

# The Economics of Internal Investigations

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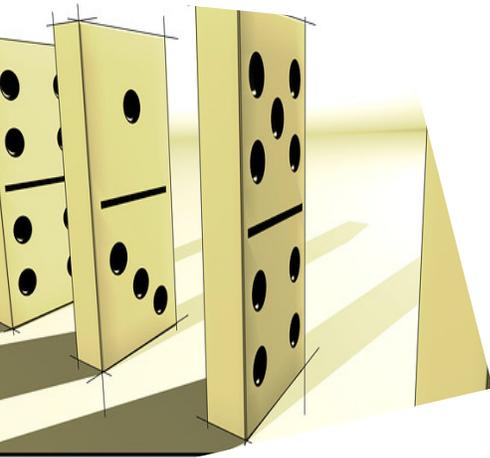
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## Introduction

An internal investigation may be the last thing an employer wants to deal with, but it can be the first thing the courts look at when deciding sanctions and fines. Conducting an internal investigation as soon as an issue is discovered can sometimes prevent litigation altogether. But even if a lawsuit is unavoidable, the courts tend to look more kindly on companies that have taken proactive steps to investigate and disclose voluntarily any wrongdoing before they are forced to.

It goes without saying that prompt internal investigations can stop cases of fraud or employee misconduct that are costly to the company. Effective and timely investigations can also reassure staff that the company takes their wellbeing seriously and may even prevent lawsuits from disgruntled employees.



## Three Triggers for an Internal Investigation

The key, however, is to know when an internal investigation is necessary, and this isn't as easy as it sounds. Misconduct often goes unreported until something drastic happens, and by then it may be too late to pre-empt law enforcement and start your own investigation.

Most misconduct is revealed through complaints, anonymous tips or discovered by accident. The remainder comes to light during audits and reviews. A comprehensive investigation policy includes mechanisms to capture information from as many sources as possible.

### Employee Complaints

In most organizations, employees are aware of misconduct before it comes to the attention of management. It's in your best interest, therefore, to encourage employees to speak up and to investigate any complaints thoroughly.

It can be tempting to sweep what look like minor employee complaints under the rug, avoiding the headache of an internal investigation for each one, but there's good reason to pay close attention, even to chronic complainers. Claims that may appear insignificant could lead to larger discoveries once the complaint is examined. Failing to investigate can get you into trouble if it turns out that a claim was legitimate.

### Whistleblower Tips

Anonymous tips can be a rich source of information for management but, unfortunately, reports show that anonymous tips are often given less credibility than those with a name attached to them. Every company should have a whistleblower hotline and encourage employees to use it.

Ignore whistleblower complaints at your peril. According to a study by the [National Whistleblowers Center](#), 89.7 per cent of employees who filed a lawsuit against their employer had originally raised the concern internally.

### Audits and Compliance Reviews

Although audits and reviews are not among the top methods for uncovering misconduct, they are valuable from an operational perspective and they often do point to anomalies in the organization that could indicate issues requiring an internal investigation. Audits and reviews also help a company to evaluate and improve the effectiveness of risk management, control, and governance processes.

Wal-Mart recently launched an internal investigation based on the information gathered after conducting a voluntary internal compliance review. The company disclosed the incident to the SEC and the US Department of Justice.

# 89.7%

of employees who filed a lawsuit against their employer had originally raised the concern internally.

“The identification of its genesis being ‘a voluntary review of its global anti-corruption practices this year’ seems significant,” wrote James McGrath, Managing Partner of law firm McGrath & Grace, in a blog post entitled [Thoughts on Wal-Mart’s Internal FCPA Probe](#). “It strongly implies two things: that the company has an FCPA-oriented audit program in place, and that its checks occur on a regular basis in given years, if not annually... it would be expected to entitle Wal-Mart to sentencing credits, were the Department of Justice to pick up this ball and run with it as a criminal prosecution somewhere down the road,” wrote McGrath.

## Internal Investigations Save You Money

According to the [2011 Fulbright Litigation Trends Survey](#), 46 per cent of companies in the US reported conducting at least one internal investigation in the past year. When it comes to labor and employment litigation, roughly 40 per cent of all respondents revealed that discrimination suits had increased the most over the past year, especially in the health care, manufacturing, financial services and insurance industries. The survey found that 91 per cent of all respondents expect the number of internal investigations involving their companies to increase or stay the same in 2012.

The 2011 Fulbright Litigation Trends Survey reports that litigation spending (excluding the cost of settlements and judgments) rose in 2011, with US companies reporting a median spend of \$1.4 million. Roughly a quarter of the American businesses polled reported spending \$5 million or more on disputes.

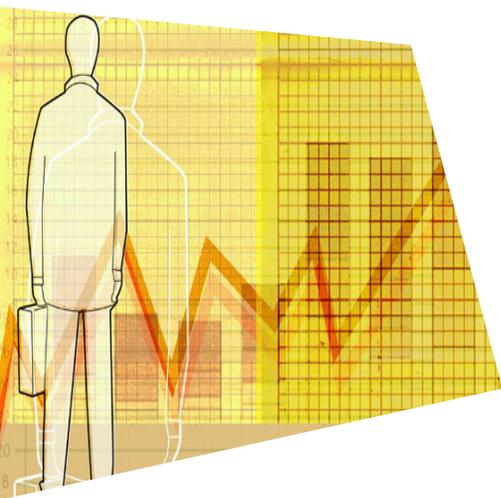
Given these numbers, it’s clear that conducting prompt and thorough internal investigations that prevent litigation or reduce the financial impact of court judgments can be a wise investment. At the same time, companies need to ensure internal investigations don’t end up costing more than the litigation they are avoiding. This means having a program in place for gathering tips and complaints, and a policy and procedure for conducting effective investigations, as an improper investigation only exposes a company to a wider range of risks, which could result in additional lawsuits, fines and other expenses.

## Weighing the Costs of Investigations

Despite cost concerns, investigations need to be thorough and appropriate in order to stand up in court, should the need arise. The decision maker has to find the right balance between a cost-effective investigation and one that meets the needs of the company.

“Investigations completed professionally can save a tremendous amount of time and money by averting litigation, preserving a company’s reputation, quantifying losses for insurance claims, and maintaining employee morale,” says Maribeth Vander Weele, President of the Vander Weele Group, a corporate investigations firm in Chicago, and founder of the online investigative service, Sagerity Investigative Intelligence.

The decision whether to use in-house resources or an outside investigator affects



the cost of an investigation, and there are many reasons to consider both options. A company may decide to spend money for outside expertise when there is nobody available in-house with the necessary skills to conduct the investigation fairly and legally.

“Although the investigation will cost the company more in dollars, the independence that an outsider brings to the situation may impart more credibility to the findings, especially in the eyes of government investigators,” wrote forensic accountant and CFE Tracy Coenen in a CFO Magazine article entitled [Investigating a Compliance Failure](#). Sometimes this can save the company money that would have been lost to lawsuits and a botched investigation.

## Cooperation, Self-disclosure and Reputation

Fines and sentences from the US Sentencing Commission (USSC) are on the rise. With the recent round of federal sentencing guideline amendments, the USSC hopes to encourage companies to take appropriate action upon discovery of criminal conduct within the workplace, and will give them credit for doing so. This credit will come in the form of fine/penalty reductions, which can bring about significant savings.

Undertaking an internal investigation before an official criminal investigation is launched is one of the most effective ways to save money in fines and penalties.

But there’s also the reputational cost. The court of public opinion can sometimes be even more demanding than a court of law, and no matter how good your compliance and ethics program, allegations of misconduct can be damaging to your brand. Voluntarily launching an internal investigation and timely self disclosure can go a long way in saving your company’s reputation from long-term damage.

On the day that Walmart announced that it had launched an internal investigation into FCPA violations the company’s shares rose by 40 cents in morning trading. Investors see the value in a company that has a robust compliance and ethics program and an effective internal investigations process.

## Federal Sentencing Guidelines

According to Chapter 8 of the [Federal Sentencing Guidelines](#):

“To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the

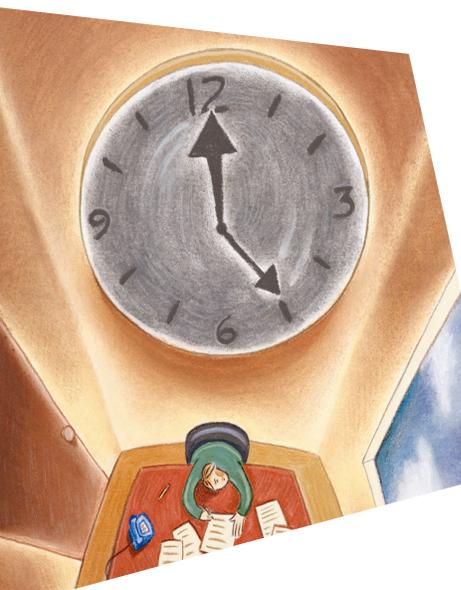
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cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation."

During the recent Siemens case, the company's level of cooperation in the bribery investigation significantly reduced the cost of the settlement with the SEC. An article in the New York Times, "[At Siemens, Bribery Was Just a Line Item](#)," also noted that Siemens was provided with additional leniency, only having to plead guilty to accounting violations, "because pleading to bribery violations would have barred Siemens from bidding on government contracts in the United States."

In the Ethisphere article "[Prepared Remarks to Compliance Week 2010- 5th Annual Conference for Corporate Financial, Legal, Risk, Audit & Compliance Officers](#)," Assistant Attorney General Lanny A. Breuer outlines the significant savings Siemens realized due to its wise handling of the investigation:

"In the end, the benefits Siemens received through its cooperation, even in the absence of a voluntary disclosure, were plain – the \$450 million fine that was paid to the Justice Department, although quite substantial, was a far cry from the advisory range of \$1.35 billion to \$2.7 billion called for in the Sentencing Guidelines. Put another way, Siemens received a penalty that was 67 to 84 per cent less than what it otherwise could have faced had it not provided extraordinary cooperation and carried out such extensive remediation."



## How Case Management Software Helps

When outlining the components of an effective ethics and compliance program, the Federal Sentencing Guidelines require that once criminal conduct has been detected, a company must take reasonable steps to respond appropriately to the criminal conduct and prevent similar behavior from occurring in the future. This means that employers need to know about misconduct as soon as possible so that they can inform the appropriate parties and begin an internal investigation.

Case management software is a powerful tool that can help investigators conduct timely, effective and efficient investigations. Given the need for quick action, there are a number of case management software features that help companies to comply with the requirements of the Federal Sentencing Guidelines.

## 1. Alerts

A case management system that contains built in alerts notifies managers and investigators when a new case is entered. Risk based alerts can also be deployed to notify management of high risk or high priority cases.

To make sure every investigation stays on track and is completed on time, alerts are sent throughout the investigative process. Alerts can be set up to remind investigators of due dates, meetings and other investigation-related tasks. Alerts can also be used to bring attention to inactive cases, overdue tasks and other areas requiring immediate attention.

Alerts reduce lag times, allowing investigators to start working on the case right away, buying valuable time at the outset so that cooperation with authorities is seen to be timely and information turned over is comprehensive. They also help keep investigations on track, ensuring that deadlines are met and all information is entered when due.

## 2. Web-based Systems

A hosted, web-based case management solution is easy to access from anywhere with an internet connection. Non-stop availability means that cases can be entered as events occur, reducing response time for workplace incidents and misconduct.

A hosted case management system is beneficial for traveling investigators, as they simply need a laptop and an internet connection to access case files. Any changes made by others while the investigator is offline are documented in the case file and available immediately to the investigator.

Case activity is kept up-to-date and listed in chronological order, along with information about when the activity was completed and by whom. This provides investigators with the ability to prepare detailed reports, especially useful if the case ends up in court.

## 3. Capture New Referrals

A web-based case entry system can also be used by employees to report incidents anonymously, alerting management to an issue that may require an investigation. If employees can only report misconduct while at work, they might be less likely to do so for fear of retaliation.

Deploy risk-based alerts to notify management of high risk or high priority cases.

Web-based case management software allows you to capture incidents through:

- Integration with existing hotlines/reporting mechanisms
- Manual entry by a manager who was informed of misconduct
- Anonymous and known reporting through an internal web form on the company's intranet
- Web forms posted on external company websites

#### 4. Case Centralization

A centralized case management system simplifies the investigative process by storing all case related information in a single location. Investigation notes, evidence, emails and other information are all stored within the case file, making it easier for investigators to locate the information they need.

#### 5. Identify Repeat Offenders

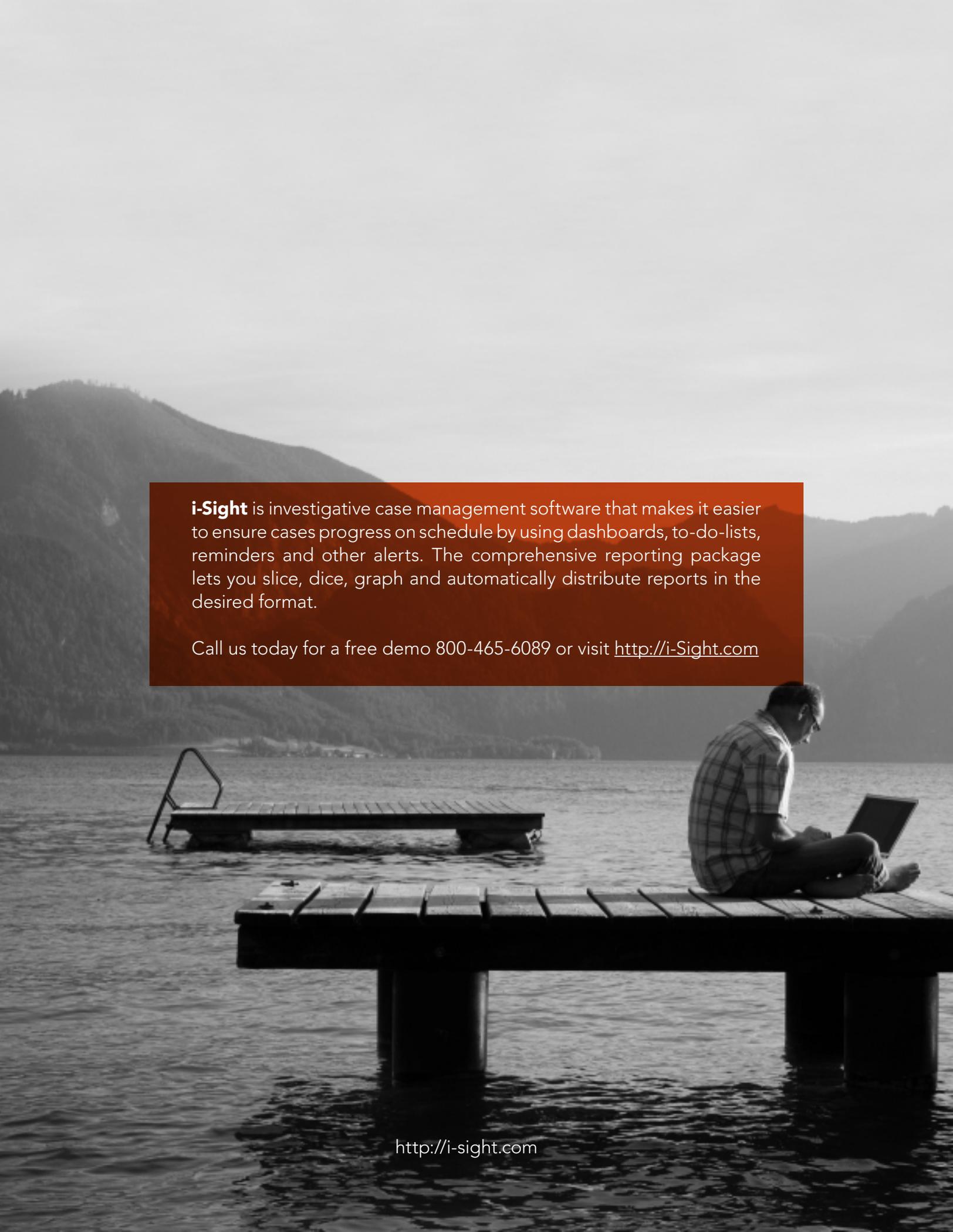
Centralized oversight makes it easier to identify and deal with repeat offenders and provides a broad overview of misconduct in an organization. Incidents reported in different areas of a company may be related, and this becomes obvious with centralized oversight of the investigations process. Management can sometimes prevent new incidents by identifying patterns and linkages between investigations and subjects.

#### 6. Reporting

Preparing investigation reports can be a time-consuming process – especially when there's a lot of evidence and multiple investigators involved in the case. A case management system allows investigators to create comprehensive reports with the click of a button. Information is extracted from the case file into a customized investigation report template, saving time and ensuring accuracy.

Investigation reports that are prepared in a case management system are consistent and accurate, no matter who prepares them, making them effective evidence in a court case.





**i-Sight** is investigative case management software that makes it easier to ensure cases progress on schedule by using dashboards, to-do-lists, reminders and other alerts. The comprehensive reporting package lets you slice, dice, graph and automatically distribute reports in the desired format.

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