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A LAW PRACTICE WITH A NEW PERSPECTIVE

Season & Sell 2.0SM Presentation: A Plain English Summary and General Discussion

First-of-Kind FinTech US Tax Legal Opinion Program
Designed for Non-US Investors Investing in
Newly-Originated or Recently-Modified US Loans

Season & Sell 2.0SM

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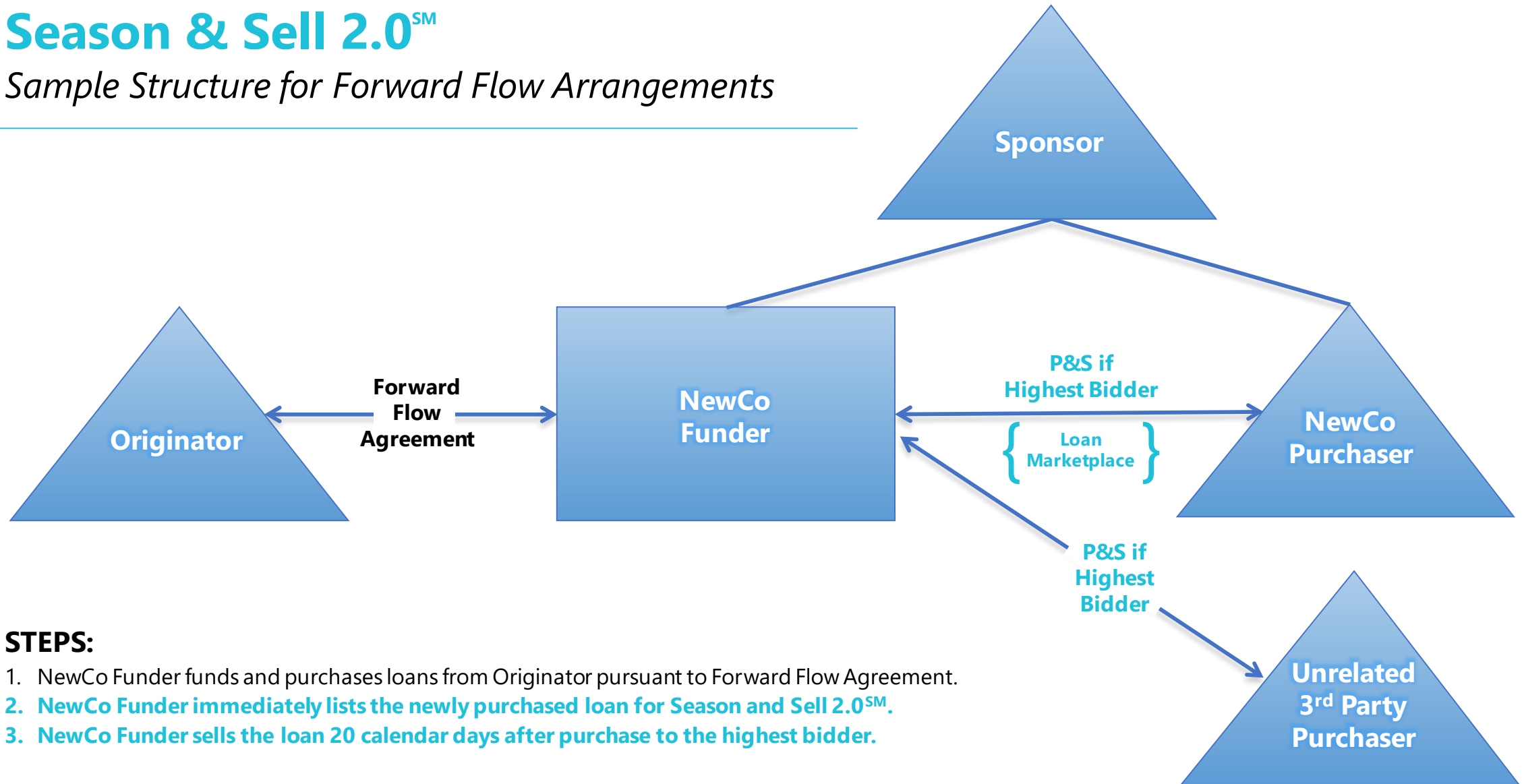
Season & Sell 2.0SM

Executive Summary

- Season & Sell 2.0SM turns a potentially “tainted loan” (one that is problematic for non-US investors to own for US federal income tax purposes) into a “clean loan” (one that is not problematic for non-US investors to own for US federal income tax purposes).
 - “Tainted loans” are loans that are potentially treated as being newly-originated in the US by a non-US investor either directly, or indirectly (or constructively) by an agent of the non-US investor.
 - “Clean loans” are loans that are acquired in the secondary market rather than through origination.
- Season & Sell 2.0SM utilizes a number of US tax opinion safeguards – including a very carefully selected open loan marketplace and a very carefully designed set of proprietary boilerplate US tax representations – to ensure zero gamesmanship and:
 - Reduce the traditional loan seasoning period typically required for related-party loan sales by 33%-77%, and
 - Eliminate a number of other restrictions traditionally imposed by historic season & sell.
- Season & Sell 2.0SM may be incorporated into various scenarios, such as: **(i) forward flow arrangements; (ii) in-house origination; and (iii) workouts.**
- Season & Sell 2.0SM may benefit among others: **(i) US direct lending funds; (ii) US mortgage REITs; (iii) non-US CLO issuers; (iv) master limited partnerships (or publicly traded partnerships); (v) US loan originators; and (vi) any investor currently using historic season & sell.**
- Season & Sell 2.0SM is a simple, flexible and inexpensive program, and it is easy to incorporate Season & Sell 2.0SM into any current or future loan origination program or platform. It generally works for any size or type of loan (and loan pools) that would otherwise qualify for historic season and sell.
- US tax legal opinion comfort:
 - Practus[®] will render a US tax opinion at the highest level at the time of each loan purchase that satisfies the Season & Sell 2.0SM requirements.
 - This opinion is rendered for the benefit of the loan buyer. In addition, this opinion is rendered on a loan-by-loan basis and does not create an attorney-client relationship with the loan buyer. The loan buyer should consult with its own tax advisors to determine the best method of incorporating Season & Sell 2.0SM into its current or future loan origination program or platform.

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Sample Structure for Forward Flow Arrangements

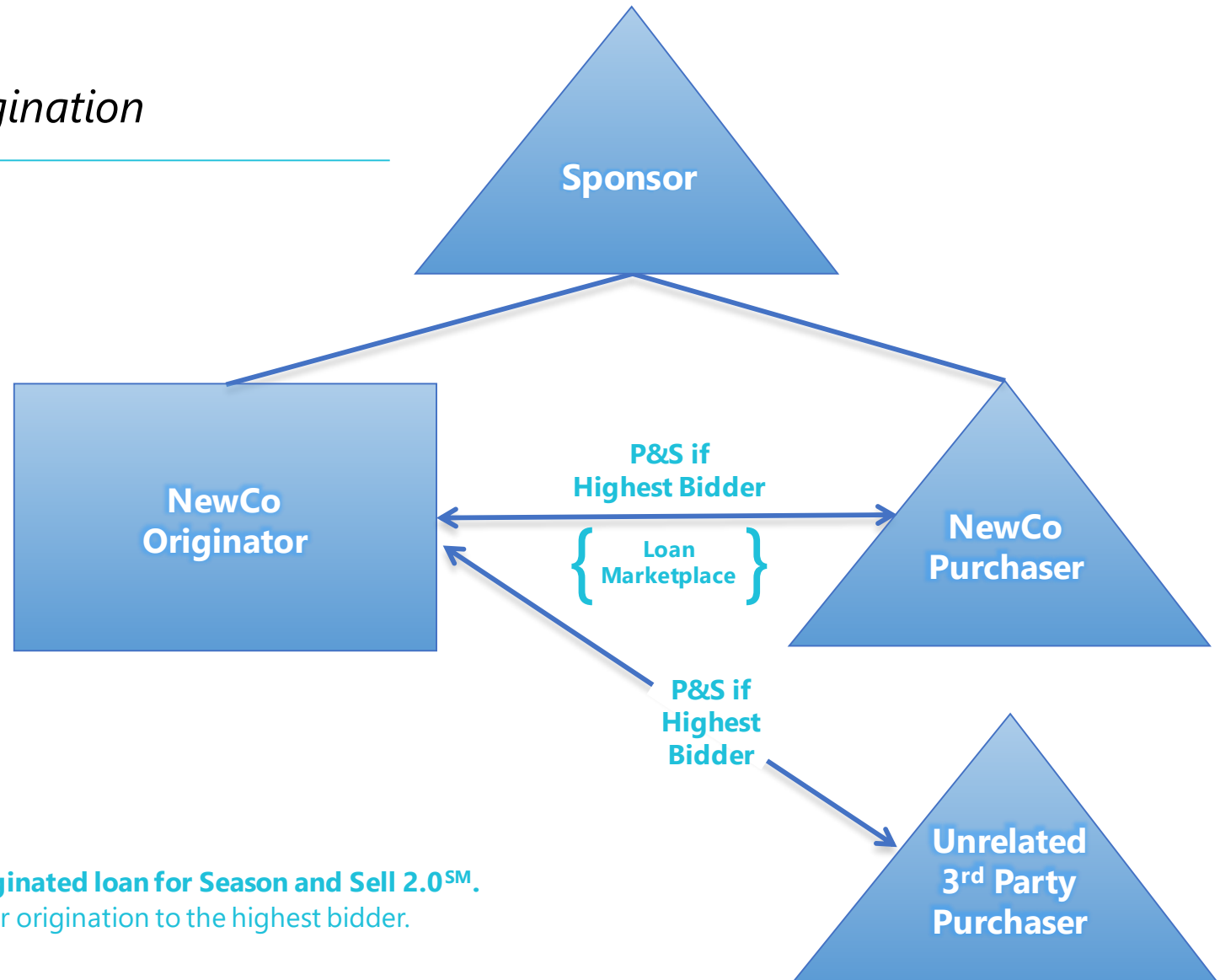


STEPS:

1. NewCo Funder funds and purchases loans from Originator pursuant to Forward Flow Agreement.
2. NewCo Funder immediately lists the newly purchased loan for Season and Sell 2.0SM.
3. NewCo Funder sells the loan 20 calendar days after purchase to the highest bidder.

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Sample Structure for In-House Origination

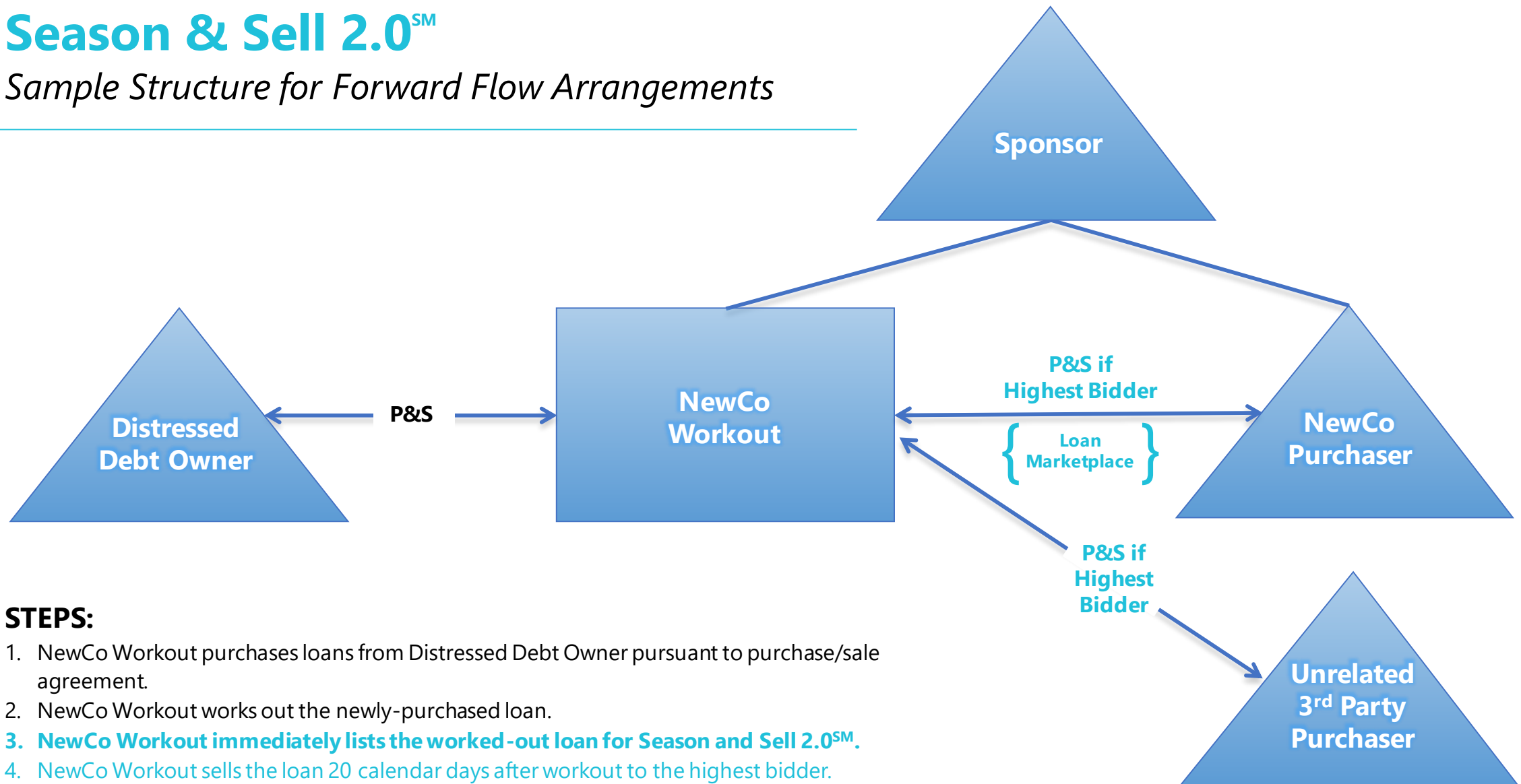


STEPS:

1. NewCo Originator originates loans.
2. **NewCo Originator immediately lists the newly originated loan for Season and Sell 2.0SM.**
3. NewCo Originator sells the loan 20 calendar days after origination to the highest bidder.

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Sample Structure for Forward Flow Arrangements



STEPS:

1. NewCo Workout purchases loans from Distressed Debt Owner pursuant to purchase/sale agreement.
2. NewCo Workout works out the newly-purchased loan.
3. **NewCo Workout immediately lists the worked-out loan for Season and Sell 2.0SM.**
4. NewCo Workout sells the loan 20 calendar days after workout to the highest bidder.

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Sample Structure for Summarized

- **Summary** – The three immediately preceding slides set forth sample structures for forward flow arrangements, in-house origination, and workouts. The structures themselves are for illustration purposes only, to show how easy it is to incorporate Season & Sell 2.0SM into any structure that raises US loan origination concerns for non-US investors. These three situations are not the exclusive situations where Season & Sell 2.0SM may produce value.
- **Forward flow arrangements** – these arrangements, depending upon how structured, may raise concerns that the buyer is treated for US federal income tax purposes as having originated the loan(s) purchased pursuant to the forward flow agreement. Depending on how the forward flow arrangement is structured, it may be economically beneficial to incorporate Season & Sell 2.0SM into the structure.
- **In-house origination** – this is the most obvious scenario where Season & Sell 2.0SM may be a beneficial addition to the current or future loan origination program or platform.
- **Workouts** – in very general terms, working out a loan may constitute a reissuance (and exchange) of the loan for US federal income tax purposes if the workout significantly modifies the original economic deal. A discussion of these US federal income tax rules is beyond the scope of this presentation. Suffice it to say that if the workout constitutes a reissuance of the original debt for US federal income tax purposes, then this may be another scenario where it may be economically beneficial to incorporate Season & Sell 2.0SM into the structure.
- **Beneficial situations** – Season & Sell 2.0SM may benefit, among others:
 - **US direct lending funds** with non-US investors;
 - **US mortgage REITs**, which may restructure their affairs to sell loans into an UPREIT operating partnership to reduce material US federal income tax drag on non-US investors;
 - **Non-US CLO issuers** acquiring US loans;
 - **Master limited partnerships (or publicly traded partnerships)** seeking to qualify for the 90% “qualifying income” safe harbor from US federal income taxation as a corporation;
 - **US loan originators** aggregating loans with non-US partners; and
 - **Any investor currently using historic season & sell** as part of their loan origination program or platform.
- Investors should consult with their own tax advisors to determine the best method of incorporating Season & Sell 2.0SM into their current or future loan origination programs or platforms.

Season & Sell 2.0SM

Season & Sell 2.0SM Matrix

	Third-Party Sale Requirement	Seasoning Period	Independent Authorization to Acquire	Loan-Level Tax Opinion Comfort
Season & Sell 2.0 SM	<ul style="list-style-type: none"> None If a loan buyer's particular tax advisor requires this based on the loan buyer's unique structure or circumstances, it is very easy to incorporate this requirement into the program. 	<ul style="list-style-type: none"> Always 20 calendar days 	<ul style="list-style-type: none"> None If a loan buyer's particular tax advisor requires this based on the loan buyer's unique structure or circumstances, it is very easy to incorporate this requirement into the program. 	<ul style="list-style-type: none"> Yes
Historic Season & Sell Tax Strategy	<ul style="list-style-type: none"> Generally must sell 15%-50% to non-affiliates (US tax practitioners vary, and some require zero sales to non-affiliates depending upon the circumstances)¹ 	<ul style="list-style-type: none"> Generally 30-90 calendar days (US tax practitioners vary, and some require zero seasoning depending upon the circumstances)² 	<ul style="list-style-type: none"> Generally Yes (US tax practitioners vary depending upon the circumstances)³ 	<ul style="list-style-type: none"> No

- 1 See, e.g., David S. Miller & Jean Bertrand, Federal Income Tax Treatment of Hedge Funds, Their Investors, and their Managers, 65 TAX LAWYER No. 2. 309, 392 (2012) (offering in sample US tax operating guidelines as **an alternative to third-party sales, a 10 day seasoning period** "from the time of the receipt of any fee for such origination, placement or structuring of any investment and the time of any commitment to purchase, or purchase, of such investment by the Issuer.").
- 2 See, e.g., Carden, D. G. and Z. Nasser. 2007. US tax operating guidelines for CDO transactions. In Global Securitization and Structured Finance: 120-127. "In certain cases, such as where an affiliate of the collateral manager undertakes extensive origination activities for third-party customers in the ordinary course of its business, and **where it can be established clearly that the affiliate is not acting on behalf of the CDO in originating the obligation, this seasoning period may be shortened or eliminated altogether.**" *Id.* at 126 (bolded emphasis added).
- 3 See, e.g., Peaslee, James M. and David Z. Nirenberg. Federal Income Taxation of Securitization Transactions and Related Topics. Frank J. Fabozzi Associates (2011, with periodic supplements): Exhibit C at 6 (identifying independent authorization as one of four alternative methods of ensuring US tax comfort for related-party loan sales). "This [independent authorization] exception should be tailored as needed to the facts. **The basic idea is to show that the Affiliate was acting like an unrelated party in respect of the Collateral Manager and the Issuer.**" *Id.* at fn. 5. (bolded emphasis added). "To avoid the 'origination issue'...**some conservative advisors** require that the purchase of [Rule 144A or privately placed securities at initial issuance] be made pursuant to an offering document and that any negotiations with the issuer over terms be conducted by an independent investment banker or private placement agent and not the collateral manager directly." See Beale et al, An Overview of the U.S. Federal Income Tax Treatment of Collateral Debt Obligation Transactions, 14. Tax'n F. Inst. 27, 57-58 (July/Aug. 2001) (bolded emphasis added). See also Ward L. Thomas & Leonard J. Henzke, Jr., *Agency: A Critical Factor in Exempt Organizations and UBIT Issues*, I.R.S. Exempt Org. Continuing Prof. Educ. Instruction Program for FY 2002 § C, 127, 134 (2001) (noting that the IRS will rarely question the separate status of a parent/subsidiary relationship when, among other things, they "[maintain] clear distinctions in the activities of overlapping directors, officers, and employees...and [they do] not observe the formalities of an agent.").

Season & Sell 2.0SM

How Season & Sell 2.0SM Works

- **Season & Sell 2.0SM works generally as follows:**
 - Loan seller signs up for free with the online loan marketplace that qualifies for the Season & Sell 2.0SM program.
 - Loan seller lists its loan(s) for free in the online loan marketplace.
 - Simultaneously:
 - Loan seller sells its loan(s) to the highest bidder on the 20th calendar day (a reserve price must be set at a price that yields the loan seller a profit typical of loan sellers).
 - Loan seller pays the online loan marketplace its fee as the loan sale closes.
 - Loan seller, loan buyer and the online loan marketplace execute a very carefully designed set of proprietary boilerplate US tax representations that they pre-approved at the time of loan listing.
 - Loan buyer receives a US federal income tax opinion at a “will level” of certainty from Practus®.
- **Season & Sell 2.0SM is very flexible:**
 - Registering with the online loan marketplace is free.
 - There is never an obligation to list any loans in the marketplace.
 - A loan seller may list as many or as few loans in the marketplace as it wants in the future.
 - A loan seller may utilize a non-disclosure agreement to protect what it deems to be proprietary information.
 - The loan seller may remove the loan from listing in the marketplace at no cost anytime prior to the receipt of any bid.
 - For example, if the loan seller hasn’t received a bid as of the 20th day of listing, then the loan seller may remove the loan from listing at zero total cost and continue seasoning the loan pursuant to its historic season & sell program if the loan seller desires to do so as a business matter.
 - Once a loan seller lists a loan, the loan seller obligates itself on the 20th calendar day to sell the loan to the highest bidder that submitted a bid at or above the reserve price set for the loan.
- **Season & Sell 2.0SM ensures a sale to the highest bidder:**
 - Season & Sell 2.0SM is very carefully designed – and any online marketplace that qualifies for the Season & Sell 2.0SM program is very carefully selected – to ensure with 100% certainty that at no point prior to the 20th calendar day after listing its loan(s) for sale does the loan seller know who will submit the highest bid at or above the reserve price (or what the amount of the highest bid will be) to purchase the loan(s).
 - The US tax representations executed by the loan seller, loan buyer and the online loan marketplace also ensure that this is true.

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Why Season & Sell 2.0SM Works

- **Open market and zero gamesmanship** – The top question that every fund founder and portfolio manager who has asked me about Season & Sell 2.0SM is: “Once I list my loan(s), do I have to sell to the highest bidder?”
 - The answer is resounding “YES.” The business benefit is optionality – the program generates the best execution and tax result.
 - Loan seller will not know until the 20th calendar day after listing the loan(s) who will buy the loan(s) or for what price.
 - Season & Sell 2.0SM ensures a sale to the highest bidder (whether related or unrelated to the loan seller).
 - Season & Sell 2.0SM US tax opinion safeguards ensure that:
 - The loan(s) is available for purchase by third-party bidders with terms and conditions substantially identical to those for a related-party bidder, and
 - All market participants (whether related or unrelated to the loan seller) have an equal opportunity to fully diligence, bid and purchase the loan(s).
- **Season & Sell 2.0SM US tax opinion safeguards include:**
 - A fully-transparent loan sale – all marketplace participants (including some of the world’s largest financial institutions) have an equal opportunity to fully diligence, bid and purchase the loan(s).
 - A fully-independent, active, robust, open, and online loan marketplace for the type and size of loan(s) being sold – any online marketplace that qualifies for the Season & Sell 2.0SM program is very carefully selected for the Season & Sell 2.0SM program. (Most marketplaces do not qualify for the program; and only recently have open online loan marketplaces emerged to qualify for the Season & Sell 2.0SM program.)
 - A 20 calendar day listing period that:
 - Based on past marketplace performance provides the marketplace participants, including affiliates of the loan sellers, a meaningful period of time to diligence, bid and purchase the loan(s), and
 - Establishes tax ownership (10-20 times longer than the seasoning period typically required of unrelated loan purchasers).⁴
 - The obligation by loan seller to sell to the highest bidder (whether related or unrelated to the loan seller).
 - A very carefully designed set of proprietary boilerplate US tax representations that each of the loan seller, loan buyer, and online loan marketplace must execute at the time of each loan purchase to ensure thorough tax due diligence, a legitimate secondary purchase by the highest bidder, and that no gamesmanship between or among the parties occurred. These tax representations are summarized on Slide 13 herein.

⁴ See, e.g., Miller, *supra* note 1, at 341 (noting a 24-48 hour seasoning period in general for loan sales between unrelated parties). See also John Kaufmann, Four Things That Offshore Funds Should Not Do. Greenberg Traurig, LLP Alert (December 2015) (<https://www.martindale.com/taxation-law/article-Greenberg-Traurig-LLP-2221608.htm>). “Most advisors take the position that, if debt is originally issued to an unrelated party, it is OK for a fund to purchase it after 24 to 48 hours after issuance, while a 30 to 90 day interval is required [pursuant to historic season & sell] if debt is originally issued to a party related to the fund.” *Id.*

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Why Season & Sell 2.0SM Works (cont'd)

- **US tax legal opinion comfort** – At the time of each loan(s) purchase, Practus[®] will render a US federal income tax legal opinion generally to the effect that, under current law and assuming the accuracy of the tax representations provided by the loan seller, loan buyer and online loan marketplace, and based on certain facts and assumptions described in the opinion, the loan purchase and ownership of the loan immediately after the loan purchase by loan buyer will not cause loan buyer to be engaged in a trade or business within the US for US federal income tax purposes or otherwise subject loan buyer to US federal income tax on a net income basis.⁵
 - This opinion is rendered on a loan-by-loan basis and does not create an attorney-client relationship with the loan buyer.
 - The loan buyer should consult with its own tax advisors to determine the best method of incorporating Season & Sell 2.0SM into its current or future loan origination program or platform.

5 Although a thorough discussion of the US federal income tax analysis of Season & Sell 2.0SM is beyond the scope of this presentation (and is proprietary to TSA Consulting Inc.); in summary, the US tax opinion safeguards set forth on Slide 11 ensure, among other things, that each loan sale constitutes a transparent arm's-length purchase after sufficient seasoning to establish tax ownership in the loan seller. See e.g., *supra* notes 1-3. There is zero opportunity for gamesmanship by or among the parties utilizing Season & Sell 2.0SM. By ensuring transparent arm's-length purchases in the open online loan marketplace that meets the rigorous standards of Season & Sell 2.0SM, the Season & Sell 2.0SM program is not materially different from a tax perspective than, for example, purchases of publicly offered bonds at original issuance. "[US tax] Practitioners have unanimously concluded that, whatever the meaning of the phrase 'trading in stocks [or] securities,' it does not preclude a CDO issuer from purchasing a publicly offered bond at original issuance. A contrary conclusion would lead to absurd results that would not be justified by any evident tax policy." See Beale, *supra* note 3 at 57. Moreover, US Treasury has reached a similar conclusion in a slightly different context. For purposes of allocating income to a US banking, financing, or similar business, US Treasury Regulations provide that: "A stock or security acquired on a stock exchange or organized over-the-counter market shall be considered not to have been acquired as a result of, or in the course of, making loans to the public." See Treas. Reg. §1.864-4(c)(5)(iv)(c).

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Tax Representations Summarized

- Season & Sell 2.0SM requires the loan seller, loan buyer and the online loan marketplace to execute each time a loan(s) is sold, a very carefully designed set of proprietary boilerplate US tax representations that they pre-approved at the time of loan listing. The tax representations serve the dual purpose of:
 - Diligencing the loan and relevant activities/conduct of the parties from loan origination to loan sale, and
 - Support for the US federal income tax opinion to be rendered by Practus® at a “will level” of certainty at the time of each loan purchase.
- Season & Sell 2.0SM US tax representations were very carefully designed for each of the loan seller, loan buyer, and the online loan marketplace to execute at the time of each loan purchase. In very general terms, they include:
 - Many of the tax representations that one would expect to find in the below tax representations or guidelines; in each case, to the extent that they are applicable to the Season & Sell 2.0SM program:
 - US debt-for-tax opinion tax representations;
 - US tax operating guidelines for a direct lending fund; and
 - US tax operating guidelines for an offshore CLO issuer.
 - Representations from the online loan marketplace to ensure, among other things, that:
 - It is a fully-independent, active, robust, open, and online loan marketplace for the type and size of loan(s) being sold, and
 - 20 calendar days constitutes a meaningful and sufficient period of time based on past marketplace performance for the marketplace participants (including some of the world’s largest financial institutions) to diligence, bid and purchase the loan(s).
 - Representations from each of the loan seller, loan buyer, and the online loan marketplace to ensure that there is no gamesmanship between or among the parties.
 - Additional representations to address additional US tax issues, including:
 - Agency;
 - Step transactions;
 - Loan negotiation, table-funding and fee sharing;
 - Dealer activity;
 - Tax ownership;
 - Disregarded entity and partnership tax structural issues;
 - Sham transactions; and
 - Section 482 of the Internal Revenue Code of 1986, as amended.

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Biography and Contact Information



Todd Anderson is a Partner of Practus® and invented Season & Sell 2.0SM – a new tool for debt capital markets.

Prior to joining Practus, Todd served as Senior Tax Partner leading US debt capital market tax matters for the world's largest law firm. For over 20 years, Todd has consistently advised many of the world's largest investment banks, investment funds, real estate partnerships, asset managers, loan originators and servicers, REITs, non-US investors, tax-exempt organizations and other tax-sensitive investors on the tax aspects of their US and non-US investment and business decisions.

Todd has worked on a broad range of financial assets and has been involved in creating very innovative investment and securitization structures. He has extensive experience in the tax aspects of structured finance transactions (including asset, mortgage and real estate transactions) and other complex financial instruments.

Throughout his career, Todd has structured, managed and advised on thousands of real estate-related transactions and other tax matters, including over US\$500 billion of REMIC, debt-for-tax, and other securitization, financing and fund-formation transactions.

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