

## WHISTLEBLOWING PROTECTION AND FREEDOM OF SPEECH: FINDING RESPECT AT THE WORKPLACE

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### Abstract

*Does the whistleblower have a place in business and organizations? Being a controversial figure the whistleblower's journey is full of obstacles. The term is taken from the actions of the English police officers or "bobbies" out on their police beats reacting to the discovery of a commission of a crime where they would blow their whistle. This immediate reaction is to alert the public and other police officers of danger within their midst. Another analogy that could also be the origins of the term is the act of the referee or umpire of a football game who would blow the whistle upon discovery or seeing a foul committed by players in the game. Simply put whistle blowing is an act of correcting once a discovery of wrongdoing has been exercised. The act of a whistleblower is an expression of an important right that is the right to free speech. When an employee voices his concerns over certain issues internal to the organization he/she is exercising a right to freely voice matters that is important for the organization to look into. Even though organizations have the privilege to ignore but choosing such a cause may not be a wise move.*

### Introduction

Has the whistleblower a place in business and organizations? Being a controversial figure the whistleblower's journey is full of obstacles. The term is taken from the actions of the English police officers or "bobbies" out on their police beats reacting to the discovery of a commission of a crime where they would blow their whistle. This immediate reaction is to alert the public and other police officers of danger within their midst. Another analogy that could also be the origins of the term is the act of the referee or umpire of a football game who would blow the whistle upon discovery or seeing a foul committed by players in the game. Simply put whistle blowing is an act of correcting once a discovery of wrongdoing has been exercised. The act of a whistleblower is an expression of an important right that is the right to free speech. When an employee voices his concerns over certain issues internal to the organization he/she is exercising a right to freely voice matters that is important for the organization to look into. Even though organizations have the privilege to ignore but choosing such a cause may not be a wise move. In fact a society can hardly claim to be democratic if it puts unjust hurdles in the path of its citizens' movement and refuses them opportunities for participating in the formulation of public policy and of being heard on the great issues of the times.<sup>1</sup>

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<sup>1</sup> Shad S. Faruqi, 2007, *Document of Destiny*, Star Publications, Malaysia, Kuala Lumpur at p.310.

Defined by Near and Miceli (1985), whistle blowing is the disclosure by a current or former organization member of illegal, inefficient or unethical practices in an organization to persons or parties who have the power or resources to take action.<sup>2</sup>

Blowing the whistle on scandals, malpractice or corruption where wrongdoings maybe of illegal or unethical activities within an organization are not a widely accepted behaviour in organizations. As a form of disclosure, a person will become a whistleblower when he/she initially raises serious concerns about the incident of wrongdoing and the risks of the wrongful activities or wrongdoings within an organisation. Taking into account that whistle blowing may occur internally and externally, organizations must acknowledge the occurrence of wrongdoings within and the fact that, whistle blowing may be able to assist the organisation in handling issues with regard to wrongdoings more effectively. Previous research have shown that by giving more attention to whistle blowing activities and acknowledging the need for an internal whistle blowing policy for the organisation external whistle blowing activities may be prevented. In fact organisations will reap the benefits of having such a system that will contribute to a more efficient and effective organisation.<sup>3</sup>

### **Exercising Right to Free Speech at the Workplace**

Freedom to speak freely is freedom of speech without censorship or limitation. The synonymous term freedom of expression is sometimes used to denote not only freedom of verbal speech but any act of seeking, receiving and imparting information or ideas, regardless of the medium used. The right to freedom of speech is recognized as a human right under Article 19 of the Universal Declaration of Human Rights and recognized in international human rights law in the International Covenant on Civil and Political Rights (ICCPR). The ICCPR recognizes the right to freedom of speech as "the right to hold opinions without interference. Everyone shall have the right to freedom of expression". Furthermore freedom of speech is recognized in European, inter-American and African regional human rights law.

The business world today with its used and application of technologies including e-commerce related autogiros unknowingly tampers with these rights at the workplace, sometimes using spywares technology to intervene into the privacy of its employees. However the enjoyment of freedom of speech at the workplace overrides this intervention in terms of giving the employees the freedom to express on issues that they feel important to them and the public. In the context of whistle blowing the right to freedom of speech is pertinent to ensure that it works and to persuade employers to accept the importance of whistle blowing at the workplace. In fact this is non-other than a demonstration of transparency by the employers to their stakeholders. The fact that only genuine whistle blowing is

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<sup>2</sup> Near & Micelli, 1993, *Blowing The Whistle: The Organizational and Legal Implications for Companies and Employees*, Administrative Science Quarterly Vol 38 Issue 4 p.683

<sup>3</sup> Michael Walsh 2004, *Whistle blowing: Betrayal or Public Duty?* <http://www.erc.org.au>.

relevant will protect the rights of others to privacy since whistle blowing is an unselfish act without ill-gain on the part of the whistleblower.

The description of incidents of whistle blowing involving a current or former employee suggests that a former employee could also turn into a whistleblower. An employee will be in such a predicament when his concerns have gone to deaf ears, where organizations ignore reports of wrongdoings from such workers internally and choose to be silent on it. A persistent employee will face retaliations in many forms and one may end up with termination. Even with this position employees can still become a whistleblower as a former employee if he blows the whistle externally to enforcement agencies or the media.

Many American researches which have studied the issue suggest that employees go to external authorities only once they come to believe that internal channels are closed to them, that the organization is amoral and that senior management is inert or complicit in the wrongdoing (Near & Jensen 1983).<sup>4</sup> In effect organizations that compromises wrongdoings and failed to take corrective action or addressing internal complaints may probably incur external whistle blowing. This is precisely why it is envisaged the importance of implementing an internal policy in organizations which do not perceived the need of such a policy. The practice of organization will be examined to coincide with the fact that in Malaysia there exists, only limited legislative protection for reporters of wrongdoings. As a matter of fact this position of a lacking in protection has been described to be compounded by the employment law, libel law and the general legal system. However having a specific law protecting whistle blowing activities itself is not sufficient. Somehow by only having a legislation that will protect whistleblowers to blow the whistle in good faith, cannot give employees the reassurance that they desire.<sup>5</sup>

Legislation will usually assist organizations to deal with matters legally or legitimately but there will always be the issue of enforcement. The latter will need the commitment of enforcement agencies which must be supported financially by the government. Laws will remain in the statute book for reference but to achieve obedience and effectiveness its implementation must be of primary importance to the authorities concerned. Only then law will serve the purpose that it was created in the first place. For the whistleblowers who discloses wrongdoings genuinely with the intention to stop or at least correct the wrongdoing from occurring so that he/she may be able to work in a more secure and ethical environment. The existence of legislation to protect these ideals acts as a support system for those involved.

It is no therefore timely that Professor Mak Yuen Tee opined that even more important than legislation is protecting whistle blowers by creating a culture that is conducive to whistle blowing. This must take precedence coinciding with

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<sup>4</sup> Near, J.P Jensen, 1983, *The Whistle blowing Process: Retaliation and Perceived Effectiveness*. Work and Occupations, 10,3-28

<sup>5</sup> Mak Yuen Teen, 2006 "Whistleblowing: Recent Developments and Implementation issues" Public Sector Opinion-issue 5 at p.3

having an internal policy and knowing how such policies affect the employees in terms of its post-policy implementation.

Must organizations risk “washing their dirty linen in public”? A very strong reason why organization must be cautious with the implications of an external whistle blowing is due to the nature of the activity itself. External whistle blowing involves the whistleblower turning to external sources to report the incident of wrongdoings for examples to outlets such as enforcement agencies and non-governmental organizations. A worse-scenario case is where the whistleblower revealed all details to the media whether press or the electronic media. This is where organisation may have to face the “wake-up call” over issues that should have been addressed earlier when they are still under the control of the organisation. When matters are out of their control ugly details which concern the reputation of the company will be under public gaze.

External whistle blowing will occur if the whistleblower has earlier faced retaliations in the form of verbal and physical abuse from colleagues or perpetrators of the wrongdoing reported or even from the top management itself. Termination will usually be followed with external whistle blowing and the organization may be slapped with a lawsuit on unfair dismissal. Retaliations will usually be the case for whistleblowers alerting the management on wrongdoings occurring internally where policies to address such reports are either absent or the organization chooses to reject the employees’ concerns. The question to be asked here is will employees go external if there is an internal policy being practiced by the organization?

Retaliations against whistleblowers are most rampant where the absence of laws protecting whistleblowers from reprisals either from the organization accused as the wrongdoer or from individuals or groups of individuals who are the wrongdoers. Organizational reprisals are most problematic since they could affect the whistleblowers job performance and employment security. Employees could be transferred, demoted, reduced in terms of job specifications or even face termination as an ultimatum for blowing the whistle. Companies with internal policies dealing with whistle blowing issues will actually give employees reassurance that their concerns will be handled effectively. Within this premise government and policy makers may be persuaded to consider legislation to protect whistleblowers from these retaliations and encourages employees to come forward and companies to have policies of similar.

Business ethics theorists generally agree that when faced with decision situations having ethical effects, managers apply ethical guidelines based on moral philosophies (Ferrell and Gresham, 1985, Hunt and Vitell, 1986). Moral philosophies are personal ethical systems of the individual and will influence strongly an ethical decision or judgment of a person. As whistle blowing is an ethical activity overwhelmed with ethical dilemmas a whistleblower would have to base his judgments on his personal ethical systems whether to blow or not to blow the whistle when confronted with the occurrence of wrongdoings. Therefore

organizations with an internal policy dealing with whistle blowing may find having useful information initially as an advantage to improve the policy. It may also be useful to find out whether employees will apply their own personal ethical system or succumbed to policy requirements when it comes to deciding whether to blow the whistle or no.

In other words organization should have good policies to ensure employees cooperation and to secure a more ethical environment at the workplace. In effect such findings will help the government and policy makers to make better decisions in relation to employees' rights and in the case of Malaysia, leading to a specific legal protection for whistleblowers. In the same vein such efforts would also promote transparency and a culture of ethics within the organization in conjunction with the government's agenda to combat abuse of powers and corruption in all sectors.

### **Taking Ethics Seriously at Work**

The drive to reduce or eradicate unethical behaviour or illegal practices in government and business should not be perceived by all parties as irrelevant. There is no denying that these activities have enormous impact on business as well as administration since it will contribute to wasteful, fraudulent and harmful repercussions to the public and management of organizations. In the world of free trade all are equally able to conduct business in the way that they think fit and lawful. Even within this simple standard business organization are still lacking in terms of ensuring that employees are reliable committing to good management and successful business. Many companies and other organizations and business enterprises have adopted whistle blowing policies. Professor Mak felt that support for whistle blowing among companies and organizations is by no means universal. Some of these organizations in fact viewed having such policies will negate employee support and will lower staff morale. Still these are more of an expression of employers rather than employees.

Looking at nationwide records Malaysia has not done great either. Based on the Corruption Perception Index (CPI) in 2006, Malaysia ranked 44 compared to 36 in the previous year in a global survey of 163 countries. The government not being discouraged by this report is aiming for a minimum ranking of 20 and a score of 8.0 by the year 2020 in the Global Perception Index as Malaysia aimed to be fully developed by then.<sup>6</sup>

The whistleblower is a person who alerted on the wrongdoings occurring within an organization to those who could affect action. The fact that the whistleblower has genuine reasons to come forward to enable companies to take corrective action or stopped the wrongdoings from continuing will help organization to ensure a more secure and ethical environment for employees and all affected parties. However the management must be prepared to realise that wrongdoings

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<sup>6</sup> Abdul Karim Abdul Jalil, 2007, *SSM's promotion of corporate governance*, paper presented at the 14<sup>th</sup> Malaysian Conference 29-31 October 2007 KLCC

occur in every organization and that to address whistle blowing activities is an important tool to help them. The perception towards whistle blowing at the moment is not too encouraging. Retaliations in many forms have taken place in most incidents of reporting of wrongdoings. Instead of getting a more responsive move from the organization most whistleblowers who were employees or former employees experienced being blacklisted by the industry where future employability will be affected with possible discrimination by future potential employers.

The effects of such actions maybe severe involving career disruption to potential and talented human resources which could have contributed more to the industry followed by loss of income that maybe due to wage cut, suspension or even demotion. The ultimate assault would be the employee facing dismissal. The moment a person becomes a whistleblower there is a perception by the industry that these are snitchers and publicity seekers. He will encounter alienation from his colleagues, workplace bullying or harassment verbal or physical from his peers. These retaliations are mostly due to the lack of support from management and prejudiced colleagues who did not really understand what whistle blowing is all about and the real intentions of a whistleblower. This already bad reputation as a troublemaker will not help much in turning whistle blowing activity into something beneficial to all parties concerned. Employees will refrain from coming forward to report wrongdoings for fear of retaliation and lack of reassurance from the management. With such a perception persisting within the industry organization may face difficulties in convincing the employees to participate in company policy.

### **Due Process at the Workplace**

Implementing due process is an assurance for all employees that the employer is serious over matters affecting employees. Implementing the principles of natural justice as part of an internal policy will ensure at least the basic standards of legal procedure are abided. This is a measure that will ensure organization would be able to show that justice must not only be done but will be seen to be done. Natural justice is a procedural right that must be addressed by any party that wants to ensure people who are accused of wrongdoings will be dealt with fairly and in accordance with the legal requirements. An accused must be given the opportunity to tell his side of the story to defend himself accordingly. Furthermore the hearing procedure is safeguarded since the adjudicators or panel hearing the allegations of wrongdoings must be impartial and not bias. These principles must be complied with to ensure the validity of any decision that comes from a hearing procedure. Any violation is a denial of right to the correct procedure of the employees and may damage any good efforts made by the organization to address internal whistle blowing activities.

In addition, companies must consider addressing the rights of employees to natural justice principles to ensure confidence from all parties, the whistleblowers and those accused of wrongdoings. The application of the principles of natural justice should be observed in any reporting incidents of wrongdoings. This is to

ensure fairness and fair judgment by the adjudicators or panels of decision makers hearing the cases having to do with disclosures of wrongdoing activities. This will ensure not only the practice of the right legal procedures but enhance public and more importantly employees' confidence in the process. Therefore the principles of giving the accused the right to be heard and the rule against bias must take precedence as an important part of the policy. This study will examine the presence of this procedure and if such practice exists to measure the extent of its application within an organization.

Companies must develop explicit, proactive internal whistle blowing policies and processes by establishing formal and confidential reporting mechanisms for reporting violations. More importantly the policies must address the security to confidentiality and non-retaliation to whistleblowers where well-trained personnel will receive and investigate reports of wrongdoings. It is also the organization's responsibility to educate and train employees on their whistle blowing policies to encourage not only an understanding but also genuine reports of wrongdoings. In the long run, positive work environments will help create a culture of openness and receptiveness towards moral questions.

Therefore the knowledge on the effects of post-policy implementation based on the perception of employees will enormously help these organizations in improving their whistle blowing policy with positive expectancy that the policy will receive employees support and encouragement.

### **Disclosure on Matters of Concern**

The act of the whistleblower in disclosing the commission or occurrence of wrongdoings within the workplace is indeed a noble one. If loyalty is an issue an employee is not surely being disloyal if he is doing an action which has the intention of making things better for the organization and the public. This is especially so when the act of disclosure is to prevent harm to the public and to other members of the organization. The realisation of the importance of this noble action must come from all factions including the top level management of the accused organization. An organization, which do not compromise the existence of unethical or illegal act will gain a good reputation and image thus goodwill to ensure survival in the industry. Employees too will feel more secure if the organization addresses the importance of behaving ethically and provides a reward in return. It must take this matter of creating an ethical culture as a long term mission seriously to ensure success in the future.

There is potentiality in correcting the reputation of whistleblowers within the industry since the effort will be beneficial to all concerned. Educating the public and members of the industry will involve the task of explaining and educating the workforce to gain a better understanding of whistle blowing activities and its role in the creation of a more secure and ethical environment within the business organization from an ethical perspective.

## **Freedom to Accept**

Whistle blowing is a deliberate and voluntary act of disclosure of individual or organizational malpractice by a person known as the whistleblower who has access to data, events or information about actual, suspected or anticipated wrongdoing within an organization to persons that may be able to affect action. In general whistleblowers are employees who exercise the right to freedom of speech to challenge *inter alia* institutional abuses of power or illegality that betray the public trust.

Whistleblowers, noble or not have not always been lucky in strive for the truth. Although their actions of disclosure of wrongdoings originated from their personal moral philosophy and are based on ethics rather than instincts many perceived them as ‘troublemakers’ or ‘snitches’ ready to cause problems to others. There is a gap in the understanding of the whistleblower’s role in the industry. It is seldom such actions are associated with the act of upholding ethical values or principles of righteousness. Nonetheless the act of blowing the whistle on wrongdoers rests on the intention of correcting if not to eradicate the wrongdoing. Retaliations faced by whistleblowers are the main factors that are discouraging potential whistleblowers from coming forward. Verbal and physical harassment are not rare and when organization responded to whistleblowers negatively the path for these individuals gets tougher.

Employees refrained from reporting for fear of isolation, reduction in job specifications, demotion, transfer and ultimately the dreaded termination. When internal outlets failed to respond as expected by whistleblowers they will search for an alternative and external whistle blowing will occur. This is where matters will go out of the control of the organization and company reputation will be questioned by these external outlets comprising the media, non-government organizations or law enforcement authorities.

Therefore organizations without a whistle blowing policy need to review their standing over this issue and be truthful in issues concerning the commission and occurrence of wrongdoings within each organization. This is an era of encouraging people to raise concerns about malpractices in the workplace and this in turn will help ensure that organizations respond by addressing the message rather than the messenger and resist the temptation to “sweep these concerns under the proverbial carpet.”

The year of 2004 saw the Association of Certified Fraud Examiners (ACFE) conducted a study over organizations in the United States reported that organizations without proper mechanisms for reporting fraud and unethical behaviour suffered fraud-related losses that were almost twice as high as those with such mechanisms. It also found that 40% of frauds are initially detected through whistle blowing compared to 24% by accident, 18% through internal controls and 11% through internal audits. In his work “Whistle blowing: Recent developments and implementation issues” Mak Yuen Tee an associate professor of Accounting at the National University of Singapore Business School viewed,



despite the fact that employees who blow the whistle play a key role in detecting and preventing fraud, thereby protecting the interest of the organizations they work for, they often face adverse consequences. A study of 233 whistleblowers in a hospital in the U.S revealed that “90% of the whistleblowers were fired or demoted, 27% suffered alcohol abuse, 17% lost their homes, 15% got divorced, 10% attempted suicide and 8% were bankrupted.

Nationwide, Malaysia has not done great either. Based on the Corruption Perception Index (CPI) in 2006, Malaysia ranked 44 compared to 36 in the previous year in a global survey of 163 countries. The government is adamantly aiming for a minimum ranking of 20 and a score of 8.0 by the year 2020 in the Global Perception Index as Malaysia aimed to be fully developed by then.

In an Australian survey entitled “CPA Australia-CGFRC Survey 2006 Quarterly Reporting and Whistle blowing” which captured the views of 367 members of CPA Australia from Singapore, Malaysia and Hong Kong on the broad areas of corporate governance, quarterly reporting and whistle blowing indicates the majority of respondents felt that manipulations of results by management to meet short term expectations and the increased cost to companies are the key problems associated with quarterly reporting. Malaysia was the highest in agreed that the benefits of quarterly reporting outweighs the problem and show a support for mandatory quarterly reporting. It was reported in the survey that more than 95% of respondents agree that whistleblower legislation should be introduced to protect whistleblowers from reprisals.

Furthermore nearly all respondents agreed that a code of conduct or ethics program is an essential component of corporate governance. A similar proportion felt that a whistle blowing policy and code of conduct should be mandatory for all listed companies. These are reflected by these results where 59% of respondents said that they would report misconduct without a whistle blowing policy, but if there is a policy in place, another 36% would report such misconduct. Some 52% said that they will report to a designated officer which is provided by the policy. Obviously a report to regulatory agencies or authorities is likely to be more damaging to an organization when matters have developed into a much larger scale.

More than a decade later after the Asian Financial Crisis, issues concerning corporate governance have represented prominent importance to maintain the economic health of corporations and the business world in general. Business organizations which have successfully nurture good corporate governance internally recognizes that this will strengthen the company’s potential to grow with integrity and efficiency at the global markets. No organization would want to tolerate unethical activities such as fraud which in time may lead to its financial difficulties. Well-governed organizations would be able to out-perform other rivals and may find that attracting investors is a great help to further its growth in business.

As it is the spirit of every whistle blowing act, the duty of the director to act in the best interest of the company is clear. Recent amendments to the Companies Act 1965 made effective on the 15<sup>th</sup> of August 2007 are considered a welcome change to corporate governance in Malaysia. Pertinent provisions relating to the rights, privileges, liabilities and obligations of corporate officers, transparency and e-services were introduced. Applying to both listed and non-listed companies the provisions have serious legal ramifications for companies in case of non-compliance. Noble as it is suppose to be the objective of these amendments are to strengthen and enhance protection and improve the corporate governance framework which will in effect create a dynamic and healthy business environment. The amendment included the introduction of subsection 174(8A) of the Companies Act 1965. This provision creates an imposition of duties to auditors of public companies to submit a written report to the Registrar on the commission of serious offences involving fraud or dishonesty which is or has been committed against the company. Auditors may have to face criminal liability if they fail to report such offences. Indeed the new provision will be able to help deter the commission of such criminal acts against the company but one little flaw that is noticed here is that the provision's failure to address situations where the company itself is the offender. Are the Auditors under a legal duty to report such wrongdoings? It would seem that the protection here is more for the organization rather than for employees. Auditors are provided protection with the reporting obligation in subsection 174A (2A) of the same Act by giving them full immunity against any form of civil action, criminal action and disciplinary proceedings. This has been described as "mandatory whistle blowing" coupled with the granting of immunity from legal action.<sup>7</sup> Rightfully this is a holistic and comprehensive concept for those who are brave enough to come forward with a sense of dignity and responsibility.

The fact that Malaysia has a limited whistle blowing provision protecting the whistleblower is a strong reason why organization must be ready to embrace change. The amendment of the securities legislation to protect certain persons-the chief executive officer, company secretary, internal auditor and chief financial officer who report securities-related offences to the authorities. The protection against retaliation includes protection against discharge, discrimination, demotion and suspension. The amendment also made it mandatory for auditors to report to the relevant authorities, breaches of securities laws and listing requirements. This is an effort to extend the existing requirements in the Malaysian Companies Act imposing a similar duty on auditors to report to the relevant authorities, breaches of company law. Considering the nature of such actions the role of the auditors equalizes the actions of whistle blowing by default.

What Malaysia actually need is a specific legal protection for whistleblowers that will address anti-retaliation provisions and encourage "good faith" disclosures. However Associate Professor Mak rightly opined that legislation alone is not sufficient and an even more important implication is the existence of a culture that

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<sup>7</sup> Abdul Karim Abdul Jalil, 2007 "SSM's promotion of corporate governance", paper presented at the 14<sup>th</sup> Malaysian Conference 29-31 October 2007 KLCC

is conducive to whistle blowing. A carefully-developed whistle blowing policy which encourages good faith reporting of serious misconduct and discourages frivolous complaints, creates greater trust in the organization by shareholders and other stakeholders. Inclusive is the application of the natural justice principles to ensure employees overall support and encouragement.

While these measures may not totally eradicate the occurrence of wrongdoings the benefits are many. These events give us vital information with regard to the issue in focus. By having a code of conduct and a whistle blowing policy can actually help companies institutionalized on ethical culture and assist companies and regulators in detecting inappropriate conducts earlier. In effect this can help reduce the risks of corporate failures caused by ethical problems and complement sound corporate governance systems. Another step companies must consider is to implement the application of the principles of natural justice to fortify the policy of whistle blowing that organizations want to adopt. This will ensure that procedural rights of employees are addressed. By applying this principle in a right manner organization will not only assure the employees of a better environment to work in but will gain more confidence from the workforce.

The organization must be professionally equipped to ensure that the principle is understood by all parties to ensure legality and be ready to educate the employees on the matter. This will ensure a good whistle blowing policy that addresses the interests of all parties concerned will be in place. The insistence on implementing the principles of natural justice at the workplace must not be compromised even though workers are known to use another recourse that is by going to the Industrial Court. Compliance is an important part of legality but prevention is better than cure and this must be applied in the case of natural justice violations.

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