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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82991; File No. SR-CBOE-2018-026]

### **Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Market Data Fees April 4, 2018.**

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 28, 2018, Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend the Cboe Data Services (“CDS”) fee schedule to establish an optional Enhanced Controlled Data Distribution Fee to further the distribution of the

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>4</sup> 17 CFR 240.19b-4(f)(2).

BBO,<sup>5</sup> Book Depth,<sup>6</sup> and Complex Order Book<sup>7</sup> (“COB”) data feeds (collectively, “Cboe Options Data Feeds”).<sup>8</sup>

The text of the proposed rule change is also available on the Exchange’s website (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

## II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the

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<sup>5</sup> The BBO Data Feed is a real-time data feed that includes the following information: (i) outstanding quotes and standing orders at the best available price level on each side of the market; (ii) executed trades time, size, and price; (iii) totals of customer versus non-customer contracts at the best bid and offer (“BBO”); (iv) all-or-none contingency orders priced better than or equal to the BBO; (v) expected opening price and expected opening size; (vi) end-of-day summaries by product, including open, high, low, and closing price during the trading session; (vi) recap messages any time there is a change in the open, high, low or last sale price of a listed option; (vii) COB information; and (viii) product IDs and codes for all listed options contracts. The quote and last sale data contained in the BBO data feed is identical to the data sent to the Options Price Reporting Authority (“OPRA”) for redistribution to the public.

<sup>6</sup> The Book Depth Data Feed is a real-time, low latency data feed that includes all data contained in the BBO Data Feed described above plus outstanding quotes and standing orders up to the first four price levels on each side of the market, with aggregate size.

<sup>7</sup> The COB Data Feed is a real-time data feed that includes data regarding the Exchange’s Complex Order Book and related complex order information. The COB Data Feed contains the following information for all Exchange-traded complex order strategies (multi-leg strategies such as spreads, straddles and buy-writes): (i) outstanding quotes and standing orders on each side of the market with aggregate size, (ii) data with respect to executed trades (“last sale data”), and (iii) totals of customer versus non-customer contracts.

<sup>8</sup> The ECDD Fee is based on The Nasdaq Stock Market LLC’s (“Nasdaq”) Enhanced Display Solution fee. See Nasdaq Rule 7026(a). See also Securities Exchange Act Release Nos. 66165 (January 17, 2012), 77 FR 3313 (January 23, 2012) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Establish an Enhanced Display Distributor Fee); and 73807 (December 10, 2014), 79 FR 74784 (December 16, 2014) (SR-Nasdaq-2014-117).

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Cboe proposed to amend the CDS fee schedule to establish an optional ECDD Fee to further the distribution of the Cboe Options Data Feeds. The new data distribution model (an “Enhanced Controlled Data Distribution” or “ECDD”) offers a delivery method available to firms seeking simplified market data administration and may be offered by Customers to external subscribers that are using the Cboe Options Data Feeds internally.

The proposed optional ECDD Fee is intended to provide a new pricing option for Customers<sup>9</sup> who provide a controlled display or entitlement product along with an Application Programming Interface (“API”) or similar solution to subscribers. Non-display use is not permitted under the ECDD Fee structure. To ensure compliance with this new fee, Customers must monitor for any non-display or excessive use suggesting that the subscriber is not in compliance. The Customer is liable for any unauthorized use by the ECDD subscribers under the ECDD. This proposed optional new fee only applies to Customer who distribute Cboe Options Data Feeds externally and who opt for the ECDD option.

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<sup>9</sup> A “Customer” is any person, company or other entity that, pursuant to a market data agreement with CDS, is entitled to receive data, either directly from CDS or through an authorized redistributor (i.e., a Customer or an extranet service provider), whether that data is distributed externally or used internally. The CDS fee schedule for Exchange data is located at [https://www.cboe.org/general-info/pdf/framed?content=/publish/mdxfees/cboe-cds-fees-schedule-for-cboe-datafeeds.pdf&section=SEC\\_MDX\\_CSM&title=Cboe%20CDS%20Fees%20Schedule](https://www.cboe.org/general-info/pdf/framed?content=/publish/mdxfees/cboe-cds-fees-schedule-for-cboe-datafeeds.pdf&section=SEC_MDX_CSM&title=Cboe%20CDS%20Fees%20Schedule).

This new pricing and administrative option is in response to industry demand, as well as due to changes in the technology to distribute market data. By providing this new fee option, Customers will have more administrative flexibility in their receipt and distribution of the Cboe Options Data Feeds. Customers opting for the ECDD Fee would still be fee liable for the applicable user fees for Cboe BBO, Book Depth, and COB data feeds, as described in the CDS fee schedule.<sup>10</sup> Cboe proposes to permit Customers to select the ECDD Fee at a minimum rate of \$500 per user/per month each for the first 5 users, \$200 per user/per month each for the 6<sup>th</sup> to the 20th user, and \$50 per User/per month each for the 21<sup>st</sup> or more users. The ECDD Fee is independent from the applicable per user fees for each of the individual Cboe Options Data Feeds as described above. However, a single per user fee under the ECDD Fee would allow access to each of the Cboe Options Data Feeds. These new ECDD Fees will become fee liable for the billing month of April 2018.

This delivery option assesses a new fee schedule to Customers of the Cboe Options Data Feeds that provide an API or similar solution. Customers may either control the display of the data or offer APIs that power third party software display applications where the Customer controls the entitlement but not the display of data. The Customer must first agree to reformat, redisplay and/or alter the Cboe Options Data Feeds prior to retransmission, but not to affect the integrity of the Cboe Options Data Feeds and not to render it inaccurate, unfair, uninformative, fictitious, misleading or discriminatory. An ECDD is any controlled display product or entitlement containing the Cboe Data Feed where the Customer controls a display of the Cboe Data Feed or offer APIs that power third party software display applications where the Customer

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<sup>10</sup> Customers redistributing the Cboe Options Data Feeds under the proposed fee change will pay underlying rates applicable to the Cboe Data Feed as set forth in the CDS fee schedule.

controls the entitlement but not the display of data. The user of an ECDD display may use the Cboe Data Feed for the user's own purposes and may not redistribute the information outside of their organization. The user may not redistribute the data internally to other users in the same organization.

In the past, Cboe has considered this type of retransmission to be an uncontrolled display since the Customer does not control the entitlements or the display of the information. Over the last 16 years, Customers have improved the technical delivery and monitoring of data and the ECDD offering responds to an industry need to administer these new types of technical deliveries.

Some Customers believe that an API or other distribution from a display is a better controlled product than a data feed and as such should not be subject to the same rates as a data feed. The offering of a new pricing option for an ECDD would not only result in Cboe offering lower fees for certain existing Customers, but will allow new Customers to deliver ECDD to new clients, thereby increasing transparency of the market.

Accordingly, Cboe is establishing the ECDD Fee for Customers who are seeking simplified market data administration and would like to offer the Cboe Options Data Feeds to users that are using the Cboe Options Data Feeds internally. The Cboe ECDD Fee is optional for firms providing a display product containing the Cboe Options Data Feeds where the Customer controls a display of the Cboe Data Feed or offer APIs that power third party software display applications where the Customer controls the entitlement but not the display of data since these firms can choose to pay the data feed fees. The new Cboe ECDD Fee is designed to allow Cboe Data Feed subscribers to redistribute data via a terminal without paying a higher fee for an attached API. As a result, it does not impact individual usage fees for the Cboe Options Data

Feeds or in any way increase the costs of any user of the Cboe Options Data Feeds. For Customers wanting to use this same functionality for other products, they would be able to do so by paying the applicable Cboe Data Feed rates.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,<sup>11</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>12</sup> in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other recipients of Exchange data. The Exchange believes that the proposed rates are equitable and non-discriminatory in that they apply uniformly to all recipients of Exchange data. The Exchange believes the proposed fees are competitive with those charged by other venues and, therefore, reasonable and equitably allocated to recipients.

The Exchange believes that the proposed rule change is consistent with Section 11(A) of the Act<sup>13</sup> in that it supports (i) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets and (ii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Furthermore, the proposed rule change is consistent with Rule 603 of Regulation NMS,<sup>14</sup> which provides that any national securities exchange that distributes information with respect to quotations for or transactions in an NMS stock do so on terms that are not unreasonably discriminatory. In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new

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<sup>11</sup> 15 U.S.C. 78f.

<sup>12</sup> 15 U.S.C. 78f(b)(4).

<sup>13</sup> 15 U.S.C. 78k-1.

<sup>14</sup> 17 CFR 242.603.

and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

In addition, the proposed fees would not permit unfair discrimination because all of the Exchange's customers and market data vendors who subscribe to the above data feeds will be subject to the proposed fees. The above data feeds are distributed and purchased on a voluntary basis, in that neither the Exchange nor market data distributors are required by any rule or regulation purchase this data or to make this data available. Accordingly, distributors and users can discontinue use at any time and for any reason, including due to an assessment of the reasonableness of fees charged. Firms have a wide variety of alternative market data products from which to choose, such as similar proprietary data products offered by other exchanges and consolidated data. Moreover, the Exchange is not required to make any proprietary data products available or to offer any specific pricing alternatives to any customers.

In addition, the fees that are the subject of this rule filing are constrained by competition. As explained below in the Exchange's Statement on Burden on Competition, the existence of alternatives to the above data feeds further ensure that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect such alternatives. That is, the Exchange competes with other exchanges (and their affiliates) that provide similar market data products. For example, the above data feeds provide investors with alternative market data and competes with similar market data product currently offered by other exchanges. If another exchange (or its affiliate) were to charge less to distribute its similar product than the Exchange charges for the above data feeds, prospective users likely would not subscribe to, or would cease subscribing to either market data product.

The Exchange notes that the Commission is not required to undertake a cost-of-service or rate-making approach. The Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for non-core market data would be so complicated that it could not be done practically.<sup>15</sup>

Cboe believes that this proposal is in keeping with those principles by promoting increased transparency through the offering of a new pricing option for an ECDD, which would not only result in Cboe offering lower fees for certain existing Customers, but will allow new Customers to deliver ECDDs to new clients, thereby increasing transparency of the market. Additionally, the proposal provides for simplified market data administration and may be offered by Customers to external users that are using the Cboe Options Data Feeds internally. Cboe notes also that this filing proposes to distribute no additional data elements and that the ECDD Fee is

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<sup>15</sup> The Exchange believes that cost-based pricing would be impractical because it would create enormous administrative burdens for all parties, including the Commission, to cost-regulate a large number of participants and standardize and analyze extraordinary amounts of information, accounts, and reports. In addition, it is impossible to regulate market data prices in isolation from prices charged by markets for other services that are joint products. Cost-based rate regulation would also lead to litigation and may distort incentives, including those to minimize costs and to innovate, leading to further waste. Under cost-based pricing, the Commission would be burdened with determining a fair rate of return, and the industry could experience frequent rate increases based on escalating expense levels. Even in industries historically subject to utility regulation, cost-based ratemaking has been discredited. As such, the Exchange believes that cost-based ratemaking would be inappropriate for proprietary market data and inconsistent with Congress's direction that the Commission use its authority to foster the development of the national market system, and that market forces will continue to provide appropriate pricing discipline. See Appendix C to NYSE's comments to the Commission's 2000 Concept Release on the Regulation of Market Information Fees and Revenues, which can be found on the Commission's website at <http://www.sec.gov/rules/concept/s72899/buck1.htm>. See also Securities Exchange Act Release No. 73816 (December 11, 2014), 79 FR 75200 (December 17, 2014) (SR-NYSE-2014-64) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Establish an Access Fee for the NYSE Best Quote and Trades Data Feed, Operative December 1, 2014).

optional. Accordingly, Customers and users can discontinue use at any time and for any reason, including due to an assessment of the reasonableness of fees charged. Lastly, Cboe notes that the ECDD fee is based on Nasdaq's Enhanced Display Solution fee.<sup>16</sup> The proposed rates are also equitable and reasonable because they are lower than that currently charged by Nasdaq, which charges at a minimum rate of \$4,000 per month for up to 399 subscribers, \$7,500 per month for up to 400 – 999 subscribers, and \$15,000 per month for 1,000 or more subscribers.<sup>17</sup>

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The Exchange's ability to price ECDD is constrained by: (i) competition among exchanges that compete with each other in a variety of dimensions; (ii) the existence of inexpensive real-time consolidated data and market-specific data and free delayed data; and (iii) the inherent contestability of the market for proprietary data.

An exchange's ability to price its proprietary data feed products is constrained by (1) the existence of actual competition for the sale of such data, (2) the joint product nature of exchange platforms, and (3) the existence of alternatives to proprietary data.

The Existence of Actual Competition. The Exchange believes competition provides an effective constraint on the market data fees that the Exchange, through CDS, has the ability and the incentive to charge. The Exchange has a compelling need to attract order flow from market participants in order to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on the Exchange to act reasonably in setting its fees for

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<sup>16</sup> See supra note 8.

<sup>17</sup> See Nasdaq Rule 7026(a).

market data, particularly given that the market participants that will pay such fees often will be the same market participants from whom the Exchange must attract order flow. These market participants include broker-dealers that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one exchange to another, any exchange that sought to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival. The Exchange currently competes with fourteen options exchanges (including its affiliate, C2) for order flow.<sup>18</sup>

In addition, in the case of products that are distributed through market data vendors, the market data vendors themselves provide additional price discipline for proprietary data products because they control the primary means of access to certain end users. These vendors impose price discipline based upon their business models. For example, vendors that assess a surcharge on data they sell are able to refuse to offer proprietary products that their end users do not or will not purchase in sufficient numbers. Internet portals, such as Google, impose price discipline by providing only data that they believe will enable them to attract “eyeballs” that contribute to their advertising revenue. Similarly, Customers will not offer ECDD unless these products will help them maintain current users or attract new ones. All of these operate as constraints on pricing proprietary data products.

Joint Product Nature of Exchange Platform. Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade executions are a paradigmatic example of joint products

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<sup>18</sup> The Commission has previously made a finding that the options industry is subject to significant competitive forces. See e.g., Securities Exchange Act Release No. 59949 (May 20, 2009), 74 FR 25593 (May 28, 2009) (SR-ISE-2009-97) [sic] (order approving ISE’s proposal to establish fees for a real-time depth of market data offering).

with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platforms where the order can be posted, including the execution fees, data quality, and price and distribution of their data products. The more trade executions a platform does, the more valuable its market data products become. The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, an exchange's broker-dealer customers view the costs of transaction executions and market data as a unified cost of doing business with the exchange.

Analyzing the cost of market data product production and distribution in isolation from the cost of all of the inputs supporting the creation of market data and market data products will inevitably underestimate the cost of the data and data products. Thus, because it is impossible to obtain the data inputs to create market data products without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of both obtaining the market data itself and creating and distributing market data products. It would be equally misleading, however, to attribute all of an exchange's costs to the market data portion of an exchange's joint products. Rather, all of an exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including 15 options self-regulatory organization

(“SRO”) markets, as well as internalizing broker-dealers (“BDs”) and various forms of alternative trading systems (“ATs”), including dark pools and electronic communication networks (“ECNs”). Competition among trading platforms can be expected to constrain the aggregate return that each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platforms may choose to pay rebates to attract orders, charge relatively low prices for market data products (or provide market data products free of charge), and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market data products, and setting relatively low prices for accessing posted liquidity. In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering.

The Existence of Alternatives. The Exchange is constrained in pricing ECDD by the availability to market participants of alternatives to purchasing these products. The Exchange must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange’s data. Other options exchanges can and have produced their enhanced display products, and thus are sources of potential competition for CDS. For example, as noted above, Nasdaq offers an enhanced display product that will compete with ECDD. The large number of SROs, BDs, and ATs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, ATs, and BD is currently permitted to produce proprietary data products, and many

currently do. In addition, the OPRA data feed is a significant competitive alternative to the BBO and last sale data included in the BBO and Book Depth Data Feeds.

The existence of numerous alternatives to the Exchange's products, including proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if its cost to purchase is not justified by the returns any particular vendor or subscriber would achieve through the purchase.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>19</sup> and paragraph (f) of Rule 19b-4<sup>20</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

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<sup>19</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>20</sup> 17 CFR 240.19b-4(f).

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

Comments may be submitted by any of the following methods:

##### Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>);  
or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2018-026 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CBOE-2018-026. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the

principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-2018-026 and should be submitted on or before [INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

**Eduardo A. Aleman,**

*Assistant Secretary.*

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<sup>21</sup> 17 CFR 200.30-3(a)(12).

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