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Client**Alert**

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Dodd-Frank Wall Street Reform and Consumer Protection Act: FDIC Proposes Additional Rules Implementing Aspects of Orderly Liquidation Authority

In its continued effort to implement its authority to resolve "covered financial companies" under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), on March 15, 2011, the Board of Directors of the Federal Deposit Insurance Corporation (the "FDIC") approved the Notice of Proposed Rulemaking Implementing Certain Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Proposed Rules"). For a detailed discussion of Title II, see the White & Case Client Alert titled Orderly Liquidation Authority, dated July 2010. The Proposed Rules build on the FDIC's interim final rule published on January 25, 2011 and provide guidance with respect to other provisions of Title II.

The Proposed Rules consist of the regulation itself along with the FDIC's commentary thereto, and are intended to address the following broad areas: (i) what constitutes a "financial company" subject to resolution under Title II by establishing criteria for determining whether a company is "predominately engaged in activities that are financial in nature or incidental thereto;" (ii) recoupment of compensation from senior executives and directors in limited circumstances; (iii) application of the FDIC's power to avoid fraudulent or preferential transfers in a Title II receivership; (iv) the priority of expenses and unsecured claims; and (v) the administrative process for initial determination of claims and the process for judicial determination of claims disallowed by the FDIC, as receiver. The FDIC is soliciting written comments, due no later than May 22, 2011, to specific questions posed by the FDIC and all aspects of the Proposed Rules.

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Financial Companies Subject to Title II Orderly Liquidation Authority

Included among the entities considered a "financial company" under Title II and subject to resolution upon a **systemic risk determination** by the Secretary of the Treasury (the "Secretary") is any company that is incorporated or organized under any provision of Federal law or the laws of any State and is (i) a bank holding company ("BHC") as defined in section 2(a) of the BHC Act of 1956 ("BHC Act"), (ii) a non-bank financial company supervised by the Board of Governors ("NFC"), **(iii) any company that is predominately engaged in activities that are financial in nature for purposes of section 4(k) of the BHC Act or (iii) any subsidiary of the foregoing three categories of companies that is predominately engaged in activities that are financial in nature for purposes of section 4(k) of the BHC Act.**[1] Proposed Rule 380.8 establishes criteria for when a company is "predominately engaged in activities that are financial in nature or incidental thereto."

Meaning of "Predominately Engaged"

Consistent with the statutory mandate, under Proposed Rule 380.8(a), a company is **"predominately engaged"** in activities that the Board of Governors has determined are financial in nature or incidental thereto for purposes of section 4 of the BHC Act of 1956 if:

- At least **85 percent** of the total consolidated revenues of the company for ***either*** of its two most recent fiscal years were derived, directly or indirectly, from financial activities;[2] or
- Based upon all **relevant facts and circumstances**, the FDIC determines that the consolidated revenues of the financial activities constitute **85 percent** or more of the total consolidated revenues of the company.[3]

Proposed Rule 380.8(a) requires that the above percentages be analyzed in accordance with ***"applicable accounting standards"*** which according to the Proposed Rules means the accounting standards utilized by the company in the **ordinary course of business in preparing its consolidated financial statements** provided that such standards are (i) US generally accepted accounting principles; (ii) International Financial Reporting Standards; or (iii) such other accounting standards that the FDIC determines to be appropriate.[4] In requiring companies to utilize their ordinary course accounting standards, the FDIC's intention is to limit the ability of companies to arbitrage the two-year test through changes in their accounting standards while simultaneously reducing the regulatory burden on companies. Further, the latter portion of this two-part test which includes the ability of the FDIC to consider all "relevant facts and circumstances" is intended to provide the FDIC flexibility to consider a full range of information that may be available concerning a company's activities including allowing the FDIC to consider the effects of a subject company's recent transactions, such as a merger, consolidation, acquisition and the like on the nature or mix of a company's activities which may not necessarily be fully revealed yet in the company's financial information.

Meaning of "Financial Activity"

Proposed Rule 380.8(b) defines "financial activity" to include: (i) any activity, wherever conducted, described in section 225.86 of the Board of Governors' Regulation Y or any successor regulation;[5] (ii) ownership or control of one or more depository institutions; and (iii) any other activity, wherever conducted, determined by the Board of Governors in consultation with the Secretary of the Treasurer, under section 4(k)(1)(A) of the BHC Act, to be financial in nature or incidental to a financial activity.[6] Section 225.86 of the Board of Governor's Regulation Y identifies certain activities that have been determined to be financial in nature or incidental to a financial activity under section 4(k) of the BHC Act. Included

1 Dodd-Frank Act §201(a)(11)(A).

2 This two-year test is substantially the same as that which was proposed by the Board of Governors for purposes of defining when a company is predominately engaged in financial activities in conjunction with a determination that a company is an NFC. *See*, 76 Fed. Reg. 7731 (February 11, 2011).

3 Proposed Rule 380.8(a).

4 Proposed Rule 380.8(b)(iii).

5 *See* 12 C.F.R. 225.86.

6 12 U.S.C. §1843(k)(1) and (2).

among these activities are those that the Board of Governors has determined by regulation or order, prior to November 12, 1999, to be "so closely related to banking as to be a proper incident thereto" under section 4(c)(8) of the BHC Act.[7] Also included are those activities that the Board of Governors had determined by regulation in effect on November 11, 1999, to be usual in connection with the transaction of banking or other financial operations abroad[8] and other activities defined as being financial in nature under the Graham-Leach-Bliley Act.[9] Finally, section 4(k) of the BHC Act authorizes the Board of Governors, in consultation with the Secretary, to determine in the future that additional activities are "financial in nature or incidental thereto."[10]

Non-Consolidated Investment Rule

Proposed Rule 380.8(d) include two rules of construction governing the application of the above two-year revenue test as it relates to revenues derived from a company's minority, non-controlling equity investments in an ***unconsolidated*** entity. These rules of construction are intended to reduce the burden of companies seeking to comply with the Proposed Rules.

- **First Rule of Construction.** Under the first rule of construction, revenues derived from an equity investment by the company in another company (the "investee"), the financial statements of which are not consolidated with those of the company under applicable accounting standards, are required to be treated as revenues derived from financial activities, if the investee is predominately engaged in financial activities.[11] In crafting this rule of construction, the FDIC intends to eliminate a company's requirement to determine the precise percentage of an investee company's financial activities in order to determine the portion of the company's revenues derived from the investment that should be treated as derived from such activities.[12]

- **Second Rule of Construction.** The second rule of construction provides a company the discretionary authority to treat revenues derived from an equity investment in the investee as revenues not derived from financial activities (regardless of the type of activities conducted by the investee) subject to various conditions designed to limit the potential for these *de minimis* investments to alter the character of the activities of the company. Specifically, the *de minimis* rule provides that a company may treat revenues derived from an equity investment in an investee company as revenues not derived from financial activities (regardless of the type of activities conducted by the investee company), if: (i) the company owns less than 5 percent of any class of outstanding voting shares, and less than 25 percent of the total equity, of the investee company;[13] (ii) the financial statements of the investee are not consolidated with those of the company under applicable accounting standards;[14] (iii) the company's investment in the investee is not held in connection with the conduct of any financial activity (such as, for example, investment advisory activities or merchant banking investment activities) by the company or any of its subsidiaries;[15] (iv) the investee company is not a bank, bank holding company, broker-dealer, insurance company, or other regulated financial institution;[16] and (v) the aggregate amount of revenues treated as not financially related under the rule of construction in any year does not exceed 5 percent of the company's total consolidated financial revenues.[17]

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7 Among these activities are making, acquiring, brokering, or servicing loans or other extensions of credit (including factoring, issuing letters of credit and accepting drafts); leasing personal or real property or acting as agent, broker, or adviser in leasing such property; performing functions or activities that may be performed by a trust company (including activities of a fiduciary, agency, or custodial nature), in the manner authorized by Federal or State law; acting as investment or financial advisor to any person, including serving as investment adviser to an investment company registered under the Investment Company Act of 1940, and sponsoring, organizing, and managing a closed-end investment company; acting as a futures commission merchant for the execution, clearance, or execution and clearance of any futures contract and option on a futures contract traded on an exchange in the United States or abroad; engaging as principal in foreign exchange as well as a broad range of forward contracts, options, futures, options on futures, swaps, and similar contracts, whether traded on exchanges or not; issuing and selling at retail money orders and similar consumer-type payment instruments; providing data processing, data storage and data transmission services, facilities, databases, advice, and access to such services, facilities, or databases by any technological means, with respect to financial data and, to a limited extent, nonfinancial data; providing administrative and other services to mutual funds; check cashing and wire transmission services; and real estate title abstracting.

8 Among these activities are management consulting services; operating a travel agency in connection with the offering of financial services; and organizing, sponsoring, and managing a mutual fund.

9 Among these activities are acting as a principal or agent in the sale of insurance or annuities; underwriting, dealing in, or making a market in securities; and acquiring and controlling shares, assets, or other ownership interests in nonfinancial companies as part of a bona fide underwriting or merchant or investment banking activity (so-called "merchant banking" activities).

10 *See* 12 U.S.C. §1843(k)(1) and (2).

11 Proposed Rule 380.8(d)(1).

12 This approach is similar to the approach proposed by the Board of Governors for determining whether a nonbank company is predominately engaged in financial activities under Title I.

13 Proposed Rule 380.8(d)(2)(i).

14 Proposed Rule 380.8(d)(2)(ii).

15 Proposed Rule 380.8(d)(2)(iii).

16 Proposed Rule 380.8(d)(2)(iv).

17 Proposed Rule 380.8(d)(2)(v).

Request for Comments. The FDIC is seeking comments related to the following issues regarding Proposed Rule 380.8:

- Whether the two-year period is the appropriate time frame for applying the 85 percent consolidated revenue test.
- Whether there is a more appropriate definition of "applicable accounting standards" than that used in the Proposed Rule.
- Whether the rule of construction regarding investments that are not consolidated is appropriate.
- Whether Proposed Rule 380.8 should be limited so that it only encompasses entities that, individually or on a consolidated basis, are eligible under section 102 of the Dodd-Frank Act for designation as nonbank financial companies supervised by the Board of Governors or be limited to companies that, individually or on a consolidated basis, are designated as systemically important under the Dodd-Frank Act.

Recoupment of Compensation from Senior Executives and Directors

The Dodd-Frank Act permits the FDIC as receiver to recover from any current or former senior executive or director substantially responsible for the failed condition of the covered financial company any compensation received during the two-year period preceding the date on which the FDIC was appointed receiver.[18] In the event that the senior executives or directors commit fraud, this time limit does not apply.[19] Proposed Rule 380.7 provides that the senior executive or director will be deemed to be substantially responsible if such individual failed to conduct his or her responsibilities with the requisite degree of skill and care required by the position, and as a result, individually or collectively, caused a loss to the covered financial company that materially contributed to its failure.[20]

Proposed Rule 380.7 establishes a **rebuttable presumption** that a senior executive or director is responsible for a covered financial company's failed condition if such individual:

- Served as the chairman of the board of directors, chief executive officer, president, chief financial officer, or in any other similar role that had responsibility for the covered financial company's strategic policymaking or company-wide operational decisions.
- Is adjudged liable by a court or tribunal of competent jurisdiction for breach of the duty of loyalty to the covered financial company.
- Was removed from the management of the covered financial company on the basis that he or she was responsible for the failure of the covered financial company.[21]

This presumption **does not apply** to senior executives who were hired and directors who joined the board of directors by/of the covered financial company in the two years prior to the FDIC's appointment as receiver to assist in **preventing the further deterioration** of the financial condition of the covered financial company, unless they are responsible for the failed condition of the company.[22] Pursuing a claim under Proposed Rule 380.7 will not preclude the FDIC from pursuing other claims against these responsible individuals.[23]

Request for Comments. The FDIC is seeking comments related to the following issue regarding Proposed Rule 380.7:

- Identification of qualitative and quantitative benchmarks for purposes of determining whether a loss materially contributed to the failure of the covered financial company for purposes of triggering substantial responsibility.

Treatment of Fraudulent and Preferential Transfers

Similar to the authority granted to a trustee under the Bankruptcy Code, the Dodd-Frank Act provides the FDIC authority to avoid fraudulent transfers made by a covered financial company within the two years prior to the appointment of the FDIC as receiver.[24] Also similar to the powers granted to the trustee under the Bankruptcy Code, the FDIC has authority to recover preferential transfers made within 90 days prior to the appointment of the FDIC as receiver, or up to one year prior to such date if the preferential transfers were made to an insider.[25] Proposed Rule 380.9 is intended to harmonize the FDIC's avoidance powers under the Dodd-Frank Act with the analogous provisions of the Bankruptcy Code by clarifying certain ambiguities in the Dodd-Frank Act. In particular, the Proposed Rule 380.9 makes clear that the FDIC could not, in a proceeding under Title II, avoid as preferential the grant of a security interest perfected by the filing of a financing statement in accordance with the provisions

18 Dodd Frank Act §210(s)(1).

19 *Id.*

20 Proposed Rule 380.7(a).

21 Proposed Rule 380.7(b).

22 Proposed Rule 380.7(b)(4).

23 Proposed Rule 380.7(c).

24 Dodd Frank Act §210(a)(11)(A).

25 Dodd Frank Act §210(a)(11)(B).

of the Uniform Commercial Code or other non-bankruptcy law where a security interest so perfected could not be avoided in a case under the Bankruptcy Code.[26] Further, Proposed Rule 380.9 would permit, consistent with the Bankruptcy Code, a 30-day grace period for perfecting a transfer of property.[27]

Subpart A—Priorities

Subpart A of the Proposed Rules is intended to clarify and organize provisions throughout Title II of the Dodd-Frank Act dealing with the relative priorities of various creditors with claims against a failed financial company.

Priorities of Unsecured Claims

Proposed Rule 380.21 seeks to integrate all of the various provisions of the Dodd-Frank Act that determine the nature and priority of payments including the specified priorities listed in section 210(b) of the Dodd-Frank Act and additional levels of priority set forth in other sections of the Dodd-Frank Act including for post-receivership debt, claims for loss of setoff rights and post-insolvency interest.[28] As integrated and in order, the 11 classes of priority of claims are as follows:

(1) Claims with respect to post-receivership debt extended to the covered financial company where such credit is not otherwise available from commercial sources.

(2) Other administrative costs and expenses of the receiver.

(3) Amounts owed to the United States.

(4) Wages, salaries and commissions, including vacation, severance and sick pay earned by an individual within 180 days prior to the appointment of the receiver up to the amount of $11,725 (as adjusted for inflation).

(5) Contributions to employee benefit plans due with respect to such employees up to the amount of $11,725 (as adjusted for inflation) times the number of employees covered by each plan, subject to adjustments.

(6) Claims by creditors who have lost setoff rights by action of the receiver.

(7) Other general unsecured creditor claims.

(8) Subordinated debt obligations.

(9) Wages, salaries and commissions, including vacation, severance and sick leave earned owed to senior executives and directors.

(10) Post-insolvency interest, which shall be distributed in accordance with the priority of the underlying claims.

(11) Distributions on account of equity to shareholders and other equity participants in the covered financial company.[29]

Administrative Expenses of the Receiver

Proposed Rule 380.22 provides some clarity as to what would constitute an administrative expense of the FDIC as receiver that would be paid ahead of other general unsecured creditors. Specifically, expenses of the receiver that are necessary and appropriate to facilitate a smooth and orderly liquidation that were incurred by the FDIC pre-failure as well as after the appointment of the FDIC will be treated as an administrative expense.[30] Examples of such administrative expenses include contractual rent under an existing lease until the date that such lease is disaffirmed or repudiated and amounts owed for services performed and accepted by the receiver.[31] Notably, obligations incurred by the receiver to repay an extension of credit through enforcement of a contract that was in existence prior to the appointment of the receiver will be treated as an administrative expense claim of the receiver and is entitled to second priority, rather than first priority afforded debt incurred or credit obtained by the FDIC as receiver.[32]

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26 Proposed Rule 380.9(b).

27 Proposed Rule 380.9(c).

28 See generally, Proposed Rule 380.21.

29 *Id.*

30 Proposed Rule 380.22.

31 Proposed Rule 380.22(a)(1) and (2).

32 Proposed Rule 380.22(b).

Amounts Owed to the United States

Proposed Rule 380.23 makes clear that the priority given to "amounts owed to the United States" includes all amounts due to the United States or any department, agency or instrumentality of the United States government, without regard for whether such amount is included as debt or capital on the books and records of the covered financial company and whether such obligations were incurred before and after the appointment of the receiver.[33] In its commentary to the Proposed Rules, the FDIC notes that because the Dodd-Frank Act does not include government-sponsored entities such as FNMA, FHMLC, or Federal Home Loan Banks, the regulation does not include these entities.

Further, the Proposed Rule makes clear that the United States may consent to subordination of its right to repayment of any specified debt or obligation provided that all unsecured claims of the United States shall, at a minimum, have higher priority than equity or other liabilities of the covered financial company that count as regulatory capital.[34] This is intended to be consistent with the requirements of section 206 of the Dodd-Frank Act which mandate that shareholders shall not receive payment until all other claims are fully satisfied.

Priorities of Claims Arising Out of Loss of Setoff Rights

Under the Dodd-Frank Act, a receiver may transfer assets of a covered financial company "free and clear of the setoff rights of any third party."[35] However, section 210(a)(12) of the Dodd-Frank Act permits a creditor to offset certain qualified mutual debts between the covered financial company and the creditor. In an effort to address the claims of creditors who have lost a right of setoff due to the sale of property free and clear, Proposed Rule 380.24 provides that **these setoff claims will be paid at the level of priority immediately prior to all other general unsecured creditors.**[36]

Post-Insolvency Interest

Under Proposed Rule 380.25, post-insolvency interest is applied to a creditor's entire claim amount and may include pre-receivership interest.[37] The Proposed Rules set the post-insolvency interest rate at, for any calendar quarter, the coupon yield of the average discount rate set on the three-month Treasury bill at the last auction held by the United States Treasury Department during the preceding calendar quarter and with such rate to be computed quarterly using a simple interest rate of calculation.[38]

Transfers to Bridge Financial Companies

Proposed Rule 380.26 is intended to make clear that bridge financial companies, as operating companies, will make payments on valid and enforceable obligations of the bridge financial company as they become due and pursuant to a claims process. Specifically, the Proposed Rule provides that any rights and obligations transferred to a bridge financial company constitutes an assumption of the contract or agreement giving rise to such asset or liability.[39] The bridge financial company will have the right and obligation to observe, perform and enforce their terms and provisions.[40] The Proposed Rule 380.26 requires that in the event that the FDIC dissolves the bridge financial company, it will do so in accordance with the laws, rules and regulations relating to covered financial companies, including those governing priorities of claims, subject to the right of the FDIC to authorize the bridge financial company to obtain unsecured credit or issue unsecured debt with priority over any or all of the unsecured obligations of the bridge financial company, provided that unsecured debt is not otherwise generally available to the bridge financial company.[41] In response to various comments received, Proposed Rule 380.26 makes clear that the proceeds that remain following the sale, liquidation and dissolution of a bridge company will be distributed to the FDIC as receiver for the covered financial company and will be made available to the creditors of the covered financial company after all administrative expenses and other creditors' claims of the receiver for the bridge company have been satisfied.[42]

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33 Proposed Rule 380.23(a).

34 Proposed Rule 380.23(b).

35 Proposed Rule 380.24(a).

36 Proposed Rule 380.24(c).

37 Proposed Rule 380.25(a).

38 Proposed Rule 380.25(b).

39 Proposed Rule 380.26(a).

40 *Id.*

41 Proposed Rule 380.26(b).

42 Proposed Rule 380.26(c).

Request for Comments. The FDIC is seeking comments related to the following issues regarding Subpart A of the Proposed Rules:

- Ways in which the definition of administrative expenses under the Dodd-Frank Act could be further harmonized with bankruptcy law and practice, including whether there is a need to expressly provide for the payment of attorneys' and accountants' fees and expenses as an administrative claim expense.
- Whether "amounts due to the United States" should be limited to obligations backed by the full faith and credit of the United States and issues related to assessment for obligations owed to the United States that are not issued by the FDIC to the Secretary under the Dodd-Frank Act.
- Manner in which the value of lost setoff rights should be determined.
- How differences in the post-insolvency interest rules contained in section 380.25 and those established under bankruptcy law and practice materially affect creditors.

Subpart B—Receivership Administrative Claims Process

Subpart B of the Proposed Rules generally outlines the process by which creditors can file claims against the receivership estate, how the FDIC as receiver will determine those claims and how creditors can pursue their claims in federal court. The administrative claims process of Title II is closely modeled after the claims process set forth in the Federal Deposit Insurance Act for receiverships of insured depository institutions and according to the FDIC is designed to maximize efficiency while reducing the delay and additional costs that could be incurred in a different insolvency regime. Generally, creditors are required to file their claims with the receiver by an established claims bar date, which is required to be not less than 90 days after the date on which notice is provided to creditors of the bar date.[43] The receiver is required to determine within 180 days after the claim is filed (subject to an extension agreed to by the claimant) whether the receiver will allow or disallow the claim.[44] If the claim is disallowed, the claimant may seek *de novo* judicial review of the claim by filing a lawsuit (or continuing a pending lawsuit) within a prescribed 60-day time period.[45] Claimants are required to exhaust the administrative claims process before any court can adjudicate the claim.

Secured creditors can seek the consent of the FDIC as receiver, which consent is solely at the discretion of the FDIC as receiver, to obtain possession of or control over any property of the covered financial company that serves as collateral for the secured claim or to permit a foreclosure or sale of any property that serves as collateral for the secured claim.[46] Outside of this administrative process, secured creditors can seek expedited relief upon alleging:

- A legally valid and enforceable or perfected security interest in property of a covered financial company or control of any legally valid and enforceable security entitlement in respect of any asset held by a covered financial company.
- That irreparable harm will occur if the administrative claims procedure is followed.[47]

The FDIC then has 90 days to determine whether to allow or disallow such claim, or any portion thereof, or whether the claim should be determined pursuant to the administrative claims procedure.[48] Upon the expiration of the 90-day period or upon a denial of the secured claim by the FDIC, the secured creditor is entitled to file suit (or continue a suit filed before the date of appointment of the FDIC as receiver).[49]

Request for Comments. The FDIC is seeking comments related to the following issues regarding Subpart B:

- Identification of additional provisions that should be included in the Proposed Rule regarding the administrative process for the determination of claims.
- Identification of the principal place of business of a multi-national organization for publication of notice of the claims process and whether such notice should be published in multiple locations; including with respect to publication notices in other countries, what standards should be applied to satisfy the "newspapers of general circulation" requirement.

43 Proposed Rule 380.32.

44 Proposed Rule 380.36(a) and (b).

45 Proposed Rule 380.38.

46 Proposed Rule 380.51.

47 Proposed Rule 380.53(a).

48 Proposed Rule 380.53(b).

49 Proposed Rule 380.53(c).

50 Absent consent of the FDIC as receiver, this provision precludes most secured claimants from exercising rights against the pledged collateral during the 90-day period after the FDIC is appointed receiver of a covered financial company.

- Whether the consent provisions of subparagraphs 210(c)(13)(C)[50] and (q)(1)(B)[51] of the Act should be interpreted as not applying to a secured creditor who has possession of or control over collateral before the appointment of the receiver pursuant to a security arrangement.
- Identification of additional provisions for inclusion in the Proposed Rules governing the treatment of secured claims and property that serves as security including any additional provisions that are necessary or appropriate regarding obtaining consent from the receiver to exercise rights against the collateral, and the sale or redemption of collateral by the receiver, whether collateral should be valued at the time it is surrendered, sold, or redeemed by the receiver, or some other time, and whether it is necessary to provide that after repudiation a security interest will no longer secure the contractual repayment obligation, but will instead secure any claims for repudiation damages.
- Identification of provisions that should be changed or added to the expedited relief procedures for secured creditors who allege irreparable injury if the ordinary claims process is followed.

51 Absent consent, this provision generally provides that no property of the FDIC as receiver shall be subject to levy, attachment, foreclosure or sale.

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