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Talking Investment Management: Best Protections for Fund Directors from SEC Exams and Enforcement – Looking Back and Ahead

October 23, 2025 | Podcast Transcript

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David Grim:

Hello everyone, and welcome back to the Talking Investment Management podcast. I'm Dave Grim, a partner here at Stradley Ronon, and I'm really excited to be joined by my colleague and partner, Jan Folena, she serves as the co-chair of our securities and regulatory enforcement practice, and Buddy Donohue, who is a current fund director, the former director of the SEC's Division of Investment Management, as well as the chief of staff at the SEC, and a good friend. Jan, Buddy, so thrilled to have you here today. And with the Independent Director's Council 2025 conference just right around the corner, thought it would be a great time to sit down with both of you and talk about some of the issues that matter most to fund directors.

So, we're going to dive into how the SEC's exams and enforcement play into the picture, looking back at the history of regulatory scrutiny on fund directors, and talk about what it's really like to be under the examination and enforcement microscope. We'll also share some strategies for hopefully staying out of those situations, and some practical steps directors can take when enforcement actions can't be avoided. We're also going to spend a few minutes on what can be expected from enforcement and exams at the current SEC.

So, with that as a windup, Buddy, let's turn it to you. We'd love to hear a bit about your background, including your time at the SEC, recognizing that it's not just about the SEC with you, you've spent time in all the important chairs when it comes to these issues. And so it would be great to hear some about your background. And also if you can give us some historical perspective. How did we get to this point? Some examples of past cases where fund directors faced enforcement or other regulatory challenges.

Andrew (Buddy) Donohue:

Happy to. And first, thank you so much for the invite to talk about this topic that I know is on the minds of many of the independent directors, probably most independent directors that sit on

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boards. I've been in the industry now for 50 years. I graduated law school in '75 and went into the industry right away.

And as I think back, I've sat in virtually every chair around this table, when you talk about funds and directors and regulators and managers. As you mentioned before, I was the division director for the Investment Management Division at the SEC and I was chief of staff there, so I have the regulator's perspective, to a large extent. I was outside attorney. I was a partner at Morgan Lewis for a while, and I was a senior counsel at Shearman & Sterling. Most of my career, I was management. Early on in my career I was president and actually a director of a small fund family. I was executive vice president, general counsel at OppenheimerFunds. I was global general counsel at Merrill Lynch Investment Managers, and I was investment company general counsel at Goldman Sachs. So, I have a little bit of experience with different firms and the approaches that those firms wound up taking.

I've been a director really of closed-end funds, open-end funds, and a BDC. I was chairman of and board member of private funds located in the Cayman Islands. And I've sat on as a board member of UCITS, both Dublin-based and Luxembourg-based. I've been an independent director of the OppenheimerFunds, and I'm currently an independent director of two of the clusters, really, of the BNY Mellon funds. I've also been on the board of the Mutual Fund Directors Forum for a number of years, and last couple of years, I was a chair of that board. And I've been an adjunct professor, teaching investment management, got to be 10 years at Brooklyn Law School, and more recently at Rutgers. A lot of seats, and I try not to get confused at times, because I guess I could wind up. But I wind up with a fair amount of experience, and I look at issues, really, from a number of different perspectives, which I think can be quite helpful.

There haven't been that many cases that have been brought against independent directors' funds, but that doesn't keep directors from necessarily worrying about the fact that they may be one, that a case winds up bringing. So, I'll mention a few of the cases. There was a case in 2012 against eight directors really related to the Morgan Keegan funds and valuation. Now that, very unfortunate, there were cases... The SEC had previously brought a case against the manager and some others about the same issue with the same funds.

I had 2013 case against Northern Lights Funds and independent directors there. A little background, I think there were 71 different series that the directors were supposed to be reviewing, information in connection with the renewal of their advisory contracts. And that can be quite a difficult task, where you have that many funds, that many different sub-advisors. And again, and the renewals that would've taken place.

2015, you had the Commonwealth applicants, and once again that was a... I would say it was a 15(c) case, but it really was, among other things, if I recall correctly, about much of the information they had requested, or some of the information they had requested in connection with the renewal of the advisory contract, they had not actually received, and actually indicated they had received it, relied upon it in their renewals.

And then more recently, I think there was a case brought in 2023, which had further action, 2025 Pinnacle, where there was a case that was brought against... I think it was two independent directors for actually aiding and abetting. And I'm going to turn on that one to Jan, because Jan, you

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were actually the lawyer that actually was able to have that case dismissed against them. So, Jan, if you want to jump in and maybe talk a little bit about that case, and then we can get back to the other things I'm supposed to talk about.

Jan Folena:

Thanks, Buddy. It's great to have you. And thanks, Dave, for getting us kicked off here. Yeah, the Pinnacle case was unique in many ways. I think one of the things it did is it demonstrated to the industry that independent directors can find themselves in the crosshairs of the SEC, and that's exactly what happened in that case. It also was a good lesson in understanding that the board's obligations under the federal securities laws are specific and limited. Board's obligations under state securities laws and state laws can be more broad, can be, but the SEC cannot enforce those obligations.

And this was a case where the specific oversight obligations of the board fell under what is known as the liquidity rule, and that boards have three very specific obligations under the liquidity rule, that the SEC has called their oversight obligation. And interestingly, in that case, the independent trustees met all three of those obligations. In order to bring that enforcement action, the SEC had to allege that they aided and abetted others in not appropriately designating the assets in the fund in the correct liquidity categories. And that's where things sort of went awry.

Interestingly though, aiding and abetting, not just for independent trustees, but really for any individuals in an SEC enforcement case, is not an easy standard for the SEC to hit. And these independent trustees had a very robust defense on that substantive charge. However, this was also a case that demonstrates what happens when the legal landscape surrounding the SEC changes during the course of the case.

Here, the liquidity rule was a new rule. On behalf of the independent trustees, we challenged the rule. It was a secondary argument. And the Supreme Court struck down Chevron deference in the courts to the SEC's ability to interpret the federal securities laws. And instead, the court asked us to re-brief the matter under the new standard, post-Chevron, under Loper Bright. And we did that. And that's ultimately what won the day for the independent trustees, because the SEC dismissed the case. The risk to the SEC of losing yet another rule in one year where they had lost four already was just too much. But I think the case taught the industry a lesson about, one, really looking to see whether the SEC has the authority it claims it has, whether your individuals actually violated the law, and whether the SEC can meet the standards and the elements of the particular offenses. So, I'm going to send it back to Buddy and Dave for the next topic.

David Grim:

Yeah, great. Great stuff, Jan. And Buddy, just ping-ponging it back to you, I'd love to get your take on the Pinnacle case, but also the other cases that you listed there, right? You've seen a lot of them. You sat in all those different chairs, as you talked about. Do you have lessons learned or practical takeaways for directors, as you think back on that enforcement history?

Andrew (Buddy) Donohue:

I do. And I've thought a lot about the whole issue of potential liability, really, for directors from SEC perspective or from litigation generally. And yeah, I'll start off by saying, listen, Jan, in deference to you, it's nice that you won the case, but if you're a director, you don't want to be in that case, right?

Jan Folena:

Exactly.

Andrew (Buddy) Donohue:

So, for many of us, it really is a question of, "Okay, how do I avoid having to hire Jan to get me out? I just want to avoid being in." And so I think as I look at some of the cases that [inaudible 00:10:28], the first thing is on the valuation cases, there's only three real provisions in the 1940 Act that actually give directors specific responsibilities and things they have to do.

One of them is the determination of fair value, if you went onto 2(a)(41). And then ultimately the rule 2a-5, and there's the requirements on the 15(a), (b), and (c). Directors have responsibility for approving the advisory contract and approving the underwriting contract. And under (c), where directors have responsibility for requesting information from the advisor relative to the renewal of the contracts, and the advisor has responsibility to provide that information, then the independent directors have the responsibility for, as independent directors, approving the advisory and the underwriting contracts. And then there's the requirement, really, for the independent directors to approve, under section 32(a), the appointment of the independent public accountants for the fund. And you can go searching all you want under the '40 Act, you're not going to find much more there.

So, there's probably over 50 rules that give directors some level of responsibilities, whether it's approval, oversight, or otherwise, for them to pick up responsibilities for doing things. So, that's the regulatory landscape that you wind up being under. What I find interesting about, and what's sometimes scary about the Pinnacle case, is that it was aiding and abetting. And so it wasn't even that they could say the directors didn't do something that they were required to do. But rather supposedly, I guess, they were aiding and abetting somebody else doing something that they shouldn't have been doing. And I think directors would find that troubling, in terms of a regulatory approach to something where the regulator didn't decide that they had a specific obligation that they didn't comply with, but rather that, for some reason, they thought they should have been in a position to maybe have prevented that from happening.

There's certain areas, I always think, as a regulator you care about. Valuation, I would say, is one of them. Now, extraordinarily important area, particularly for open-end funds. People are transacting on those, and you need to make sure that, in fact, assets and liabilities are being properly valued. And directors, by statute, are given that responsibility, where there aren't readily available market locations for portfolio security. So, it doesn't surprise me that the directors may not have been, in any regulator's view, doing their job properly. The fact they might decide that that's an area they want to pursue.

I do think that the regulators will be somewhat reluctant to bring cases against directors. And that was my experience, and that's why the aiding and abetting part really troubles me a bit. Because the recognition, it's a difficult job and you want to make sure that you can attract the best people to be there. And so they want to make sure that they're not doing anything that would discourage really good directors from taking on the role and doing the job properly. Going forward, I just think that it's likely that a lot of the cases that the SEC might consider then would be what I would call process cases.

So, just think about the valuation cases that were brought. Yeah? They were not about the fact that the value that the board gave to a particular instrument was wrong, right? So, it'd hard for the SEC actually to make that case, because the statute is fair value is determined in good faith by the directors. So, it really is that the process they use to reach or the process they didn't use to reach that determination. And that's an easier case to bring, right? Because you can actually go through and say whatever. And there's any number of, if you would, regulations that have been adopted to actually tell you what you have to do. And if that's the case, you better make sure that actually you're following exactly what the regulation says you have to do or, alternatively, cases could be brought based on your failure to follow your own procedures. Where you yourself have essentially said, "Here's how we're going to do something," and then as you wind up in a situation where you're addressing that very specific issue, you don't do what you said you were going to do.

And so I think there's a degree of diligence I think that we all should have, as we're looking at our role as directors, to make sure that not only we're doing the right thing, but that we're doing it in the right way. And I think that's a combination of what we said we'd do, what we disclosed we would do, and also what we may be required to do, either by our own policies and procedures, or by rules that have been adopted, or statutory regulations that wind up in place.

Now, if I'm an independent director, and I am an independent director, one of the things I really do is rely a lot on my counsel. I rely on my counsel and I rely on the management company to really help me make sure that, in effect, I've done things that I need to do, I've done within timeframe I have to do them, and I've done them in the manner, approach, with the information I need to have to do them effectively.

And so as I look at these cases, I look at them and I say, "It's unfortunate." I don't feel good about the cases having been brought. But I do recognize that we... Listen, independent directors have incredibly important responsibilities, and the SEC and investors rely on us doing our job properly. And so I think we need to make sure that, in fact, we earn their trust and we do things that we're supposed to do in the way in which we're supposed to do that. David and Jan, I don't know if that answers the question, but that's the approach that I wind up and the observations I wind up taking from you.

I would also point out that there was a '33 Act case or a '34 Act case that came up where an independent director, not a fund case, but was less than forthcoming about a personal relationship that he had with management. And that really didn't enable either the shareholders for the fund or the directors or their counsel or management to ascertain whether or not he really was an independent director. The SEC brought an action against him based on that, and he wound up having to, I think, settle with the SEC.

So, just not all the cases are going to be '40 Act-type cases. If you're a fund director, you oversee a lot of different areas, and you have policies and procedures that you have adopted, made sure were adopted under 38a-1 to prevent violation of federal securities laws. And now I think you ought to be mindful that we just ought to always be diligent about what we're doing.

And as I was saying before, I think that a lot of them are going to be process cases. And a lot of them likely will either be relying on or use as a mode of settlement, really, the compliance rule 38a-1.

Fortunately, I don't have a lot of experience in terms of enforcement actions against independent directors. Other than observing them when I was at the commission, and reading them before I was there and then after I've left. But Jan, what do you think in that regard?

Jan Folena:

Yeah, Buddy, thanks. It's interesting, I think we've seen Chair Atkins, in a couple of speeches now, indicate what he's really looking to do, in terms of enforcement. And even if it doesn't focus on independent trustees specifically, I think what he has to say is important for boards, because what we will see, and what we saw in the last administration under Chair Clayton, is investment management will be a focus, because that's where retail investors are. And Chair Atkins in particular is going to focus on protecting retail investors. And the way to do that is really through the two '40 Acts.

My suspicion is there's going to be a focus there once again. In fact, the investment management case numbers under Clayton were actually higher than they were under Gensler. So, if that's any indication. The other thing is Chair Atkins has been quite clear about being less prescriptive. About products that can be offered, programs, what retail investors are permitted to invest in. And that is certainly a priority for this commission. But what will also have to be a priority are disclosures, because if you're going to allow market access to more products, you have to make sure the market has accurate information. And that's an easy one, because that's right squarely in both of the '40 Acts, the '33 and the '34 Act.

So, I think we're going to see a real emphasis on disclosure, which means as lawyers and as board members, we have to be aware of what the requirements are in disclosure cases, and where there really is still a lot of room for the law to develop. So, you mentioned valuation, Buddy, I think valuation still could be an important point for this commission because it goes to the value of the fund, and that's what investors are looking at. That has to be correct. However, as you also point out, valuation cases are very difficult for the SEC to bring as a substantive matter, because of the way the courts have defined valuation as an opinion and not a fact.

So, now the question is do you bring cases under the compliance rule? Do you bring cases under in technical violation areas? I think not. I think we're going to see less of that in enforcement, but that raises the next question. Can we actually do enforcement at the SEC now without bringing enforcement action? And the answer to that is yes. And I think Buddy and Dave can both speak to this. There's an exam program, and at least two of the three commissioners, Republican commissioners, have been pretty outspoken about how many violations, potential violations, borderline violations, can be dealt with effectively in the exam program.

Also important during that process, that your response to deficiency letters appropriately address those, so that you satisfy the commission. Because if they want to avoid enforcement action, that is really now the place to do it. And again, individual accountability, I think, is going to take priority over cases against entities and high penalties. And penalties are going to go back to where they were when Chair Atkins was on the commission, where they have to be tailored, they have to be within the statutory limits, and they cannot harm shareholders. So, from the board's perspective, you could be looking at those things if in fact you have an issue that is coming before you, when we're talking about penalties.

Andrew (Buddy) Donohue:

Jan, those are very, very interesting points. And the point about the examination program I think is an important one. It's been... You can look at that favorably and say that rather than having to go through enforcement actions and the bad outcomes that can come from that, things can be disposed of at the examination phase in a hopefully satisfactory manner. Having spent most of my career in management, you didn't want to have to resolve them at a higher level. If you could resolve something at the examination level, that was really what you sought to do.

There is a concern, a counter concern, if you would, which is also that the examination process can wind up really being its own regulatory regime. Where, in fact, the new rules, if you would, are being determined by the examiners. By the way, who are not the Investment Management Division. They're not commissioners, they're not the regulatory division that's supposed to have responsibility for developing those, but they're rather the examination area, and the way they possibly believe things should evolve. And that's a counter to that, and I would encourage people to be careful in that arena.

But you can easily see where you would agree to do something that maybe you're not obligated to do, if in fact you wind up not having to address either that or a different issue, if you would, in what can be the more troublesome enforcement arena. So, yes, there is the advantage that you can maybe dispose of things at the examination phase, but there's also a concern that, in fact, you're developing the new rules, if you would, without the opportunity for notice and comment, regulatory action actually having taken place, and a concern that I would have there with that proposal.

I would also point out, I think there's... One of the philosophical issues that I had seen when I was out the commission and that I can appreciate this stuff, the fact that frequently where there's been a violation, the action by the SEC against the entity that actually was harmed by the violation or the shareholders wind up imposing a fine on that very entity and hurting shareholders even more, and that's part of... I know that the current chairman of the SEC, you know, has made that comment when he was a commissioner, I'm sure still feels that way, you shouldn't be harming the shareholders, really, of a company that was harmed twice. They already suffered because that thing that happened shouldn't have happened, and now you're imposing a fine on them also or some other complication. And therefore, your alternative is to make sure that you're holding individuals responsible. And I do believe it likely will be directives.

I also note that if you're going to make a number of less liquid type investments available to retail investors, valuation is going to be a key. Disclosure, Jan, as you had mentioned, is going to be a key. And you're going to have to make sure that, in fact, the investors that are making choices are making the correct choices. The people that are responsible for making sure the assets are being valued properly are doing that properly. And that, I think, increasingly will be a challenge for some board members and something that board members, counsel, management companies, and everybody needs to look together and make sure you get it right.

David Grim:

Yeah, great stuff from both of you. Thanks for all that. Jan, one thing that I wanted to ask you, we've talked some about trying to avoid getting in the crosshairs of the SEC, right? But sometimes you get in the crosshairs despite your best intentions, right? And you just had a front row seat where that happened with your clients. And I'd love it if you could just share with us, like how does that feel, right? What does it feel like? And practically, if you're a director that ends up in that unfortunate seat, what are some things, some practical things, they can do to get themselves out of that seat, hopefully?

Jan Folena:

Sure, yeah. This was a really interesting perspective for me. When I was inside the SEC and the SEC would sue individuals, I always thought, "Wow, it's a tough pill to swallow when you're named as a defendant in an SEC action." Having a front row seat to actually defending that was similar. Independent trustees, or individuals in any position, feel as if it is almost a personal attack on their abilities as either a chief executive officer, a chief financial officer, or as a director. They feel as if their reputations are impugned, and in a sense they are. There is a press release that comes out from the SEC. It details the SEC's version of what they feel was wrong. And it doesn't make you, as an individual, look very good, career-wise or other.

So, how do you get on top of that? You have to stay one step ahead of the regulator. That's key. You have to be thinking ahead of where they are. What are the defenses? Where are the holes in the case? And how are you able to capitalize on that? There is a defense to every SEC action, it's just a matter of finding it. You have to keep the lines of communication open, especially when you're dealing with independent trustees who, again, are not necessarily steeped in the industry. They are not lawyers and they are not regulators. So, your job as counsel is to educate them as best you can on what the law actually requires them to do, what they did, and whether or not it complied.

And you have to be in a receive information and listening mode from them, so you can fully understand how they were operating and what the facts are surrounding this violation that may or may not be provided to you, either from the SEC during a Wells process, or in the complaint when it's finally filed. And then you have to assess and reassess the merits of the case, your defenses in the case, and how is the law developing while you may be litigating the case. As I said, that was key here. And being able to pivot. Pivot from what might have been, at the outset, your strongest argument to a secondary argument that now becomes the strongest argument because things have changed. If you are unable to pivot in those circumstances, you can't adequately represent your clients or take advantage of what is really a changing environment.

What are some practical steps though, when you are not in an enforcement action, but you, as a board, can envision an enforcement action? I think there, and this is sort of advice that I typically give, and that is what is the potential violation? What are the elements of that violation? And how will the regulator establish the violation against you, against your fund, against your advisor? Whoever it may be. And walk backward, and take action that will alleviate and eliminate the SEC's ability to hit those elements. So, you're preventing a claim from ever actually developing or ripening into something that can be filed in a complaint, in an enforcement action against you.

And look, I'm not here to say perfection is going to be achieved. Perfection is not the standard though under the federal securities laws. But understanding how to avoid a level of imperfection that can result in liability is what is key here. And again, to Buddy's point, this is your counsel, this is your asset manager, these are your fund managers working together to identify what the issue is and resolve it before you get to an enforcement action.

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Andrew (Buddy) Donohue:

Jan, those are really, really good points. As a director, you could give me really, really good advice when I'm in the barrel being shot at, where my only goal is to get out of the barrel. David, you likely would be the one who would give me superior advice about how never to be in the barrel to begin with. And I think that for me, that's always been the way that I look at it. I don't want to be in the barrel. Jan, you gave some really good advice on, as they're trying to put you in, maybe how you can keep them from actually doing that.

And I think I've always relied on really good counsel and really good management to be very thoughtful about the role that they're putting directors in, and responsibilities that directors have. And then basically how to make sure that the manner in which the board is operating, independent directors are making decisions, being asked to do things, is being done properly, so that the ability, if you would, for the regulator to try and put you in the barrel is really diminished to a great extent.

David Grim:

Agree 100%. Buddy, I think you put it so well earlier, right? When you're talking about staying out of the barrel. The continued focus on process, right? That's where the focus of the commission has been, that's where it's going to be. And what does your procedure say? Are you following it? What does your disclosure say? Are you following it? A continued focus on that, it's so critical to staying out of the barrel. Not that we don't love working with you, Jan, right? But let's try to keep it from getting there, right? All right, like-

Andrew (Buddy) Donohue:

David, I would point out, it's unfortunate that it really is kind of the check the box kind of approach, as opposed to what's really important, but that, I think, is the world that we live in. And we can always take care of the really important stuff as directors, we just have to make sure we're also checking all the boxes.

David Grim:

Well said. So, as a way of wrapping us up here, we've spent a little bit of time already, I think, prognosticating about what's going to be coming down the pike from the SEC, but I want to just wrap by coming back to that and seeing if there's any other points we want to share with our audience on what we're going to be looking at in the coming years here. And just I'll kick it off by noting that Chairman Atkins, at the SEC himself, was a fund director. And I think that's an excellent thing for all fund directors, right? It gives him a perspective that will inform how he thinks about these issues. So, that's a really good thing about Chairman Atkins.

And then the other point that I just wanted to highlight is that in the last administration, there was quite a bit of focus on potential 15(c) related cases. And pleased to report that so far, none of that has come to fruition. Let's hope it stays that way with the new administration. So, that's a couple of things I've been thinking about in terms of looking forward. Buddy, how about you? Anything else that we haven't covered in terms of today's SEC and looking forward that you would share with our audience?

Andrew (Buddy) Donohue:

I think you've done an excellent job, and you and Jan in particular were pointing out issues observed, really, since the creation, really, of the Asset Management Unit inside Enforcement. That there had been an increased focus, if you would, on the advisor and the fund arena, in terms of the way that everyone is complying with the rules and the laws that are applicable. And I think the size of that unit will have a lot to do with the focus, really, of enforcement on that particular area. And the focus went up in that area significantly when that unit was created. I liken it to the fact that you have regulatory enforcement lawyers that can only fish in certain ponds, and the pond they have is asset management, and so that's where they're fishing and they want to get the biggest fish they can. So, if that unit winds up being expanded or reduced or whatever, I think it'll have some influence, if you would, on the number and types of cases that are being brought.

David Grim:

Excellent point. Agree 100%. Jan, how about you in terms of looking ahead, anything else you would add to what you've shared previously?

Jan Folena:

Yeah, I would add, I think Chair Atkins made an interesting comment, Dave, and you pointed this out too, the other week, how he was looking for the SEC to secure judicial opinions to interpret the law for the SEC and establish guidelines for the agency. I found that interesting, because if enforcement is going go down, that's not consistent with securing judicial opinion. So, it'd be interesting to see if he doesn't bring some cases to try to obtain judicial opinions to really settle the law in some areas where it's still pretty uncertain.

The other point I'll make is the SEC, with respect to fund directors, I suspect will be looking for fund directors to assist rather than assume the liability of all of the violations of an investment advisor and their fund. But private lawsuits will not be so forgiving or understanding. And that's where I think you could still be, as an independent director, at risk.

David Grim:

Excellent. Well, I think that is a good place to bring today's conversation to a close. We've obviously covered a lot of different ground: recent shifts at the SEC, what it feels like to be on the other side of an enforcement action, how trustees can manage that risk, and what to watch for, going forward. Buddy and Jan, you guys have just been superb. It's been an absolute treat to talk about this with you. And we're looking forward to keeping this dialogue going as we get ready for the IDC conference coming up here soon.

We'd love to connect with you out there if you're there. In the meantime, if you need more information, feel free to reach out to any of us. Take a look at Stradley.com. Thanks everyone for listening, and hope you have a terrific day.

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Andrew (Buddy) Donohue:

Jan and David, thank you.

Jan Folena:

Thank you.

End:

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