NASD Notice to Members 97-19

NASD Regulation And New York Stock Exchange Memorandum Discusses Sweep Report And Provides Guidance On Heightened Supervision Recommendations

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Executive Summary

The *Joint Regulatory Sales Practice Sweep Report* recommended that firms should, among other things: adopt stringent procedures for hiring registered representatives; initiate heightened supervisory procedures for registered representatives with a history of customer complaints, disciplinary actions, or arbitrations; and ensure compliance with cold-calling requirements. This *Notice to Members* contains a memorandum developed and jointly issued by NASD Regulation, Inc. (NASD Regulation℠) and the New York Stock Exchange, Inc. (NYSE) which describes the findings and recommendations of the Joint Regulatory Sales Practice Sweep (Sweep) that would alert firms of their responsibilities under NYSE and NASD® rules to provide particularly close supervision to certain registered representatives. The memorandum also describes actions that could constitute heightened supervisory procedures.

Questions concerning this Notice may be directed to Mary Revell, Assistant General Counsel, NASD Regulation, at (202) 728-8203.

Questions about the Sweep should be directed to Daniel M. Sibears, Vice President, Member Regulation, NASD Regulation, at (202) 728-6911.

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NASD REGULATION

New York Stock Exchange

MEMORANDUM

TO: **Members and Member Organizations**

DATE: **April 15, 1997**

SUBJECT: **The Joint Regulatory Sales Practice Sweep; Heightened Supervisory Procedures**

I. Background

The Joint Regulatory Sales Practice Sweep (Sweep) was an initiative involving the staffs of the National Association of Securities Dealers, Inc. (NASD®), the New York Stock Exchange, Inc. (NYSE), the Securities and Exchange Commission (SEC), and representatives of the North American Securities Administrators Association, Inc. (collectively, the Working Group) to review the sales practice activities of selected registered representatives and the hiring, retention, and supervisory practices of the brokerage firms employing them.[1] From December 1994 through November 1995, the Working Group conducted on-site examinations of 179 branch and main offices of 101 different brokerage firms throughout the U.S. The examinations focused on the sales practice activities of 347 registered representatives who were selected based on criteria including, among other things, a history of customer complaints, disciplinary problems, or arbitrations. One-fifth of the Sweep's 179 examinations resulted in enforcement referrals and an additional one-fourth of the examinations resulted in the issuance of letters of caution or deficiency letters.

II. Sweep Findings

The *Joint Regulatory Sales Practice Sweep Report* (Sweep Report) was released on March 18, 1996. Although the findings are not representative of the industry as a whole, they provide important information for the entire industry. The key findings included in the Sweep Report are:

- Some firms are willing to employ registered representatives with a history of disciplinary actions involving abusive sales practices or customer complaints.

- Many of the branch offices examined conduct only the minimum background review required by NASD or NYSE rules before hiring a registered representative. This may contribute to the significant movement within the securities industry of registered representatives with a history of customer complaints, disciplinary actions, or arbitrations.

- Supervisors in certain branches examined conducted either inadequate or no routine review of customers' securities transactions effected by registered representatives to detect sales practice abuses.

- While one-half of the branches examined engage in some type of cold-calling activity, almost one-half of these did not fully comply with the applicable laws or regulations governing unsolicited telemarketing.

[1] This review was undertaken as a follow-up to the SEC report titled "The Large Firm Project: A Review of Hiring, Retention and Supervisory Practices," issued in May 1994.

III. Sweep Report Recommendations

Based on the results of the Sweep, the Working Group made specific recommendations relating to the prevention and detection of sales practice abuses by registered representatives. In the following discussion of the recommendations addressed to firms, NASD Regulation, Inc. (NASD Regulation℠) and the NYSE reiterate their support and endorsement of the Sweep Report recommendations and remind firms of their current responsibilities under NASD and NYSE rules.

A. Improved Hiring Procedures for Registered Representatives

To aid in efforts to identify and, where appropriate, exclude registered representatives with a history of customer complaints, disciplinary actions, or arbitrations from the securities industry, it is recommended that firms and their branch offices determine if their hiring procedures are adequate and, if necessary, improve their hiring procedures when considering registered representatives for employment.

In addition to reviewing an applicant's Form U-4 and Form U-5, reviewing the applicant's history in the Central Registration Depository℠ (CRD℠), and contacting the applicant's previous employers, as is now required under existing self-regulatory organization (SRO) rules, firms should consider the following as "best hiring practices":

(1) discuss with the applicant the nature of the applicant's prior customers and the types of securities sold while associated with prior employers;

(2) obtain from the applicant explanations regarding any customer complaints and regulatory actions to determine the merit, to the extent practicable, of each before hiring;

(3) ask applicants about the existence of and nature of any pending proceedings, customer complaints, regulatory investigations, or arbitrations not listed in CRD; and

(4) involve compliance and legal staff, as appropriate, in the hiring process, and designate an individual (above the branch office manager level) or a committee to review the customer complaints, disciplinary actions, or arbitrations before hiring a registered representative with such a history.

Firms are reminded that they are responsible under SRO and SEC rules and regulations to investigate adequately each applicant's character, business repute, qualifications, and experience before hiring and to maintain documentation of the steps taken in the hiring process. Required employment records are subject to regulatory review during examinations.

B. Supervision for Registered Representatives with a History of Customer Complaints, Disciplinary Actions, or Arbitrations

A firm that hires a registered representative with a recent history of customer complaints, final disciplinary actions involving sales practice abuse or other customer harm, or adverse arbitration decisions should determine if it is necessary to develop and implement special supervisory procedures tailored to the individual registered representative, or whether its existing supervisory procedures and educational programs are sufficient to address the circumstances. This determination should be made also where a registered representative, during his or her employment, develops such a history. The procedures should involve, where appropriate (as discussed in more detail in Section IV below), a more frequent or focused review of the registered representative's activities by his or her supervisor for a period of time.

The individual's direct supervisor or other designee of the firm should consider performing a thorough review of a registered representative's customer account activity if, subsequent to hiring, the registered representative becomes subject to customer complaints. Such a review procedure could be activated, for example, when the registered representative is named, during a one-year period, in three customer complaints alleging sales practice abuse.

C. Branch Manager Compensation

As a means to encourage branch office managers to devote sufficient time and employ adequate supervisory tools, firms should consider tying or increasing an existing component of a branch office manager's compensation to the manager's effective supervision of the branch's registered representatives. Under such a scenario, managers would be compensated, in part, for effective supervision and compliance efforts which avoid sales practice abuses.

D. Firm Supervisory Obligations

Firms must fulfill all of their obligations under SRO rules to supervise the activities of registered representatives and other associated persons. Firms are reminded of their long-standing responsibilities to implement reasonable procedures designed to detect and prevent rule violations and to correct deficiencies in, and violations of, relevant laws, rules, and regulations. Firms also are reminded that they are responsible for supervising branch offices and that it is important that appropriately registered principals be designated to carry out supervisory responsibilities.

NASD members are reminded of the following supervisory obligations under NASD rules:

1. Firms must designate one or more appropriately registered principals in each office of supervisory jurisdiction (OSJ), including the main office, and one or more appropriately registered representatives or principals in each non-OSJ branch office with authority to carry out the supervisory responsibilities assigned to each office [NASD Rule 3010(a)(4)].

2. At least annually, firms must conduct a review of the businesses in which they engage. The review must be reasonably designed to assist in detecting and preventing violations of and achieving compliance with applicable securities laws and regulations and with the rules of the NASD [NASD Rule 3010(c)].

3. Firms must conduct an annual inspection of their OSJs [NASD Rule 3010(c)].

4. Firms must conduct inspections of non-OSJs according to the schedule in the firm's written supervisory procedures [NASD Rule 3010(c)].

5. Firms must retain a written record of the dates that each review and inspection was conducted [NASD Rule 3010(c)].

NYSE members are reminded of the following supervisory obligations under NYSE rules:

1. Firms must supervise each office, department, or business activity [NYSE Rule 342(a)].

2. Firms must delegate to qualified principals or employees responsibility and authority for the supervision and control of each office, department, or business activity, and provide appropriate procedures for supervision and control [NYSE Rule 342(b)(1)].

3. Firms must establish a separate system of follow-up and review to determine that the delegated authority and responsibility is being properly exercised [NYSE Rule 342(b)(2)].

4. Firms must appoint a compliance officer to direct day-to-day compliance activities (NYSE Rule 342.13).

5. Firms must conduct an annual inspection of each branch office (NYSE Interpretation Handbook, NYSE Rule 342(a),(b)/03, p. 3404).

E. Cold-Calling Training and Supervision

Firms must adequately train and supervise all telemarketers and registered representatives who engage in cold calling on the provisions of Federal Communications Commission and SRO rules on cold calling.

Firms must maintain a "do-not-call" list and make the list available to all personnel that engage in cold calling or telemarketing.[2]

IV. Guidance: Heightened Supervisory Procedures

This section of the memorandum provides guidance to firms that have made the decision to hire one or more registered representatives whose records reflect: (1) disciplinary actions involving sales practice abuse; (2) a history of customer complaints; and/or (3) arbitrations that were not resolved in favor of the registered representative. In particular, this memorandum discusses the profile of registered representatives that should be considered for heightened supervision based on their histories, and contains examples of the types of specifically designed supervisory procedures that firms may want to consider in order to provide a heightened level of scrutiny of their activities.

A firm that hires one or more registered representatives with a history of customer complaints, disciplinary actions, or arbitrations, or that employs a registered representative who develops such a record during his or her employment, should recognize that it has heightened supervisory responsibilities that will require it, at a minimum, to examine the circumstances of each such case and make a reasonable determination whether its standard supervisory and educational programs are adequate to address the issues raised by the record of any such registered representative. As stated in the Sweep Report, firms should recognize that if a registered representative with such a history engages in further sales practice violations, securities regulators will closely evaluate whether the firm itself should be subject to disciplinary action for a failure to supervise the registered representative, beginning with the decision-making process that led to the individual being hired.

Due to the importance of these issues, NASD Regulation and the NYSE urge their members to distribute this memorandum to all appropriate supervisory personnel. NASD Regulation and the NYSE, in the course of their member examinations, will review the practices in place as part of the hiring process, the means used to identify and supervise registered representatives with problematic histories, and any specific supervisory systems and procedures developed by a member to provide heightened supervision where appropriate, and will consider whether specific rules requiring special supervision are warranted.

A. Disciplinary History

The principal means of identifying registered representatives who may require special supervision is a review of all relevant customer complaints, disciplinary actions, and arbitrations disclosed for each registered representative on Forms U-4 and U-5 filed with the CRD. A heightened level of supervision may be appropriate for a registered representative whose CRD report discloses sales practice problems and not simply isolated instances of customer complaints, minor disciplinary actions, or arbitrations. While final disciplinary actions, complaints, or arbitrations resolved in a manner adverse to the registered representative indicate a disciplinary problem, multiple pending complaints, disciplinary actions, or arbitrations may be indicative of a history that should be carefully reviewed.

A firm that employs persons in the following categories and does not have a standard supervisory policy that addresses such persons should determine whether existing procedures are adequate to provide reasonable supervision or whether heightened supervision is warranted:

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[2] Subsequent to the release of the Sweep Report, the SEC approved new NASD telemarketing rules imposing time restrictions and disclosure requirements in connection with telephone calls made to customers by members and their associated persons. *See* Release No. 34-38009 (December 2, 1996); 61 FR 65625 (December 13, 1996) (File No. SR-NASD-96-28). Therefore, firms also must ensure that their associated persons comply with these new telemarketing rules.

- registered representatives with a history of customer complaints, disciplinary actions, or arbitrations;
- persons hired in a non-registered capacity who previously were employed as registered representatives and who have such a history;
- registered representatives who develop such a history while associated with the firm;
- registered representatives terminated from prior employment for what appears to be a significant sales practice or regulatory violation; or
- registered representatives who have had a frequent change of employers within the industry.

The following list of examples of actions that must be reported on Forms U-4 and U-5, with a cite to the relevant questions on the specific form, is provided to **illustrate** the types of actions firms should review in determining whether a registered representative should be subject to special supervision. The review need not necessarily lead to the conclusion that heightened supervision in excess of that ordinarily provided by the firm is warranted in a particular case, but any conclusion that is reached must be reasonable and supportable in view of all circumstances.

Regulatory Disciplinary Actions
- A pending or adjudicated regulatory action or an investigation by the SEC; the Commodity Futures Trading Commission; a federal, state, or foreign regulatory agency; or an SRO (Questions 22C, 22D, 22E, and 22G on Form U-4).

Domestic or Foreign Civil Judicial Actions
- A pending investment-related civil action (Question 22H(2) of Form U-4).
- An injunction in connection with an investment-related activity; a violation of an investment-related statute or regulation; or a settlement of an investment-related civil action (Question 22H(1) on Form U-4).

Customer Complaints
- A customer complaint, arbitration, or civil action that is investment-related alleging sales practice violations that is still pending, that was settled, or that resulted in an award or judgment (Question 22I on Form U-4).

Terminations
- Termination for cause or a permitted resignation after investigations or allegations of violation of investment-related statutes, regulations, rules, or industry standards of conduct (Question 22J on Form U-4; Form U-5).

B. Development and Implementation of Special Supervision

SRO rules require members to establish written procedures for supervising registered representatives and other associated persons. The procedures must be reasonably designed to achieve compliance with applicable securities laws and regulations and SRO rules. See NASD Rule 3010 and NYSE Rule 342.

The findings and recommendations of the Sweep Report suggest that ordinary supervisory procedures may not be sufficient to ensure compliance with federal securities laws and SRO rules by newly hired registered representatives with a history of repeated customer complaints, disciplinary actions, or arbitrations or registered representatives who develop such a history while associated with a firm. The NYSE and NASD Regulation recommend that firms make appropriate changes in their supervisory procedures in such cases.

Consequently, once an individual has been identified as requiring special supervision because of the existence of such a history, the firm should consider developing and implementing special supervisory procedures structured to address sales practice concerns that are raised by that history. Similar to procedures related to employing a person subject to a statutory disqualification, these procedures should be developed based on the areas that were the subject of the person's previous customer complaints, disciplinary actions, or arbitrations. The procedures also should recognize the nature of the firm's business and the size and structure of the firm. The individual who will oversee the activities of the registered representative should be adequately qualified and have the appropriate training and experience to provide adequate supervision. The firm also should review the registered representative's CRD record and the nature of the activities in which he or she is, or will be, engaged (considering, for example, the types of products he or she plans to sell and reviewing the person's top accounts, including changes or trends in account activity and commissions earned). The firm should consider meeting with the registered representative and the person who is or will be his or her supervisor, during which the supervisor's understanding of the prior conduct of the registered representative and willingness to accept responsibility for his or her supervision can be confirmed.

The SRO rule requirement to establish written procedures for supervising registered representatives provides a firm with a basis for documenting each special supervisory arrangement that it chooses to put in place, including assessment of the type of special supervision needed, identification of the person who is responsible for providing the supervision, and specification of the frequency and scope of review as determined by the firm. For such procedures to be effective, the firm should alert the registered representative and the supervisor to the terms of the special supervision, including the period of time the special supervisory procedures will be in effect. The firm could require the registered representative and his or her direct supervisor to sign an acknowledgment, indicating their understanding and their agreement to abide by the terms of the special supervision for the requisite time period. It also is advisable for the firm to document the termination of a period of special supervision, including an assessment of whether the objectives of the supervisory arrangement were met. It is important that firms retain evidence of special supervision.

SRO rules also require firms to enforce their supervisory procedures. Accordingly, the firm should develop mechanisms for monitoring any special supervisory procedures that it chooses to adopt to the same extent that it monitors its supervisory procedures generally. For example, firms that regularly require supervisors to provide a sign-off on daily activity could require supervisors of registered representatives subject to special supervisory arrangements to expressly include those arrangements in such a sign-off, or to periodically attest in writing that they have carried out the terms of the special supervision. As is the case with supervisory procedures generally, compliance with the terms of the special supervisory arrangements could be reviewed by the individuals who normally conduct branch office inspections required by SRO rules as a routine part of those inspections. Of course, firms would be free, as they are today, to determine that more frequent than annual inspections may be appropriate in any situation where heightened supervisory procedures are in effect. As is the case with any inspection, a report of findings, including discrepancies, would be reported to and acted on by the appropriate party.

C. Developing and Implementing Heightened Supervisory Procedures

Some factors that might be considered for guidance in devising tailored supervisory programs are described in detail below. Firms are cautioned that these factors and suggestions are neither exhaustive nor will they constitute a safe harbor. The adequacy of a supervisory program can be determined only with reference to the profile of the specific firm, situation, and individuals.

Registered Representative Activities

One of the first things to consider when establishing heightened supervisory procedures is the nature of the conduct that resulted in the registered representative's history of customer complaints, disciplinary actions, or arbitrations, and whether the conduct involved a particular securities product, customer type, or activity. In any of these instances, the product, customer, or activity type should be examined to identify the level and type of risk it presents. The firm should then determine what type of supervision might best control and limit this type of risk. This may range from providing the ordinary level of supervision, to restricting a registered representative's activities for a period of time in a manner that is based on the firm's assessment of the registered representative's prior problems, to assigning a mentor or partner in whom the firm has confidence to work with the registered representative. A firm also may determine that its standard procedures will be adequate, and operate on the understanding that if there is any sign of a problem detected during some stated period, heightened procedures or sanctions will follow. Additionally, such actions may be positively reinforced if associated with training or education involving the product or activity in question.

Training
SRO rules require each member firm, as part of the Firm Element of its Continuing Education Program, to conduct a needs analysis and establish a training plan that includes certain minimum standards. See NASD Rule 3070 and NYSE Rule 345A. For example, such programs, when dealing with investment products and services, must identify their investment features and associated risk factors, their suitability in various situations, and applicable regulatory requirements that affect the products or services, and present these themes in an understandable format. When analyzing needs and developing Firm Element programs, a determination should be made as to whether specialized training should be provided to a registered representative who has a history of customer complaints, disciplinary actions, or arbitrations involving a particular securities product or a particular activity. Firms could make certain that such training focuses upon the areas in which the registered representative has had problems and is tailored to any special needs in these areas. Additionally, firms should track customer complaints and, if specific trends are identified, programs should be established to train registered representatives to avoid future complaints.

New Account Procedures
If warranted after a review of all circumstances, firms should consider whether a supervisor should exercise closer than normal control over the establishment of new customer accounts by a registered representative. For example, if a registered representative has a history of complaints involving initial transactions in accounts, closer scrutiny of his or her account opening practices may be warranted. In addition to the normal requirements for opening a new account set out in NASD Rule 3110 and NYSE Rule 405, the manager might choose to speak with all or selected new account holders or to independently verify the customer information on the account form on a random or consistent basis, depending on the situation. If the firm deemed it prudent in view of prior activities, it might prohibit any trading until the account information or the order information could be independently verified with the customer. Of course, the optional practice of sending notices to all new customers to verify and ask for comment on the new account information on file at the firm upon the opening of the account might be sufficient in a specific set of circumstances, as might a decision to instead monitor subsequent transactions.

Many firms currently encourage their registered representatives to revise and resubmit customer account information forms each time the customer's investment objectives change. This practice, when in use, can also be an aid in monitoring registered representatives under special supervision. Finally, while not prohibited by rule, firms should be particularly cautious about allowing individuals who warrant special supervision to handle certain types of accounts, including: discretionary accounts; margin, futures, and options accounts; employee, employee-related, and retirement-plan accounts; accounts that contain low-priced, speculative securities; other accounts engaged in high-risk strategies; or any accounts where any of the conduct leading to the previous regulatory problems might be an issue.

Specific Transactions
SRO rules require firms to establish procedures for the review of all transactions by a supervisor. See NASD Rule 3010 and NYSE Rule 342. When reviewing conduct to determine whether heightened supervision is warranted, firms should focus on whether a specific type of transaction was involved in prior problems, and should consider prohibiting like transactions, or requiring supervisory approval of all such transactions **in advance** of execution, as is routinely required at many firms in the case of low-priced securities, options, and discretionary trades. Examples of orders that may pose potential harm, and as to which many firms may as a matter of prac-

tice already require prior supervisory approval, are: orders in discretionary accounts; orders in low-priced, speculative securities; orders of an unusual size or frequency considering the particular account's trading pattern; deep out-of-the money and uncovered options orders; or mutual fund switches. Firms without such procedures as a normal part of their supervisory programs should give careful consideration to making them a part of any heightened supervision program.

Customer Account Activity Monitoring
SRO rules require members to periodically examine customer accounts to detect and prevent irregularities or abuses. See NASD Rule 3010 and NYSE Rule 342. Many firms meet this requirement by generating special exception or activity reports that enable supervisors to detect unusual trading activity in the account. For example, firms could consider developing exception reports that are designed to detect: transactions that are uncharacteristic in size or volume; any unusual increases or decreases in a broker's commissions; transactions between accounts; or excessive or suspicious corrections. Firms also could consider reviewing the registered representative's customer contacts by, for example, monitoring selected telephone conversations between the registered representative and both existing and potential customers or attending meetings between the representative and his or her clients. Firms also could consider requiring supervisors to have more frequent and closer contact with customers of registered representatives who are subject to heightened supervision to determine whether potential problems exist and further inquiry is warranted. Contacting customers who choose to transfer their accounts to another firm also may be helpful in certain circumstances.

D. Suggestions for Standard Supervisory Procedures
The following are supervisory procedures that are included in this memorandum as a reminder to pay particularly close attention to compliance with these procedures by registered representatives under special supervision.

Trade Corrections, Extensions, and Liquidations
Because excessive trade corrections, extensions, and liquidations may be a sign of compliance problems, firms should be particularly careful to take appropriate action to identify registered representatives under special supervision whose transactions result in repeated trade corrections, extensions, or liquidations and to investigate and take follow-up action as appropriate.

Communications With the Public
Notwithstanding recent proposed changes to SRO rules that would eliminate the need for prior approval, a firm should consider the need for additional review of correspondence between a registered representative subject to special supervision and his or her clients.

Outgoing Correspondence, Advertising, and Sales Literature
A firm's routine procedures should include a reasonable system for the supervision of a registered representative's correspondence or use of advertising and sales literature, as defined in SRO rules. See NASD Rules 3010 and 2210 and NYSE Rules 342 and 472. Enhanced procedures may be appropriate for registered representatives subject to special supervision, including, for instance, requiring the approval of **all** correspondence **prior** to use, even when prior approval is not specifically required by SRO rules. Firms also should take reasonable steps to prevent such individuals from circumventing approval by, for example, using the Internet or other electronic media for communications, or restricting the registered representative's use of certain types of communications, including the Internet or other electronic media, electronic mail, or mass mailings, where appropriate.

Incoming Correspondence and Customer Complaints
Firms should have in place reasonable procedures for supervising incoming correspondence, including correspondence sent by facsimile, electronic mail, overnight mail, or courier. Firms' procedures should include a system for handling customer complaints that requires customer complaints to be brought to the attention of the appropriate supervisor. Repeated sales practice complaints regarding a registered representative subject to heightened supervision, particularly a representative who previously was disciplined for sales practice violations,

may be indicative of a compliance problem. Such complaints should be closely monitored and resolved in coordination with the registered representative's supervisor and other firm management, as warranted. Also, whenever a registered representative subject to special supervision is named in a credible customer complaint alleging sales practice abuses, it is prudent for the firm to conduct a thorough review of selected customer accounts of the registered representative for conduct similar to the conduct described in the complaint.

V. Conclusion

While most firms have adequate supervisory systems in place, firms can and should continually review the effectiveness of their policies, procedures, supervisory systems, and internal controls and make appropriate changes when necessary. Additionally, firms should review their pre-hiring procedures and consider the recommendations in this memorandum if they are not included in their procedures. Strong pre-hiring procedures will strengthen the industry's efforts to preclude problem registered representatives from remaining in or re-entering the industry.

The SEC, the SROs, state securities regulators, and the industry must work together to identify registered representatives with a history of customer complaints, disciplinary actions, or arbitrations at an early stage. Sales practice abuse can be reduced through enhanced and effective firm supervisory policies and procedures designed to prevent and detect abusive sales practices as well as through effective supervision and training, examination oversight, and an aggressive enforcement effort. In addition, those firms that do not already have in place pre-hiring processes that allow for the identification and review of disciplinary, regulatory, and other issues before a hire is made must improve their pre-hiring screening of registered representative applicants. Implementation of the recommendations and suggested supervisory procedures set forth above can greatly enhance the prevention and detection of sales practice problems, thereby protecting the integrity of the marketplace and the interests of the investing public.

The Sweep Report is available on the SEC's Web Site at *www.sec.gov* or you can request a copy by contacting:

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