



# **Blowing the Whistle From Abroad:**

A GUIDE TO THE  
U.S. FALSE CLAIMS ACT  
AND U.S. DODD-FRANK  
WALL STREET REFORM AND  
CONSUMER PROTECTION ACT



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The United States Government has established laws providing for bounties to be paid to those who report certain types of fraud. Even foreign citizens are eligible to receive these monetary awards, which are paid under the False Claims Act ("Federal False Claims Act" or "FCA") and through the Dodd-Frank Wall Street Reform and Consumer Protection Act. While the False Claims Act provides for redress against those entities or individuals that cheat the United States Government or its agencies, the Dodd-Frank Act provides for bounties to be paid to individuals reporting violations of U.S. Securities Laws including, the Foreign Corrupt Practices Act ("FCPA"), which makes it unlawful for covered companies to bribe foreign officials in order to secure business.

## I. What Is The U.S. False Claims Act?

The False Claims Act, a law dating back over 100 years, provides bounties to private citizens who blow the whistle on contractors that cheat or defraud the U.S. Government. Foreign citizens have an opportunity to blow the whistle on the wrongful conduct of vendors serving U.S. Military installations, manufacturers of goods and services sold to other U.S. government agencies, and even recipients of United States Government aid who misuse their grants.<sup>4</sup> Under the False Claims Act, whistleblowers seeking a bounty must file a lawsuit in a United States District Court and be represented by attorneys who can practice law in the United States.

Since 1986, whistleblowers bringing suit under the False Claims Act have enabled the United States Government to recover more than \$20 billion. The statute generally provides for recovery of three times actual damages in addition to civil penalties – between \$5,000 and \$11,000 – for each false statement used to secure payment from the Government. Whistleblowers who initiate FCA cases are entitled to a portion of the money recovered by the Government. Depending on the circumstances, this "bounty" ranges from 15 to 30 percent of the Government's total recovery.

Recoveries under the False Claims Act can often be categorized into identifiable schemes which include:

### Defense Contractor Fraud<sup>5</sup>

While fraud on the United States Department of Defense ("DOD") often involves sophisticated multi-billion dollar weapons systems and enormous Fortune 500 companies like General Electric and Lockheed<sup>6</sup>, many frauds involve smaller companies and contracts for such ordinary items as computers, uniforms, vehicle parts, and office equipment. Even small janitorial companies that perform services for the military can engage in conduct that cheats the Government and implicates liability under the False Claims Act.

The False Claims Act is broadly written to bring large prime contractors and their subcontractors within the orbit of the law.<sup>7</sup> A subcontractor violates the False Claims Act when it cheats a prime contractor performing services or producing a product under a DOD contract.

The following conduct may raise red flags:

- Over-billing the Government in any number of ways including: a) billing for services or products that were not provided; b) shifting the costs of a fixed price contract to the costs of a cost-plus contract that the contractor may also maintain with the DOD or a DOD prime contractor; or c) in any other way inflating – absent justification – the costs of cost-plus contracts.
- Providing defective parts or parts not manufactured in accordance with Government specification or regulation.<sup>8</sup>
- Failing to disclose or affirmatively concealing product defects.
- Providing services or products that were not provided or manufactured in accordance with procurement regulations including those governing: a) environmental compliance; b) labor standards; c) Buy American Act

requirements; d) worker health and safety protections; and e) bidding.

- Failing to engage in the proper inspection or testing required by contract.<sup>9</sup>

### Fraudulent Loans and Grant Fraud<sup>10</sup>

Many agencies of the Federal government make monetary grants for research and other projects in the U.S. and abroad. False statements made to secure a grant or statements made to continue receiving funding under a grant can be a source of liability as can any violation of a condition of the grant.<sup>11</sup>

The following may raise red flags:

- Violation of a law or regulation where compliance is mandated by the grant. This may include violations of U.S. environmental, wage and hour, or health and safety standards.
- Violation of ethical standards that are a condition of the grant.
- Violation of organizational conflict of interest ("OCI") standards that are a condition of the grant.
- Use of grant money for purposes outside the scope of the grant or for otherwise improper or illegal purposes.

### Federal Government Contract Fraud<sup>12</sup>

The U.S. Government buys a wide array of goods and services. Supplying reconstituted powdered milk, not the fresh milk that the contract requires, is a False Claims Act violation. When U.S. Army mess halls are delivered inferior quality meat, the False Claims Act is violated. Charging the U.S. Government higher labor rates than those agreed to or given to commercial customers is another scheme that may violate the False Claims Act.<sup>13</sup>

False billing cases can also involve misrepresenting indirect and overhead labor charges as direct labor costs. Collusive bidding schemes where bidders conspire to rig prices can similarly trigger False Claims Act liability.

A false certification of regulatory and statutory compliance, necessary to obtain a contract, can render false all claims for payment under that contract. Likewise, a contractor's failure to meet contract performance requirements and failure to provide goods and services in conformance with federal statutes and regulations, as set forth in what might otherwise be termed as "boilerplate" – but still extremely important – sections of contracts, may be sufficient to violate the False Claims Act.

Presentation of a claim for payment, when the failure to abide by contract requirements has not been affirmatively disclosed to the Government, is deemed equivalent to a false certification of compliance with such laws, rules, and regulations. Thus, if Government funding is conditioned on compliance, submission of claims for payment when the contract requirements have not been fulfilled in all respects gives rise to a potential False Claims Act violation.

### Who Can Be A Whistleblower Under the False Claims Act?<sup>14</sup>

A prospective whistleblower seeking to bring a case under the False Claims Act cannot base his or her case on specifically enumerated "public information." The "public disclosure bar" applies when the whistleblower's information is based upon information from: 1) a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; 2) a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or 3) the news media.

An exception to the public disclosure bar exists where the whistleblower is an "original source" of the information. An "Original Source" includes individuals who either: (1) prior to a public disclosure have voluntarily disclosed to the Government

the information on which the allegations or transactions in a claim are based; or (2) have knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions; and (3) have voluntarily provided the information to the Government before filing an action under this section.

These are known as "standing requirements" or requirements that enable an individual to bring a case in court under the statute.

## II. What Is The Foreign Corrupt Practice Act?

The Dodd-Frank Act, a law passed by the United States Congress and signed into law by President Obama on July 21, 2010, requires the SEC to award bounties of between 10-30 percent to whistleblowers who provide the agency with original information leading to the Government's successful recovery of monetary sanctions against certain entities that violate U.S. securities laws, including the Foreign Corrupt Practices Act.<sup>15</sup> The FCPA, itself, is a law enforced by the United States Department of Justice ("DOJ") and the SEC in U.S. courts against "issuers" and "domestic concerns."<sup>16</sup> An "issuer" is a corporation that has issued securities registered in the U.S. or which is required to file periodic reports with the SEC. A "domestic concern" is any partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship, which has its principal place of business in the United States or which is organized under the laws of a state. Domestic concerns also include individuals who are U.S. citizens, or individuals who reside in the United States.

Over the past three years, there has been an increase in FCPA enforcement by the U.S. Government. In 2008, the SEC and DOJ brought 34 actions, 40 in 2009, and 56 in 2010. In 2010 alone, the Government recovered "over \$1 billion through resolutions of FCPA investigations, more than any other year in the history of FCPA

enforcement efforts."<sup>17</sup> With the passage of the Dodd-Frank Act, over \$300 million a year could potentially be awarded to whistleblowers.

The FCPA has both anti-bribery and accounting provisions. The anti-bribery provisions make it illegal for issuers, domestic concerns, or those acting on their behalf, to offer, promise, or authorize the giving of anything of value to a foreign official to obtain or retain business.<sup>18</sup>

The FCPA accounting provisions require that every issuer keep books and records that fairly reflect their transactions.<sup>19</sup> The accounting provisions seek to ensure that companies maintain a system of internal accounting controls designed to prevent improper payments or bribes.<sup>20</sup>

Since 2002, the United States Government has recovered billions of dollars in FCPA settlements covering wrongful conduct occurring in more than 30 countries. Large enforcement actions include: Chevron which paid \$30 million in 2007; Siemens which paid \$800 million in 2008; KBR/Halliburton which paid \$579 million in 2009; BAE Systems which paid \$400 million in 2010; Daimler AG which paid \$338 million in 2010; Technip S.A. which paid \$338 million in 2010; and Snamprogetti Netherlands B.V. which paid \$365 million in 2010.

Historically certain industries have been prone to conduct implicating the FCPA. For example, companies within: (1) the telecommunications industry, including Titan Corp., BellSouth Corp., Global Crossings Ltd., Magyar Telekom, Alcatel Lucent, and UTStar, Inc.; (2) the defense and security manufacturing including, InVision Technologies, Lockheed Corp., United Industrial Corp.; (3) the energy and natural resource industry including, Chevron, Baker Hughes, Inc., Vetco Gray Controls, Statoil ASA, Hermrich & Payne, Inc.; and (4) the healthcare arena, including medical and pharmaceutical manufactures such as Diagnostic Products Corp., Micrus Corp., Johnson & Johnson, have all made payments to the U.S. Government to resolve alleged FCPA violations.

### What Types Of Behavior May Be Considered A Violation?

The FCPA bribery provisions make it illegal for a domestic concern/issuer or individuals acting on their behalf to offer, promise or authorize the giving of anything of value to a foreign official to obtain or retain business. Payments can be made directly or through intermediaries. Bribes are not confined to payments in cash, but also include travel expenses, gifts, and meals. For example, UTStarcom entered into a settlement agreement with the U.S. Government for \$3 million after spending nearly \$7,000,000 on trips for employees of government-controlled telecommunications companies to attend overseas "training" conferences in Hawaii, Las Vegas and New York.<sup>21</sup>

Unlawful kickback schemes to foreign officials can take a variety of forms. One of the most common FCPA schemes involves payments to government officials to secure military contracts. For example, in 2010 BAE Systems paid \$400 million in penalties stemming from alleged unlawful payments to Saudi Royalty and other government officials to secure arms contracts.<sup>22</sup> In 2010 Daimler AG agreed to pay \$91.4 million to settle FCPA charges that Daimler AG made payments to Russian, Croatian, and Chinese officials, in exchange for lucrative government equipment and automobile supply contracts.<sup>23</sup>

Other common FCPA schemes include payments to:

- **Secure contracts with government owned utilities corporations.** In 2010, ABB paid \$58 million to settle FCPA allegations including alleged bribes to state-owned utilities officials to procure favorable contracts.<sup>24</sup> Specifically, ABB allegedly wire transferred money to relatives of government owned electric utility company officials, paid direct cash bribes, and financed Mediterranean cruise vacations for officials and their wives.<sup>25</sup>
- **Receive favorable tax benefits or avoid paying taxes.** In 2008, Willbros Co. paid over \$28 million to settle

FCPA charges. The allegations by the SEC included a fraudulent tax avoidance scheme in Bolivia and bribes to Nigerian tax and court officials.<sup>26</sup> In 2009, Avery Dennison Corp., paid the U.S. Government, to settle allegations that it made improper payments to Indonesian tax officials as part of a tax avoidance scheme.<sup>27</sup>

- **Unlawfully impact elections for favorable business treatment.** In 2005, Titan Corp. paid more than \$28 million to settle FCPA charges including allegations of unlawful payments in support of then President of Benin, Mathieu Kerekou, in order to maintain government contracts within Benin.<sup>28</sup>
- **Impact doctors at state-owned hospitals.** In 2005, Micrus Corp. settled FCPA charges alleging that it had paid over \$105,000 to doctors at state-run hospitals in France, Turkey, Spain and Germany to induce hospitals to purchase certain medical devices.<sup>29</sup> Micrus used agents and sale representatives to allegedly bribe doctors.<sup>30</sup> Similarly, AGA Medical agreed to pay \$2 million dollars to settle allegations that it made unlawful payments to physicians at state-owned hospital in China so that hospitals would purchase certain medical devices.<sup>31</sup>
- **Impact regulatory decisions including, health and safety inspections of products or goods.** In 2011, Tyson Foods entered into a settlement with the SEC after it was discovered that Tyson had put the wives of Mexican Government veterinarians on their payroll.<sup>32</sup>

Companies often disclose in securities filings if they are under investigation by the SEC or DOJ. For example on August 9, 2011, Goldman Sachs confirmed the SEC was investigating the company for potential FCPA and other securities violations.<sup>33</sup>

### III. Other Securities Violations

The Foreign Corrupt Practice Act is only one small piece of U.S. securities law. Accordingly, the whistleblower provisions implicated through the Dodd-Frank Act, apply not just to violations of the Foreign Corrupt Practice Act, but all violations of securities laws within the purview of the SEC. This encompasses, SEC Rule 10b-5 violations, insider trading, ponzi schemes, as well as investment and accounting fraud.

SEC Rule 10b-5 prohibits any act or omission resulting in fraud or deceit in connection with the purchase or sale of any security.<sup>34</sup> Rule 10b-5 makes it unlawful, in connection with the purchase or sale of any security, for any person to directly or indirectly: employ a device or scheme to defraud; make any untrue statement of material fact or omit to state a material fact; or engage in any practice or course of business which operates as a fraud. For example, Enron engaged in 10b-5 violations during the highly publicized Enron scandal, which involved corporate officials making public misrepresentations concerning the company's financial condition.<sup>35</sup>

While Enron is a well known case, violations frequently occur on a smaller scale and unfortunately go unnoticed until there is harm to shareholders. Prospective whistleblowers should focus on any material misrepresentation or omissions concerning a company's financial condition, products, clients, customer relations, or contracts.

Ponzi schemes can take on a variety of forms and can involve international entities. Numerous lawsuits have sprung up in the aftermath of the Bernie Madoff ponzi scheme. For example, in August 2011, Irving Pacard, the trustee for the victims of Madoff ponzi scheme, filed a complaint against the Abu Dhabi Investment Authority, one of the worlds largest sovereign wealth funds.<sup>36</sup> The complaint alleges that the Abu Dhabi Investment Authority is liable to investors for over \$300 million in investments that were withdrawn from Fairfield Sentry, a

feeder fund involved in the Madoff ponzi scheme.<sup>37</sup> Sovereign wealth funds are state-owned investment vehicles, many of which control hundreds of billions of dollars in foreign investments. China, United Arab Emirates, Russia, Norway, Kuwait, Saudi Arabia are countries with some of the largest Sovereign Wealth Funds.

Recently the SEC has reached numerous settlements related to business practices that have fleeced both domestic and foreign investors, in violation of U.S. securities laws. For example, on October 19, 2011, Citigroup agreed to pay \$285 million to settle charges that it misled investors by profiting from short positions in housing market assets.<sup>38</sup> Citigroup selected over \$500 million of assets for investors, while not disclosing it had taken a short position against the very same assets it helped select. Other banks and financial advisors have paid significant fines to the SEC for their misconduct leading up the financial crisis, including: Credit Suisse; RBC Capital Markets; TD Ameritrade; Charles Schwab; Bank of America; J.P. Morgan Securities; and Goldman Sachs.<sup>39</sup> The SEC has recovered over \$1.97 billion in fines stemming from the current financial crisis.<sup>40</sup>

### What Is Required For A Whistleblower To Recover A Bounty Under The Dodd-Frank SEC Provisions?

- The whistleblower must submit “Original Information” from independent knowledge to the SEC.
- “Original Information” has a broad definition and can include public information, provided that the information leading to the SEC action is derived from the independent analysis of the whistleblower.
- The information cannot be *exclusively* derived from an allegation made in a judicial or administrative hearing, government report, hearing, audit or investigation, or from the news media, unless the whistleblower is a source of the information.

- Three categories of individuals are excluded from being an “independent source”: (1) officers, directors, trustees, or partners of an entity that obtained the information in connection with the entities process for indentifying, reporting or addressing potential non-compliance with the law; (2) individuals whose principal duties involve internal compliance or internal auditing, as well as outside firms retained for that purpose; and (3) employees of firms that are retained to conduct internal investigations into possible violations of law.

- However, an individual who fits within one of those categories may be eligible to be a whistleblower if (1) the person believes disclosure is necessary to prevent the relevant entity from engaging in conduct likely to cause substantial injury or financial harm to the entity or its investors; (2) the person has reason to believe the entity is acting with bad faith, by destroying documents or improperly hindering an investigation; and (3) once 120 days have passed since the person received the information and informed his or her supervisor of the potential violation on.

- The original information must lead to the successful enforcement of a judicial or administrative action, that results in monetary sanctions that exceed \$1,000,000.

- The submission must be voluntary and will not be considered voluntary if it is compelled through a subpoena or other applicable law to disclose information.

### If You Have Knowledge Of A Potential FCPA Violation, You Need To Think About:

1. What specific facts support your contention that there has been a violation?
  - Who has received a payment?
  - What was the payment purportedly for?

- How were the “foreign officials” influenced by the payment?

2. What documents support your contentions?
  - Letters?
  - Emails?
  - Receipts?

3. What other individuals can support or confirm your contentions?
  - Who are they?
  - How can they be located?
  - What will they say?

4. What are the plausible explanations that the company will give as to why these payments were not bribes or not to foreign officials?

5. What documents might support a company’s explanation?

*For more information on the False Claims Act or Foreign Corrupt Practice Act or questions please contact Reuben Guttman at [rguttman@gelaw.com](mailto:rguttman@gelaw.com).*

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- 2 Reuben A. Guttman is a partner at the law firm of Grant & Eisenhofer P.A. where he heads the firm’s False Claims Litigation Group. He is an Adjunct Professor and Senior Fellow at the Emory University School of Law Center for Advocacy and Dispute Resolution and a member of the Law School Advisory Board. Mr. Guttman was lead counsel for the lead Relator in *U.S. ex rel. McCoyd v. Abbott* (recovery of \$1.6 billion); lead counsel for Lois Graydon (one of four Relators in the government’s recovery of 1.1 billion against Glaxco-Smith Kline); lead counsel for Glenn Demott (one of six Relators in the government’s recovery of 2.3 billion from Pfizer); co-lead counsel in *U.S. ex rel. Szymoniak v. BOA et al.* (part of government 2012 \$25 billion bank settlement); and co lead counsel in *U.S. ex rel. Johnson v. Shell* (\$300 million recovered from oil industry). He is a founder of the website [www.whistleblowerlaws.com](http://www.whistleblowerlaws.com).
- 3 Justin Victor, jvictor@gelaw.com, is an Associate at the law firm of Grant & Eisenhofer where he focuses on complex fraud litigation.
- 4 See 31 U.S.C. § 3729(a) (2006); See also Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 at § 4(a)(1)(a)(1) (2009).
- 5 <http://www.whistleblowerlaws.com/types-of-fraud/defense-contractor-fraud/>
- 6 DOJ Press Release, *Lockheed Martin & BAE Systems Controls to Pay U.S. \$6.2 Million to Settle False Claims Act Case* (September 18, 2002) available at: [http://www.justice.gov/opa/pr/2002/September/02\\_civ\\_533.htm](http://www.justice.gov/opa/pr/2002/September/02_civ_533.htm)
- 7 See DOJ Press Release, *Rocky Mountain Instrument to Pay U.S. \$1 Million to Resolve False Claims Act Allegations*, (Oct. 29, 2010) available at <http://www.justice.gov/opa/pr/2010/October/10-civ-1233.html>; *U.S. v. Rocky Mountain Instrument Co.*, 10-cr-00139-WYD-01 (D. Colo. 2010).
- 8 See *U.S. ex rel. Roby v. Boeing Co.*, 73 F. Supp. 2d 897 (S.D. Ohio 1999) (Defendants, a subcontractor and primary contractor, were found to be in violation the False Claims Act by supplying the U.S. government helicopters with defective transmission gears).
- 9 See *U.S. ex rel. Barajas v. Northern Corp.*, 147 F.3d 905 (9th Cir. 1998) (Defendant falsely certified it had performed testing required by a government contract on fluids used with cruise missiles).
- 10 <http://www.whistleblowerlaws.com/types-of-fraud/fraudulent-loans-and-grants-2/>
- 11 See *U.S. ex. Rel. Feldman v. Van Gorp*, 2010 WL 2911606 (S.D.N.Y. 2010); *U.S. ex rel. Feldman v. Van Gorp*, 2011 WL 651829 (S.D.N.Y. 2011) (Defendants’ made false statements in their initial grant application as well as progress reports to ensure continued funding).
- 12 <http://www.whistleblowerlaws.com/types-of-fraud/government-fraud/>
- 13 See *U.S. ex rel. Frascella v. Oracle Corp.*, 751 F. Supp. 2d 842 (E.D. Va. 2010) (Defendant allegedly failed to disclose to the government discounts offered to many of its commercial customers, resulting in substantial overcharges to the government).
- 14 31 U.S.C. §§ 3730(e)(4)(A), 3730(e)(4)(B) (2010).
- 15 Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 922, Pub. L. No. 111-203, § 1011(a), 124 Stat. 1376 (2010).
- 16 Foreign Corrupt Practice Act (“FCPA”), 15 U.S.C. §§ 78dd-1, et seq.; 15 U.S.C. §§ 78m (2006); For an overview of the FCPA, available at <http://www.justice.gov/criminal/fraud/fcpa>
- 17 Testimony of Lanny A. Breuer, Assistant Attorney General, Criminal Division, Department of Justice, before the Committee on the Judiciary, United States Senate, *Protecting the American Taxpayers: Significant Accomplishments and Ongoing Challenges in the Fight Against Fraud*, (January 26, 2011).
- 18 15 U.S.C. §§ 78dd-1, et seq.
- 19 15 U.S.C. §§ 78m (The accounting provisions require issuers to “make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of an issuer” and “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances.”).
- 20 F. Joseph Warin, Michael S. Diamant, and Jill M. Pfenning, *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 Va. L. & Bus. Rev. 33, 45 (2010).
- 21 DOJ Press Release, *UTStarcom Inc. Agrees to Pay \$1.5 Million Penalty for Acts of Foreign Bribery in China* (December 31, 2009) available at <http://www.justice.gov/opa/pr/2009/December/09-crm-1390.html>; Litig. Release No. 21357, *SEC Charges California Telecom Company With Bribery and Other FCPA Violations*, (Dec. 31, 2009), available at <http://www.sec.gov/litigation/litreleases/2009/lr21357.htm>
- 22 DOJ Press Release, *BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine*, (March 1, 2010) available at <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html> (BAE paid kickbacks to government officials to secure defense contracts regarding the sales of fighter jets in Saudi Arabia).
- 23 SEC Press Release 2010-51, *SEC Charges AG with Global Bribery*, (April 1, 2010) available at <http://www.sec.gov/news/press/2010/2010-51.htm>
- 24 SEC Litig. Release No. 21673, *SEC Charges ABB For Bribery Scheme in Mexico and Iraq-ABB to Pay \$29 Million in Disgorgement and Civil Penalties*, (Sept. 29, 2010) available at <http://www.sec.gov/litigation/litreleases/2010/lr21673.htm>
- 25 *Id.*
- 26 SEC Litig. Release No. 20571, *SEC Files Settled FCPA Action Against Willbros, Inc. and Several Former Employees*, (May 14, 2008) available at <http://www.sec.gov/litigation/litreleases/2008/lr20571.htm>
- 27 SEC Litig. Release No. 21156, *SEC Files Charges Against Violating The Books and Internal Control Provisions of the Foreign Corrupt Practice Act* (July 28, 2009) available at <http://www.sec.gov/litigation/litreleases/2009/lr21156.htm>
- 28 SEC Press Release 2005-23, *SEC Sues Titan Corporation For Payments to Election Campaign of Benin President*, (March 1, 2005) available at <http://www.sec.gov/news/press/2005-23.htm>
- 29 DOJ Press Release, *Micrus Corporation Enters into Agreement to Resolve Potential Foreign Corrupt Practice Act Liability*, (March 2, 2005), available at [http://www.justice.gov/opa/pr/2005/March/05\\_crm\\_090.htm](http://www.justice.gov/opa/pr/2005/March/05_crm_090.htm)
- 30 *Id.*





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