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Bribery and Controversy in the US and Global Market

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Kathleen Thompson ('13) and Charlotte Medina ('13) conducted this research for an international management class in the fall of 2011 under the mentorship of Dr. Chien Wen Yu. This research was also presented at the 2011 BSU Mid-Year Symposium.

Throughout the history of trade and business, there have always been alternative—and often unethical—ways of closing sales in the form of extra kick-backs and luxurious goods. In modern times these unethical incentives are referred to as bribes. More recently, the practice of bribery has been linked to high-profile corruption and fraud cases in the United States, rocking the international marketplace for companies such as Pfizer, Avon, Johnson & Johnson, and Daimler AG. However, many international companies actually welcome bribery as a way to compete with other companies in the global marketplace. When looking at bribery and its effect on the global market, it is important to discuss the ways in which businesses actually practice bribery, the ethical issues behind it, how it is used in the global market, the effects of United States' laws enacted to prevent it, as well as the controversy behind the practice of bribery in general.

Bribery in its most basic form is the practice of giving gifts of monetary value to a client or potential customer to persuade their decision. According to *Black Law's Dictionary*, bribery is "The offering, giving, receiving, or soliciting of any item of value to influence the actions of an official or other person in charge of a public or legal duty." This practice constitutes a crime in most developed countries and is highly controversial. As with any controversy, bribery has its advantages as well as problems. Common advantages of bribery include gaining business without needing to have superior quality or services, building business relationships with foreign officials, standing in favor with potential clients, and having small payouts lead to hefty profits for the company. As communism fell in Eastern Europe, bribery opened the path to many businesses in the once-Soviet-controlled countries and assisted them in the transformation to capitalism. Jon Moran (1999), in his article in the journal *Business Ethics: A European Review*, wrote that "The collapse of communism cleared the field for increased transnational economic integration but also widened the scope for international governance... bribery was tolerated because of the need to build stable anti-communist regimes in the Third World" (p. 109)

Despite these advantages in some cases, bribery has caused myriad problems in the global market. The money and goods being given as bribes are purchased with shareholders' and customers' money. These shareholders have no say in where their money is going when it is used for bribes and corruption. According to James Webber and Kathleen Getz (1999), "Economically,

bribery has distortionary and disincentive effects (Webber and Getz, 1999). It has opportunity costs because the money paid as bribes is not put to productive use. It may lead officials to contract with inefficient firms for inappropriate goods or services” (p. 42). Webber and Getz go on to say that “bribery leads to distortion in multiplier effects, competitiveness, fiscal functions, debt effects, and investment. Bribery creates disincentives to investment by increasing risk and uncertainty for firms, such that economic development is hindered” (p. 42). As these problems begin to outweigh the advantages of bribery, firms and governments are taking notice of the ethical issues surrounding the corruption.

Ethical issues in the business world are vast, and in the emergence of the global market, bribery and its ethical implications are increasing in importance. According to James Fieser (1995), author of “Business Ethics” “When people refer to business ethics, they are often referring to 1 of 3 things: avoid breaking the criminal law in one’s work-related activity, avoid action that may result in civil lawsuits against the company, or avoid actions that may be bad for the company’s image” (p. 1). Bribery falls into all three categories it breaks the criminal law in the United States, has the possibility to bring lawsuits, and can bring a bad company image. Fieser goes on to say that “a company will stay away from actions that will result in bad business ethics only if it costs the company money or will cause a bad reputation. The business will rarely focus on ethics simply for the moral dilemma” (p. 2). Unfortunately, as the market expands globally, bribery is an issue that is costing businesses millions of dollars and is becoming an ethical dilemma that they are forced to focus on. While regulations have been put in place in countries in which bribery has been deemed illegal, issues arise in countries where it is culturally accepted.

In addition to reviewing the ethical dilemmas surrounding bribery, it is important to see how bribery is used by businesses to perform important and advantageous functions. Bribery is used in businesses to assist in closing deals, creating close relationships with foreign countries, and getting a step ahead of the competition. According to Transparency International, a Berlin-based group, in a 2011 survey China and Russia were the two countries most likely to use bribery to secure foreign contracts. In China and Russia these incentives helped to strengthen the trust and loyalty between the customer and firm, as well as created opportunities to enter the marketplace of a foreign country (Stillman, 2011). As helpful as bribery can be, it is harmful to the taxpayers of the nations involved and to the customers of the company. Officials are accepting kickbacks that are not being taxed as part of their pay, and companies are giving gifts of monetary value that are not being accounted for and properly taxed, causing a disparity between

those benefiting from bribes and other tax-paying employees and customers. For companies that are engaging in the practice of bribery, changes in business environments and the resulting changes in a public official’s status could create a high risk for any firm. Jon Moran (1999) mentions this in his article in *Business Ethics: A European Review*: “Changing business environments may affect the status of public officials and thus create uncertainty for businesses. In the emerging markets the position of a public official may be flexible” (p. 38). Investing incentives in a public official whose duties may change could present a potential loss for a company. While it is clear how bribery can benefit a business, there are also risky setbacks that a firm should consider before engaging in such an activity.

When discussing the various ethics, advantages and problems of bribery, it is important to look at the views of this topic in various countries throughout the world. In response to a survey by Transparency International, in which 3,000 company executives were asked which firms they dealt with engaged in bribery, a Chinese reader stated, “bribe-paying happens not only in the commercial field but in almost all parts of social life here.” A Russian reader had similar thoughts after reading the survey, responding, “if you want your child to get into a good kindergarten or go to a good school or university, a Russian person has no other way but to bribe” (Stillman, 2011, p. 1). Bribery is viewed as the norm in countries such as these, and the preceding statements show how prevalent the enticement of firms can be. The relatively “bribe-happy” ways of two of the BRIC (Brazil, Russia, India, and China) countries is concerning, considering their increasing importance in the global economy.

Bribery can also create a barrier to entry into the global market because not all countries encourage firms to give incentives as freely as others. A representative for the Transparency International agency stated, “Given the increasing global presence of businesses from the countries, bribery and corruption are likely to have a substantial impact on societies in which they operate and on the ability of companies to compete fairly in these markets” (Stillman, 2011, p.1). Some countries that are the least likely to engage in bribery and ranked the lowest on the survey are the Netherlands, Switzerland, Belgium, Germany, and Japan.

India was ranked “most improved” when it comes to foreign bribery, as compared to its score on the 2008 survey. The nation is far from corruption-free despite improvements in regulations, but is slowly making progress. Taiwan and Turkey were also appeared near the bottom of the list, indicating high levels of bribery. The United States was ranked number 10 of the 28 countries listed. Most of these low-ranking countries

have regulations in place to deter firms from performing bribery (Stillman, 2011). Along with many of the other low-ranking nations, the United States has taken a legal and ethical stand against bribery. For such nations, the benefits of doing business ethically and with no incentives or monetary gifts are said to outweigh the advantages that may be gained by engaging in bribery. Glynn, Kobrin, and Naim (1997), co-authors of *The Globalization of Corruption*, summed up this belief: "Under such circumstances [of bribery] it becomes all too easy for economically beleaguered publics to confuse democratization with the corruption and criminalization of the economy—creating fertile soil for an authoritarian backlash and engendering potentially hostile international behavior by these states in turn" (p.10). This statement explains one of the reasons many countries implement regulations against bribery. Such governments understand that consumers hear what they read in the news and easily trade it for reality. Most countries do not want the negatives in the news about the few corrupt business and political figures to reflect the nation. An example of this can be seen in the United States' involvement and corruption in the Niger Delta. The Texas contractor Wilbros Group has been laying down pipe in Nigeria for 50 years, since the discovery of oil there. The corruption in the Niger Delta is so rampant that it even includes a US congressman and a Fortune 500 company. Sam Kennedy (2009), journalist for *Frontline World*, states, "If bribe money has bought anything in the Delta, it is a culture of pervasive, profound neglect" (p. 1). This is an example that describes just how detrimental bribery can be for the people of a nation.

One leader in global business that is working hard against corruption is the United Kingdom. The United Kingdom's Bribery Act went into effect July 1, 2011. This act is wider in scope than the United States' Foreign Corrupt Practices Act and revolutionizes England's laws on bribery. The act redefines bribery and adds a new corporate offense: companies can now be held criminally liable for bribes paid by their employees. The act also widens the UK's jurisdiction over offenses committed abroad (Bribery Act, 2010). The regulations placed on bribery by some nations can make entrance into the global market difficult for other countries. However, entrepreneurs can have difficulty starting businesses in countries in which corruption is prominent. The corruption is an obstacle in nations such as India in which thugs demand bribes on a regular basis to "disappear."

Corruption has troubled the U.S. marketplace for ages. As the United States is an active participant in the world market, it has great influence on the regulations that are put in place by world economic conventions. The U.S. is a major importer of foreign goods, and is home to major corporations that do

business globally. Due to these factors, the position the U.S. takes on the issue of bribery is highly important and can greatly affect the way business must be conducted by American companies abroad and foreign companies on American soil. The first aspect to consider is the ethical view that the U.S. takes on bribery. The U.S. does not look kindly on bribery and views the practice as unethical and unfair. The U.S. has taken measures to penalize bribery on the home front and in business affairs abroad. Companies are banned from using incentive tactics within the United States as well as when they are doing business abroad. According to the journal *Business America* (Transnational Bribery, 1996), the U.S. stand on bribery is that "bribes undermine democratic accountability and distort trade and investment where it flourishes. Officials who reap large dividends from bribes are not accountable to their citizens, weak governments become weaker, and public trust is harder to maintain" (Transnational Bribery, p. 1). The U.S. stance on bribery abroad is even stricter. The same journal notes, "bribery is a barrier to trade which hurts U.S. commercial interests. Bribery is essentially an unpredictable and unfair tariff increase. U.S. exporters are put at a competitive disadvantage when foreign firms engage in bribery" (Transnational Bribery, p. 1). Since the United States has such a broad reach in the global market, the realization that its firms are being put at a disadvantage due to bribery in foreign countries caused the U.S. to take action and make known its sentiments. The U.S. government's policy is that "bribery and corruption affect the strength of the global trading system. In countries where it exists, it hurts the economy by denying it the benefits of trade agreements" (Transnational Bribery, p. 1).

As a result of the disparity between the U.S. policy on bribery and the practices of countries where bribery is tolerated, the United States initiated the Foreign Corrupt Practices Act (FCPA) in 1977 to restrict American companies from bribing foreign officials and to demand they keep more detailed records of their business transactions to ensure legitimacy. It is believed that the FCPA materialized from investigations in the White House by the Securities and Exchange Commission (SEC) after the Watergate incident. These investigations found that "corporate slush funds" were used to bribe foreign officials (Webber & Getz, 2004). James Webber and Kathleen Getz (2004), in an article in the journal *Business Ethics Quarterly*, said that "The extent of corruption was much greater than anticipated, leading Congress to pass the FCPA virtually without debate" (p. 699). This was the first step the U.S. took to combat bribery in firms based within its own borders but operating overseas. The hope for this legislation was that it would "restore public confidence in what some had begun to view as the uncertain integrity of the American business system" (Salimbene, 1999, p. 92). The investigations leading up to the

FCPA had discovered that “over 400 U.S. companies admitted to making illegal or questionable payments in excess of 300 million dollars to foreign government officials, politicians, and political parties” (Salimbene, 1999, p. 92). The FCPA was put in place to regulate and guide firms operating overseas in a way that promoted trust and gave shareholders the comfort of knowing that business was being done in an ethical fashion according to U.S. standards. In 1988, the FCPA was amended “to clarify the conditions under which a business would be liable for bribery carried out by an agent. More significantly, the 1988 amendments included a provision requiring the President to seek international cooperation in suppressing business bribery” (Webber & Getz, 1999, 699). These amendments to the FCPA not only made clear exactly which situations constituted bribery for businesses, but also pushed the U.S. to seek sanctions for bribery at a global scale. Following this amendment to the FCPA, the U.S. sought bribery sanctions in the Organization for Economic Cooperation and Development (OECD working group, n.d.). Through those measures, the FCPA truly fueled the controversy of bribery around the globe today.

In addition to the Foreign Corrupt Practices Act, the U.S. also passed regulations concerning the Overseas Private Investment Corporation (OPIC). OPIC gives U.S. franchisers the financing needed to go international. In order to be eligible for OPIC, “U.S. companies, investment funds, and joint ventures supported by OPIC financing represent and covenant that their projects comply with the FCPA and all other applicable laws, including applicable foreign laws, pertaining to corrupt practices” (Transnational Bribery, 1996, p. 5). This ensures that any small or medium-sized business looking to go international and seeking government aid is compliant with all the U.S. regulations regarding bribery. If a company supported by OPIC is found to have violated any of the regulations, the consequences are severe. “A violation of these provisions could lead to a default on, or suspension of, OPIC financing, creating significant deterrents to such practices” (Transnational Bribery, 1996, p. 5). Through this OPIC measure, the U.S. is clearly looking deeper into segments of international business to help end bribery.

The United States took action in 24 cases under the FCPA in 2010 (Dunning, 2011). This demonstrates the seriousness of the FCPA and the dedication the U.S. government has been giving to this legislation in recent years. U.S. firms need to be aware of the severe penalties for violating this act, as it could be costly for them. Matt Dunning (2011), in an article in the journal *Business Insurance*, spoke about the sanctions for violating the FCPA:

Criminal penalties for violations of the FCPA can carry fines of up to \$2 million for companies and \$100,000 for individuals—not to mention jail time—or, under the Alternative Fines Act, up to twice the cash value of the benefit sought in making the bribe or other corrupt payment. The government also can impose civil fines of up to \$10,000 per employee convicted of violating the anti bribery law. Beyond fines, companies risk forfeiting their right to bid for U.S. government contracts, suspension or revocation of their export licenses, as well as possible external civil litigation for damages under other federal or state laws. (p. 1)

These penalties could run companies millions of dollars over the benefit that they were seeking through a bribe. Firms also need to be aware that they could violate the FCPA without paying a single dollar to an official (Dunning, 2011). Dunning explains that while the FCPA does not regulate travel expenses and other expenditures relating to business negotiations, “excessive expenses” such as luxurious hotel rooms, meals, and gifts could very well fall within the category of an incentive. The FCPA also extends to those with whom employees conduct business, such as partners and agents. A firm will be punished for a bribe even if the company did not know of the actions of its agent or any intermediaries. Engaging in the practice of bribery presents huge risks to a company on the home front, and could possibly lead to sanctions in the foreign country where business was sought. The sanctions of the FCPA are vital for a company to have knowledge of and are likely incentives in themselves to stay away from bribery.

It is obvious by these steps taken by the U.S. that this country has a vested interest in striking down bribery. It is also apparent through these regulations that bribery is deemed unfair and unethical in the United States. All of these aspects are important to consider, because the United States is a major player in economic operations around the world. The view of bribery within the U.S. and the policies enacted to enforce that view has affected global trade in key ways.

Its policies on bribery have an impact on the way the U.S. interacts with the rest of the world. The Foreign Corrupt Practices Act (FCPA) was implemented to prevent U.S. businesses from engaging in practices of bribery abroad and to help promote trust in the American business system. However, the FCPA had effects that were felt well beyond U.S. businesses—in other countries around the world and in global economic organizations that have pushed regulation in favor of U.S. policy.

One of the biggest effects the bribery policy in the U.S. has had

on its firms, however, came in the form of losses. “In October 1995, Commerce Secretary Ron Brown presented a CIA report to the U.S. Congress claiming that between 1994 and 1995 the U.S. lost \$36 billion of business deals due to bribery and corruption by its competitors” (Moran, 1999, p. 142). U.S. companies were losing business to foreign companies that were bribing foreign officials and not being sanctioned for it by their home country. This led to a pessimistic feeling toward the FCPA in U.S. business—a feeling that U.S. businesses were at a disadvantage due to the new legislation. U.S. firms felt that they could not compete with their foreign competitors who were able to bribe their way into millions of dollars’ worth of business. In addition to losing out on costly business contracts, U.S. businesses are still paying millions of dollars for compliance programs to avoid the costly fines that come with any type of violation of the FCPA. In 2011 Pfizer was “expected to pay more than \$60 million... to resolve U.S. government probes into whether the drug maker and Wyeth, which it acquired in 2009, paid bribes to win business overseas” (Palazzolo, 2011, B1). There is a steep price to pay for an act of bribery committed by company agents, even when training was provided and there is ambiguity about who exactly is considered a public official, which has led several corporations to lobby for a change to the FCPA. In his article “Business Slams Bribery Act” in the *Wall Street Journal*, Joe Palazzolo (2011) said,

Amending the law is the top priority for the U.S. Chamber of Commerce, the largest lobbying organization in Washington. In the first three quarters of this year, the Chamber paid outside lobbyists...a total of \$700,000 to press for changes to the FCPA and other laws, according to House lobbying records. Though they can’t estimate to what extent, the Chamber and defense lawyers say they have anecdotal evidence that the law has had a chilling effect, stunting U.S. business interests abroad as companies shun deals for fear of triggering the FCPA probes. (p. B1)

While the FCPA may have taken measures to ensure that bribery is not a practice U.S. firms engage in, it has created uproar from the very people whose integrity it was trying to protect. In addition to the loss of business to foreign contractors, fear of entering the foreign market and the legal backlash, the FCPA has caused companies to pay more attention to their accounting practices. The second part of the law requires that companies keep accurate records of their business transactions so that discrepancies caused by bribery may be easily spotted. With the recent legislation of the Sarbanes Oxley act, more violations of the FCPA are being uncovered as companies are keeping their books more and more precisely. This has led to an increase in penalties among several companies, and in increase in complaints from U.S. businesses. In light of all these effects

on U.S. companies, the FCPA has had a resounding impact on the rest of the world as well.

The FCPA was amended in 1988 to include provisions encouraging the President of the United States to take action in the Organization for Economic Cooperation and Development (OECD working group, n.d.) and push for a policy similar to that in the U.S. The OECD was established in 1961 and today has 34 member countries all over the globe. The OECD “provides a forum in which governments can work together to share experiences and provide solutions for common problems” (OECD working group, n.d.). Its members also “set international standards on a wide range of things, from agriculture and tax to the safety of chemicals” (OECD working group, n.d.). One international standard that was adopted by the OECD came about from legislation of the FCPA and dealt with the issue of bribery among OECD member countries. “On November 21, 1997 OECD member countries...adopted a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Convention was signed in Paris on December 17, 1997 and entered into force on February 15, 1999 after the requisite number of signatory countries ratified the convention” (Cleveland, Favo, Frecka, & Owens, 2009). In their 2009 article “Trends in the International Fight Against Bribery and Corruption, Cleveland, Favo, Frecka, and Owens discussed how this OECD convention was similar to the FCPA in that it prohibits bribery of foreign public officials and contains a provision concerning accounting practices. However, unlike the FCPA the OECD convention does not “include foreign political parties within its anti-bribery provisions.” Cleveland et al. also noted that “the OECD convention is not self executing (the OECD has no direct enforcement power); rather it requires signatory nations to adopt their own legislation to make bribery illegal. To make sure that this happened, the Convention implemented a rigorous surveillance process beginning in 1991.” The OECD’s members, and countries whose legislation was impacted by signing with the OECD, include Germany, Korea, Denmark, Mexico, Turkey, Japan, Italy, and many more. The FCPA extended its arm through the 1988 amendments into the OECD convention in 1997, which in turn impacted about 34 countries all over the world and their policies on bribery.

The FCPA also made itself manifest in the Organization of American States (OAS). The OAS was created in 1948 in Columbia and “was established in order to achieve among its member states...an order of peace and justice to promote their solidarity, strengthen their collaboration and defend their sovereignty, their territorial integrity and independence” (OAS: Who are we, n.d.). The OAS has 35 members, including

Brazil, Mexico, the U.S., and Argentina. In 1996, the OAS entered into a treaty named the Inter-American Convention against Corruption (Salimbene, 1999). This treaty “requires the parties to make acts of corruption unlawful. The OAS treaty also makes acts of transnational bribery and illicit enrichment unlawful to the extent that these do not conflict with a party’s constitution or fundamental legal principles” (Salimbene, 1999, p. 95). In this wave of anti-bribery policies, the U.S. has reached almost all Latin American countries and influenced the members of the OAS to instill policies similar to their own in their respective countries.

The U.S. policy on bribery, therefore, has been felt not only by U.S. firms, but also by firms in other countries where the policy has spread through various ways such as the OECD and OAS conventions. While U.S. companies struggle with the looming threat of large fines, disadvantages in the marketplace, expensive compliance measures, and expansive book keeping, the FCPA is making its reach around the globe. Many countries which are members of the OECD and OAS have also signed into their own legislation the treaty agreements concerning bribery and corruption; they are joining the U.S. in the battle to promote fair business practices. A new age has arrived in the global marketplace as a result of the legislation against bribery in many conventions and countries. It remains a question whether bribery will have much of a place in any market or country in the years to come, or whether the new legislation is here to stay.

There has been discussion of the negative effects of bribery, namely the difficulties firms face when they enter a nation full of corruption, and the impacts of regulations put in place to combat these issues. However, the regulations of the FCPA—and, in turn, that the OECD and OAS have enacted—are packaged with their own set of disadvantages and problems. As previously discussed, firms have a more difficult time entering the global market with other nations that are free to bribe and are more culturally accepting of the concept. Along with this issue, businesses are faced with heavy fines and fees if they do not adhere to the strict government regulations. So questions are raised about whether these implemented policies harm more than they are helping. Not according to business journalists Joseph McKinney and Carlos Moore (2008): “Bribery introduces inefficiencies in the international business system that put a drag on economic progress. It is particularly harmful to the poor of the world, for it has been shown to channel resources away from expenditures on health, education, and other social services” (p. 103). They go on to say that bribery is also detrimental as safety and environmental regulations are often compromised by the practice. Bribery is a cloud over the judgment of government and business officials

when making decisions regarding the rule of law (McKinney & Moore, 2008). Perhaps with these issues in mind, countries such as China and Russia have begun taking steps toward anti-corruption regulations. In February 2009, the Russian Federation formally applied to the OECD Secretary General to be a full participant in the Working Group on bribery. The Working Group is in charge of monitoring the implementation and enforcement of the OECD Anti-Bribery Convention, the 2009 Recommendation on Further Combating Bribery of Foreign Bribery in International Business Transactions, and related instruments. Transparency International holds this peer-review system as the “gold standard” for monitoring and enforcement (OECD working group, n.d.). “For the purpose of enhancing mutual understanding of domestic and international anti-bribery measures, the OECD Secretariat undertook a mission to Moscow in May 2009 to discuss matters with representatives from the Russian Federation” (OECD working group, n.d.). To further show Russia’s willingness to become an anti-bribery state, the Federation also participates in the Anti-Corruption Network for Eastern Europe and Central Asia. This is one of the regional outreach programs provided by the OECD Working Group on bribery.

On May 1, 2011 China took corruption policy matters into its own hands and enacted a long-arm jurisdiction policy. This new law will reach Chinese nationals and companies. The amendments to Amendment 8 now state, “Article 164 of the Criminal Law makes it unlawful for one to offer ‘*money or property to the staff of a company or enterprise in order to make illegitimate benefits*’” (Mark & Bullock, 2011). Both China and Russia, countries that have been identified as top bribery nations, have recognized the need to address the issue. The disadvantages of bribery are finally outweighing the advantages. The process of changing the ideals of nations such as China and Russia that have not known ways of business without bribery will take time and dedication. However, the governments have begun working to build stronger regulations and business ethics.

Corruption is an increasing problem for the global economy in both developing and industrialized countries. According to Susan Rose-Ackerman (1997) author of *The Political Economy of Corruption*, corruption in the customs service of Indonesia became so ingrained that the head of state signed a contract with a private Swiss firm to take over the duties of the agency. She goes on to state, “In Guinea, continuous demands for bribes are reportedly a feature of any business deal.... From Italy to Ghana to Venezuela, allegations of corruption have toppled sitting rulers or led to the arrest of past incumbents” (Rose-Ackerman, 1997, p. 32). Corruption and bribery have been issues on a global scale, in many levels of business for

some time now, but recently governments have begun to take action. The United States, OECD, and OAS, along with Transparency International, are working hard to build a global market free of corruption. Many nations have enacted their own set of regulations and amendments on top of the OECD and OAS regulations to combat bribery. Today, bribery remains a controversial issue for businesses as they enter the world market; however, the tide in the business world is changing and bribery is no longer the norm. Companies that have been complaining of the disadvantages they face due to anti-bribery regulation now can see evidence that more and more countries are taking a stand against bribery. The business world has a long way to go until it is free from corruption, but nations are taking steps in the correct direction.

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