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Enforcement of the Foreign Corrupt Practices Act

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Research Guides

Enforcement of the Foreign Corrupt Practices Act

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Overview

The Foreign Corrupt Practices Act (15 U.S.C. §78dd-1 *et. seq.*) ("FCPA") prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business. The FCPA is comprised of two primary sets of provisions: (1) anti-bribery provisions; and (2) accounting standards and internal controls provisions.

History

After the Watergate scandal cast a spotlight on corruption in the American business and political systems, investigations by the Securities and Exchange Commission ("SEC") found rampant bribery of foreign government officials, political parties and politicians. Approximately 400 companies admitted corrupt payments totaling over $300 million. The FCPA was enacted in 1977 to halt bribery of public officials and to restore confidence in the integrity of the American business system.

The FCPA was amended in 1988 by the International Anti-Bribery Act (Pub.L. 105-366) to implement the provisions of the Organization for Economic Cooperation and Development's (the "OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Anti-Bribery Provisions

Pursuant to the FCPA's anti-bribery provisions, it is unlawful for:

- a U.S. domestic concern (broadly interpreted to be a U.S. person or company), issuer (public company with registered securities) or any other person in the U.S.
- with corrupt intent
- to offer, pay, promise to pay, or authorize payment
- directly or indirectly
- of anything of value
- to a foreign official, foreign political party or official, or any candidate for foreign political office, or any person with knowledge that a portion or all of the payment will be offered or given directly or indirectly to a foreign official, foreign political party, or any candidate for foreign political office
- for the purpose of influencing any official act or decision, inducing any act or omission in violation of a lawful official duty, or securing advantage
- in order to assist in obtaining, retaining or directing business to any person.

It is important to note that the FCPA does not require that a corrupt act succeed in its purpose. The offer or promise of a corrupt payment is enough. Also, the FCPA prohibits paying or promising to pay *anything of value*, including cash, gifts, trips, meals, campaign contributions, lobbying payments, tangible and intangible property, useful information, promise of future employment, college scholarships, etc.

There is an exception for payments made to facilitate or expedite routine government action. However, these "facilitating" or "grease" payments may violate local law. Additionally, anti-bribery laws of other countries (*e.g.*, the United Kingdom, Germany and Italy) do not include this exception.

There are also two affirmative defenses available to defendants. First, a defense is available if the payment in question was lawful under *written* foreign law. Second, a defense is available for reasonable and bona fide expenditures for promotion/demonstration or contract performance. The defendant has the burden of showing that the payment met one of these requirements.

Accounting/Internal Control Provisions

The FCPA's accounting requirements require corporations to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to establish systems of internal accounting controls.

- Books and Records – Company books and records must accurately and completely reflect a company's transactions and asset dispositions in reasonable detail.
- Internal Controls – A company's system of internal controls must provide reasonable assurances that transactions are carried out as authorized, transactions are accurately recorded, that financial statements are prepared according to GAAP (if possible), that there is no unauthorized access to assets, and that there are periodic audits.

The FCPA accounting and internal control provisions apply to issuers as well and individual officers, directors, shareholders and employees of the issuers. Additionally, the issuer may also be liable for the actions of its subsidiaries, joint ventures and affiliates owned and controlled by it.

Enforcement

The Department of Justice (the "DOJ") is the chief enforcement agency. The DOJ works in conjunction with the SEC, which enforces the accounting and disclosure requirements under the FCPA for public companies, and the Federal Bureau of Investigation's ("FBI") International Corruption Unit.

The DOJ and SEC have dramatically increased their efforts to enforce the FCPA. In 2007, the agencies initiated 34 enforcement cases, the most in the FCPA's 30-year history. In 2008, there were 33 enforcement cases; in 2009, there were 40 enforcement cases. There are currently approximately 140 investigations underway, with 20 FBI agents working on FCPA cases on a full-time basis.

Penalties

Violations of the FCPA may result in criminal penalties of up to $2 million per violation for corporations; individuals may face criminal fines of up to $100,000 and/or receive sentences of up to five years imprisonment. Additionally, the FCPA authorizes civil penalties of up to $500,000 against business entities and up to $50,000 for individuals. Actions may also be brought for disgorgement of profits, and companies and/or individuals may be barred from conducting future business.

Because the potential exposure for violations is so great, many corporations settle with the DOJ and SEC to minimize criminal and civil fines. They may enter into deferred prosecution agreements, agree to set fines, and/or agree to monitoring by an independent third party. However, such agreements are not available to individuals.

Scope of the Topic

The purpose of this research guide is to provide an overview of the FCPA and its enforcement. There are many intricacies to the topic that are not discussed in this guide. This guide should serve as a starting point for research on the FCPA. It provides primary and secondary sources on the topic, as well as electronic resources for accessing relevant materials.

About the Author

Ruth Hughes is a law student at Georgia State University College of Law and will graduate in December 2010. This bibliography was written for the Fall 2010 section of Professor Nancy Johnson's Advanced Legal Research class. For further information regarding this bibliography, please email Professor Johnson at njohnson@gsu.edu .

Disclaimer

This research guide is intended as a starting point for a law student or attorney to research the FCPA. It is recommended that the user Shepardize or KeyCite all statutes and cases before relying on them. This guide should neither be considered as legal advice nor as a legal opinion on any specific facts or circumstances. If you need further assistance in researching this topic or have specific legal questions, please contact a reference librarian in the Georgia State University College of Law Library, or consult a qualified attorney.

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Primary Sources

Legislation

FCPA

The Foreign Corrupt Practices Act ("FCPA") is codified at 15 U.S.C. §§ 78dd-1, 2 and 3, and § 78ff.

- 15 U.S.C. § 78dd-1 prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business by *issuers* (i.e., those companies with a class of securities registered under the Securities and Exchange Act of 1934 (the "1934 Act") or those companies required to report under the 1934 Act) and their officers, directors, employees, agents or stockholders. (See http://www.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00000078--dd001-.html).

- 15 U.S.C. § 78dd-2 prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business by domestic concerns (i.e., individuals who are citizens of the U.S. and companies other than issuers with a principal place of business in the U.S. or organized under U.S. law) and their officers, directors, employees, agents or stockholders. (See http://www.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00000078--dd002-.html).

- 15 U.S.C. § 78dd-3 expands the jurisdictional reach of the FCPA by prohibiting corrupt payments to foreign officials for the purpose of obtaining or keeping business by persons other than issuers and domestic concerns while in U.S. territory. (See http://www.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00000078--dd003-.html).

- 15 U.S.C. § 78ff outlines the penalties for violations of the FCPA. (See http://www.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00000078--ff000-.html).

The full text of the FCPA can also be accessed free of charge at:

- Government Printing Office's ("GPO") GPO Access web site (http://www.gpoaccess.gov/uscode/browse.html). Although the version of the United States Code on the GPO web site is slightly outdated (2006), users are able to browse the code including annotations free of charge.

- Department of Justice's Fraud Section FCPA page (http://www.justice.gov/criminal/fraud/fcpa/statutes/regulations.html).

Other Statutes

The DOJ may also bring charges against violators of the FCPA under other federal statutes. These statutes may also apply to the conduct prohibited under the FCPA, and may also broaden the scope of the prosecution to include bribery of anyone, not just foreign officials. These statutes include:

- The U.S. Travel Act, codified at 18 U.S.C. § 1952, prohibits the use of communications and travel facilities to commit state or federal crimes, and has increasingly been used by the DOJ in FCPA prosecutions. See http://www.law.cornell.edu/uscode/18/usc_sec_18_00001952----000-.html.

- The USA PATRIOT Act, Pub. L. 107-56 (115 Stat. 272), expanded previous anti-money laundering laws to include foreign crimes involving corruption, including bribery and misappropriation of funds. See http://www.gpo.gov/fdsys/pkg/PLAW-107publ56/content-detail.html.

- Federal Conspiracy Statute, codified at 18 U.S.C. § 371. The DOJ frequently includes a conspiracy charge under the Federal Conspiracy Statute. By including the conspiracy charge, the government may be able to admit evidence that would otherwise be inadmissible, broadly join persons and allegations and extend the statute of limitations. See http://www.law.cornell.edu/uscode/18/usc_sec_18_00000371----000-.html.

- The Sarbannes-Oxley Act of 2002, Pub. L. 107-204 (116 Stat. 745) requires certain certification with regard to financial information by CEO's and CFO's. FCPA violations can trigger disclosure and certification issues for companies and their executives. See http://www.gpo.gov/fdsys/pkg/PLAW-107publ204/content-detail.html.

Case Law

S.E.C. v. World-Wide Coin Invs., 567 F. Supp. 724 (N.D. Ga. 1983) – This case represents the first litigated FCPA decision. The defendant was a corporation whose primary business involved the trade of coins and other collectibles. The court found that the company, aided and abetted by management, violated the records provisions of the FCPA.

U.S. v. Liebo, 923 F.2d 1308 (8th Cir. 1991) – In this case, the defendant was a vice president in the aerospace division of NAPCO International. He was convicted of violating the anti-bribery provisions of the FCPA because he offered plane tickets as a gift to a Nigerian consular employee with whom he had been working to get obtain approval on contracts for military equipment and supplies. The court held that there was sufficient evidence to sustain the convictions and that it was irrelevant that the recipient of the tickets considered them to be a gift.

Lamb v. Phillip Morris, Inc., 915 F.2d 1024 (6th Cir. 1990) – The plaintiffs in this case were private tobacco growers who sued Phillip Morris alleging that donations promised by the defendant to various foreign governments in exchange for price controls. The court held that the plaintiffs did not have a private cause of action under the FCPA.

U.S. v. Castle, 925 F.2d 831 (5th Cir. 1991) – Two Canadian company executives were indicted under Federal Conspiracy Statute for conspiracy to violate the FCPA. The court held that foreign officials who are excluded from prosecution under the FCPA may not be prosecuted under the general conspiracy statute.

Saybolt International B.V. v. Phillippe S.E. Schreiber, 327 F.3d 173 (2nd Cir. 2003) – In this legal malpractice action, the court held that defendants may not assert reliance on advice of counsel as a defense to the FCPA's anti-bribery provisions. The plaintiff in the case sued its attorney and the attorney's firm for wrongly advising that bribes would not violate the FCPA if the payments were made out of a Dutch subsidiary. The suit commenced after the company pled guilty to violations and its CEO was convicted in a jury trial.

U.S. v. King, 351 F.3d 859 (8th Cir. 2003) – The defendant was convicted by a jury for violating the FCPA and the Travel Act by agreeing to bribe officials in Costa Rica to obtain valuable land concessions. The court held that testimony of co-conspirators and recordings of conversations were enough to show defendant's knowledge of the proposed bribes to foreign officials and this were sufficient to support his conviction.

U.S. v. Kozeny, 493 F. Supp. 2d 693 (S.D. N.Y. 2007) – The defendant was indicted for scheming to bribe senior government officials in the Republic of

Azerbaijan to achieve the privatization of a state oil company. The alleged scheme took place in 1998, but the government didn't bring charges until 2005. The court held that the appropriate statute of limitations was five years under 18 U.S.C. §3282.

Glazer Capital Mgmt., L.P. v. Magistri, 549 F.3d 736 (9th Cir. 2008) – In this case, the court held that certifications required under Sarbannes-Oxley were not sufficient to raise a strong inference of scienter on the part of a CEO whose company announced potential violations of the FCPA, casting doubt on the closing of a potential merger.

U.S. v. Kay, 513 F.3d 432 (5th Cir. 2008) – This is the landmark Fifth Circuit case that defines the scope of the FCPA. The defendants were executives of a U.S. rise export company who were indicted on FCPA violations for bribing Haitian officials in an effort to reduce customs duties, sales tax, and harassment by port officials. The district court dismissed the charges on the grounds that bribery aimed to reduce custom duties was not a payment made to obtain or retain business under the FCPA. The government appealed and the Fifth Circuit Court of Appeals reversed the district court's ruling holding that that defendants had fair notice of the prohibited conduct because the FCPA was not statutorily vague, even though the court had previously held that the FCPA was ambiguous; that a person of common intelligence would have understood that bribing foreign officials was illegal; and that the government proved that defendants willfully, not accidentally, violated the FCPA. Although this decision has been criticized for its broad interpretation of the statute, it is currently the law nationwide.

FCPA Reporter

FCPA enforcement actions are reported in the Foreign Corrupt Practices Act Reporter (the "FCPA Reporter"). Many defendants choose to settle with the government to limit or mitigate their exposure to criminal penalties and fines. These settlements are also reported in the FCPA Reporter. The FCPA Reporter can be accessed on WestLaw using the database "FCPAREP."

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Secondary Sources

Practice Guides

Corporate Compliance Series: Designing and Implementing an Effective FCPA and Anti-Bribery Compliance Program (Current through the 2009-2010 Edition) by William M. Hannay

This practice guide features a detailed overview of the FCPA, its elements, and penalties for violations, as well as information on recent enforcement actions and developments in international anti-corruption laws. In addition, the guide provides valuable information on designing and implementing successful monitoring and compliance programs and on conducting internal investigations. The appendix includes a full-text version of the FCPA, lists of recent enforcement actions, sample FCPA programs and forms and an example of a corporation compliance program. The guide is available with a subscription to WestLaw using the database "CORPC-FCPA."

Practicing Law Institute's Doing Business Under the Foreign Corrupt Practice Act by Don Zarin

This reference guides the reader through detailed discussions of each element of the FCPA, as well as exceptions to the statute and affirmative defenses. The guide also provides helpful suggestions on drafting contracts to limit exposure and information on compliance programs. There is also discussion of other federal statutes with FCPA implications. Finally, the guide outlines the DOJ's FCPA opinion procedure, whereby corporations can ask the DOJ for guidance on how potential transactions would be viewed by the agency under the FCPA. This practice guide is updated frequently and is available with a WestLaw subscription using the database "PLIREF-FCPA."

Legal Encyclopedias

69A Am. Jur. 2d Securities Regulation – Federal § 1391

This American Jurisprudence entry provides a brief description of the purpose of the FCPA and indicates there is no private right of action under the statute.

69A Am. Jur. 2d Securities Regulation – Federal § 1657

This entry discusses the criminal penalties that may be imposed for Securities Exchange Act violations, including FCPA violations.

American Law Reports

American Law Reports ("ALR") provide an analysis of specific legal issues and discussion of relevant case law relating to that issue. ALR can be accessed with a subscription to WestLaw or LexisNexis.

Robin Miller, J.D., ***Construction and Application of Foreign Corrupt Practices Act of 1977***, 6 A.L.R. Fed. 2d 351

This ALR article provides a brief background of the FCPA and provides a summary of case law relevant to the elements of an FCPA violation, analyzes issues related to both civil and criminal cases, and discusses how the FCPA has been applied by courts. This article is updated regularly with updated case law.

Books

The Foreign Corrupt Practices Act Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners by Robert W. Tarun (ISBN: 978-1-60442-951-1) (2010)

This book is an excellent desk reference for in-house counsel and attorneys alike who may deal with FCPA compliance issues. It provides detailed analysis of the FCPA, its elements, defenses and penalties, and provides helpful guidance related to compliance and monitoring programs. The book is updated annually and includes information about recent enforcement actions.

Foreign Corrupt Practices Act Compliance Issues: Leading Lawyers on Responding to Recent FCPA Enforcement Actions, Maintaining an Effective Compliance Program and Navigating Risk in Emerging Markets by Multiple Authors (ISBN: 978-0-314-26779-5) (2010)

This book is a compilation of essays prepared by lawyers who practice in the FCPA arena. The book includes chapters on enforcement trends and the challenges increased enforcement present to multinational companies, maintaining effective compliance programs and conducting business in emerging markets.

Law Review Articles

Cortney C. Thomas, ***The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended and Justified***, 29 Rev. Litig. 439 (2010).

In this article, the author defends the recent increase in enforcement of the FCPA and argues that the use of “diversion agreements” such as deferred and non-prosecution agreements can satisfy the goals of the FCPA. The author also addresses concerns that the increased enforcement of the FCPA has lead to prosecutorial abuse.

Rollo C. Baker, ***Foreign Corrupt Practices Act***, 47 Am. Crim. L. Rev. 647 (2010).

This article is a good overview of the FCPA, its elements, defenses and penalties for violations. Additionally, it discusses the importance of corporate compliance programs in limiting exposure and the recent increase in FCPA enforcement by the DOJ and SEC.

Robert W. Tarun and Peter P. Tomczak, ***Introductory Essay: A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy***, 47 A. Crim. L. Rev. 153 (2010).

In this article, the authors propose a corporate leniency program that could be used by the DOJ’s Fraud Section to incentivize companies to self-report FCPA violations. The policy would be similar to the policy used by the DOJ’s Anti-Trust Section. The authors argue that massive penalties assessed against companies like Siemens ($1.6 million) and BAE Systems ($400 million) deter self-reporting when it is unlikely that law enforcement will learn of potential violations. The article provides a brief history of the FCPA, the Sherman Act, and the Corporate Leniency Program established by the Anti-Trust Section, and outlines a proposed policy for use by the Fraud Section.

J. Scott Ballenger, Douglas N. Greenburg and Nathan H. Seltzer, ***Reigning in the Foreign Corrupt Practices Act: The Supreme Court Ignores a Perfect Opportunity***, 46 Crim. L. Bull. Issue 4, Art. 2 (2010).

This article reviews the issues in U.S. v. Kay, the landmark Fifth Circuit decision that addresses the scope of the FCPA and argue that it may be time for corporations to stop settling with the DOJ and start actively litigating in an effort to curb the reach of the FCPA.

Peter J. Henning, ***Corporate Criminal Liability and the Potential for Rehabilitation***, 46 Am. Crim. L. Rev. 1417 (2009).

This article discusses the appropriateness of using criminal prosecutions to punish corporations and other types of businesses for violations of laws like the FCPA. The author argues that criminal prosecutions are appropriate because designating conduct as criminal is an expression of society’s moral judgment and it is important that bad corporate actors are labeled as criminal when they play a significant role in the economy and society. The author also argues that the use of deferred and non-prosecution agreements are the proper way to resolve corporate criminal cases because they encourage companies to rehabilitate themselves.

Priya Cherian Huskins, ***FCPA Prosecutions: Liability Trend to Watch***, 60 Stan. L. Rev. 1447 (2008).

This article discusses the recent trend of holding directors and officers personally liable for failing to implement proper internal controls to make sure their companies were not violating the FCPA. The author suggests that companies should pursue both preventative training and proactive monitoring to reduce their exposure.

David Hess and Cristie L. Ford, ***Corporate Corruption and Reform Undertakings: A New Approach to Old Problems***, 41 Cornell Int’l L.J. 307

(2008).

This article reviews the recent rise in FCPA enforcement actions and the use of deferred prosecution agreements to deal with corporate violations of the FCPA. The authors argue that although controversial, the agreements are appropriate because they attempt to address the root cause of violations – corporate culture.

Cherie O. Taylor, ***The Foreign Corrupt Practices Act: A Primer***, 17 Currents Int'l Trade L.J. 3 (2008).

This article is a good brief overview of the FCPA, its elements, and current trends in enforcement.

H. Lowell Brown, ***Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act***, 26 N.C. J. Int'l L. & Com. Reg. 239 (2001).

This article analyzes the 1998 amendments to the FCPA, which were promulgated to comply with the OECD's Convention on Combating Bribery of Foreign Officials in International Business and discusses how the amendments expanded the reach of the FCPA with its provisions regarding the extraterritorial applicability of the FCPA's anti-bribery provisions.

H. Lowell Brown, ***Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act***, 50 Baylor L. Rev. 1 (1998).

This article discusses the liability a parent corporation has under the accounting and reporting provisions of the FCPA, addresses compliance obligations of the board of directors and management, and describes how effective compliance programs and training can help limit a parent's exposure.

Judge Stanley Sporkin, ***The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday***, 18 N.W. J. Int'l L. and Bus. 269 (1998).

This article is an interesting look at the FCPA, written by the former Director of Enforcement for the SEC who helped shape the statute.

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Electronic Resources

Enforcement

Department of Justice, Fraud Section –
http://www.justice.gov/criminal/fraud/fcpa/

The Fraud Section of the DOJ has an excellent web page with many resources for practitioners and laymen alike. The page includes an overview of the FCPA and a link to a full-text version of the statute. Also, the page includes a link to the Fraud Section's "Lay Persons Guide," which spells out the requirements of the FCPA in plain language. Other resources available include information on the DOJ's Opinion and Review Procedures, links to Opinion and Review Releases, and a listing of related enforcement actions.

Security and Exchange Commission, Enforcement Division –
http://www.sec.gov/divisions/enforce/enforceactions.shtml

The Enforcement Division of the SEC posts updated lists of enforcement actions, including litigation, administrative proceedings, Administrative Law Judge proceedings and Commission Opinions. Although the site does not have the detailed information contained on the DOJ page, it is a good resource for tracking enforcement actions.

Department of Commerce, Office of General Counsel –
http://www.commerce.gov/os/ogc/transparency-and-anti-bribery-initiatives

This web page includes links to various FCPA and anti-corruption resources, including a useful bibliography of FCPA related articles, books, and other publications.

Blogs

http://www.antibriberyblog.eu/
http://www.compliancebuilding.com/
http://www.complianceweek.com/
http://www.corporatecomplianceinsights.com/
http://www.fcpablog.com/
http://fcpaprofessor.blogspot.com/
http://www.governmentcontractslawblog.com/
http://lawprofessors.typepad.com/whitecollarcrime_blog
www.wrageblog.org

Law Firm Publications

Law firm publications are excellent resources for information. Following is a sampling of FCPA publications available law firm web sites.

Covington & Burling LLP
http://www.cov.com/publications/?Practices=5193c65a-31f6-417c-ad34-317c4e0dc27c&search=1

DLA Piper
http://www.dlapiper.com/us/services/detail.aspx?service=661&show=pubs

Gibson Dunn
http://www.gibsondunn.com/publications/pages/2010Mid-YearFCPAUpdate.aspx

Hughes Hubbard
http://www.hugheshubbard.com/files/upload/2010%20mid-year%20fcpa%20alert.pdf

Jenner & Block
http://www.jenner.com/news/news_item.asp?id=000014763224

King & Spalding
http://www.kslaw.com/practice_areas/pags/ForeignCorruptPracticesAct.pdf

Mayer Brown
http://www.mayerbrown.com/publications/article.asp?id=7132&nid=6

Miller Chevalier
http://www.millerchevalier.com/OurPractices/International/FCPAInternationalAntiCorruption?view=websitePublications

Paul Hastings
http://www.paulhastings.com/PracticeArea_Publications.aspx?PracticeAreaId=88

Shearman & Sterling LLP
http://shearman.symplicity.com/files/03f/03f164bc0bd3d772e53eff9d9cbba048.pdf

Sidley Austin LLP
http://www.sidley.com/SidleyUpdates/Detail.aspx?news=4522

Skadden, Arps, Slate, Meagher & Flom LLP
http://skaddenpractices.skadden.com/fcpa/index.php?sectionID=32

Steptoe & Johnson LLP
http://www.steptoe.com/publications-7066.html

Venable LLP
http://www.venable.com/services/practices/ServiceDetail.aspx?service=261&view=pubs

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