioritization" of Internet content, that is, arrangements under which consumers and content providers could get expedited transmission service for an additional fee. Critics decry such prioritized service as unfair.

But premium offerings would be neither unique or a matter of concern. Almost every service offers some level of differentiated benefit at a discount or a premium rate. Airline passengers, for example, can fly coach or first class, sports fans choose between box seats or grandstand benches, cable service can be basic or enhanced tier. Paying more—or less—for a product or service according to the quality and quantity received is a sign of a robust, diverse marketplace, not an unfair one.

Nor do premium service offerings endanger competition. Priority services are not purchased just by the market leaders. Indeed, they can be more helpful to new entrants trying to win customers from a dominant firm than to an already entrenched firm.

Defining "net neutrality" is, of course, easier said than done, and doing so without harm to the Internet is virtually impossible.

Rather than preserve service levels for non-premium customers, banning paid prioritization would actually make a deterioration of service more likely. Broadband network owners invest tens of billions of dollars annually to maintain and expand their networks. In fact, the two biggest sources of capital investment in the U.S. economy in 2013 were AT&T and Verizon.[15] Regulations that limit revenue and

12. "Dodd–Frank Progress Report," DavisPolk, September 2, 2014, http://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report/ (accessed September 29, 2014).
13. Daren Bakst, "Obamacare's Menu Labeling Law: The Food Police Are Coming," Heritage Foundation *Issue Brief* No. 4008, August 6, 2013, http://www.heritage.org/research/reports/2013/08/obamacare-s-menu-labeling-law-the-food-police-are-coming.
14. See letter to OIRA Administrator Cass Sunstein dated September 30, 2011, from the National Association of Manufacturers, the National Federation of Independent Business, the Associated General Contractors of America, the American Road & Transportation Builders Association, the Steel Manufacturers Association, the Portland Cement Association, the Precast/Prestressed Concrete Institute, the California Construction and Industrial Materials Association, the American Concrete Pavement Association, the National Ready Mixed Concrete Association, and the American Chemistry Council Crystalline Silica Panel, http://db78bc60e308ad8dc7c2-6f6534a35fc09b927eb00e4333a7f4cf.r47.cf2.rackcdn.com/uploaded/r/0e896071_regulatorylegalcrystallinesilicacoalitionletter.pdf (accessed September 18, 2014).
15. Diana G. Carew and Michael Mandel, "U.S. Investment Heroes of 2014: Investing at Home in a Connected World," Progressive Policy Institute, September 19, 2014, http://www.progressivepolicy.org/issues/economy/u-s-investment-heroes-2014-investing-home-connected-world/ (accessed September 18, 2014).

thus discourage such investment —such as the proposed neutrality rules—are the real threat to consumers who rely on robust broadband service.

But what if competition fails? Without net neutrality rules, would consumers be left at risk? Not at all. Agencies such as the Federal Trade Commission can address any legitimate concerns under existing antitrust laws. And, antitrust rules focus on consumer welfare—an approach far preferable to the FCC's vague charge to further the "public interest."

Steps for Congress

Congress should take steps to ensure that each new and existing regulation is necessary and, if so, that costs are minimized. Foremost among these is requiring congressional approval of new major regulations as provided for in the Regulations from the Executive in Need of Scrutiny (REINS) Act (H.R. 367, S. 15) now pending in Congress. Congress, not regulators, should make the laws, and should be accountable to the American people for the results. To help ensure this, no major regulation should be allowed to take effect until Congress explicitly approves it.

Congress has always had the constitutional authority—and duty—to authorize new regulations. All of the thousands of rules and regulations issued each year are based on powers delegated to agencies by Congress. These rules can always be modified or revoked by legislation. In addition, recognizing that institutional inertia can make it difficult to move legislation forward, the 1996 Congressional Review Act (CRA) established "fast track" procedures for blocking new rules, ensuring an up-or-down vote in the House and the Senate on "resolutions of disapproval."

The CRA, however, has been successfully used only once to stop a rule, and that was more than a decade ago, when a rule on workplace ergonomics promulgated by the Clinton Administration was rejected shortly after George W. Bush was inaugurated. One problem is that a CRA resolution—like all other legislation—is subject to presidential veto. But few Presidents are keen on rejecting the work of their own appointees. As a result, the CRA and congressional review of rulemaking have been toothless tigers.

The REINS Act would provide real teeth to regulatory review by, in effect, reversing the burden of proof for new rules. Specifically, major rules would be conditioned on approval by Congress. They would not be formally adopted until and unless a "resolution of approval" is adopted by Congress. As with the CRA's "resolution of *dis*approval," this resolution would be subject to fast-track consideration.

This would be a significant change in the way rules are adopted. The effect is to reinforce the constitutional balance of powers. As a first matter, the change restores Congress's constitutional role of legislating, too much of which has been delegated to regulators in recent decades. As important, the change would also make lawmakers more accountable for their legislative actions.

Under present practice, Congress can take credit for enacting popular but vague legislation, and then can plausibly deny responsibility for the costly regulations that result. Thus, for example, the FCC is charged with furthering the "public interest," the EPA with regulating global warming, and the new Consumer Financial Protection Agency with limiting "abusive" financial practices without a clear indication of what those terms mean. This allows Congress to stand on the sidelines, ready to take credit or to denounce the agencies' actions, rather than take responsibility itself.

The result is power without accountability—a useful formula politically but an abysmal one for policymaking. The REINS Act would end this shell game.

Despite the claims by opponents, the REINS Act is not inherently anti-regulatory. Instead, it ensures scrutiny of new rules by Congress. It would apply just as much to agency decisions that reduce regulatory burdens as it would to those that increase such burdens.

This is not to say that equal numbers of regulatory and deregulatory actions would be subject to scrutiny under the REINS Act. That is not because of any bias in the legislation, but rather is simply because agencies act to increase regulation far more often than they act to reduce it. In Republican as well as Democratic Administrations, decreases in regulation have been far outnumbered by increases. Under President Obama, they have almost disappeared entirely (at least among major rules). The unavoidable fact is that we are facing a flood of new regulation, not a flood of deregulation. Reviews under the REINS Act would only reflect that fact.

Some critics say that the task of reviewing so many rules would be too burdensome for Congress and would "gum up" the regulatory works. But as noted above, a large number of the major rules are administrative or budgetary in nature, such as those

setting Medicare reimbursement rates, and perhaps could be exempted from REINS review. In any case, it hardly makes sense to excuse Congress from the task of reviewing new rules because too many are being produced. If anything, that would indicate a greater need to monitor regulatory activity.

Critics also argue that the REINS Act would displace regulators' "expert" judgment with political decision making. For example, Sidney Shapiro of the Center for Progressive Reform writes that congressional action "is likely to be nakedly political, reflecting the raw political power of special interests," while agency actions "are backed up with reasonable policy determinations."[16]

Since Members of Congress must regularly face the voters, they will have a different perspective from appointed regulators. That is not a bug in the system; it is a feature.

But, outside of political science textbooks, that is not how government works. Regulators have their own self-interested agendas—and political considerations do influence the process.

Most regulatory decision making involves more than scientific expertise, which often is abandoned in pursuit of political aims. Rulemaking largely involves value judgments as to which burdens will be placed on the American people. Such decisions properly involve Congress.

Congress and agency "experts" will not always agree. Since Members of Congress must regularly face the voters, they will have a different perspective from appointed regulators. That is not a bug in the system; it is a feature. Simply put, no rule should be adopted if the American people, as represented by Congress, do not agree that it is properly designed or necessary.

While the REINS Act would provide an important start toward taming excessive regulation, it is no silver bullet. Other reforms that complement the changes made by REINS are also needed. Among them:

1. **Requiring regulatory-impact analyses of legislation before Congress.** Lawmakers routinely vote on bills authorizing mandates or restrictions on Americans without any systematic assessment of the costs imposed or other potential effects. Just as a Congressional Budget Office review is required for any on-budget spending measures, a regulatory assessment should be required for any measure before it reaches the floor for a vote.

2. **Establishing a sunset date for regulations.** While every new regulation promulgated by executive branch agencies undergoes a detailed review by OIRA, there is no similar process for reviewing regulations already on the books. Old regulations tend to be left in place, even when they are no longer useful. To ensure that such retrospective review occurs, regulations should automatically expire if they are not explicitly reaffirmed by the relevant agency through a notice and comment rulemaking. As with any such regulatory decision, this reaffirmation would be subject to review by the courts. Sunset clauses already exist for some new regulations. Regulators, and if necessary, Congress, should make them the rule, not the exception.

3. **Subjecting "independent" agencies to executive branch regulatory review.** Increasingly, rulemaking is conducted by so-called independent agencies outside direct executive branch control. Agencies such as the FCC, the SEC, and the Consumer Financial Protection Bureau are not subject to review by OIRA or even required to conduct cost-benefit analyses. This is a serious gap in the regulatory process. These agencies should be fully subject to the same safeguards applied to executive branch agencies.

Conclusion

President Obama's blunt assertion that he will use his executive authority to bypass Congress if it dares to block his agenda has stirred much controversy, but was nothing new for this Administration. During his first five years in office, an eye-popping 157 new major regulations have been imposed at a cost of $73 billion annually—and 120 more are in the pipeline.

16. Sidney Shapiro, "The REINS Act: The Latest Conservative Effort to Gum Up the Regulatory Works," Center for Progressive Reform blog, January 14, 2011, http://www.cprblog.org/CPRBlog.cfm?idBlog=84F5CF0B-E804-F8D1-7197786456C5DC4F (accessed September 2014).

Congress—which shares much of the blame for enabling this flood of red tape—must act to stem it, ensuring that unnecessary and excessively costly rules are not imposed. Without decisive action, the costs of red tape will continue to grow, and the economy—and average Americans—will be the victims.

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