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Corporate and Financial Weekly Digest

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SEC/CORPORATE

SEC Publishes Final Rule Amendments Extending SOX 404 Auditor Attestation Date for Smallest Public Companies

As reported in the October 2 edition of *Corporate and Financial Weekly Digest*, the Securities and Exchange Commission extended the date for compliance by companies with a public float under $75 million (non-accelerated filers) with the Sarbanes-Oxley Act Section 404 requirement that management's assessment of the effectiveness of internal control over financial reporting (ICFR) be audited by an independent registered public accounting firm. The attestation requirement, which was applicable to annual reports covering fiscal years ending on or after December 15, 2009, has been extended to annual reports covering fiscal years ending on or after June 15, 2010. On October 13, the SEC published the text of final rule amendments which will implement such extension.

Non-accelerated filers will continue to be required to disclose that their annual report does not include an auditor's attestation report regarding ICFR. Management reports that are not accompanied by an auditor's attestation report will continue to be considered "furnished" rather than "filed" with the SEC.

Although the requirement of non-accelerated filers to include an auditor's attestation regarding management's report on ICFR has been deferred a number of times, the SEC does not expect to further defer such obligation.

Click here for the complete text of the SEC's adopting release.

SEC Proposes Proxy Rule Changes to Improve Notice-Only Option

On October 14, the Securities and Exchange Commission proposed rule changes to its notice and access proxy solicitation model in order to enhance shareholder comprehension of the "notice-only option" and improve shareholder response rates to proxy solicitations. The SEC adopted rules in 2007 allowing for proxy solicitations to be delivered either by providing notice to shareholders that proxy materials can be obtained via the Internet (the notice-only option) or by providing a traditional set of paper proxy materials to shareholders (the full-set delivery option).

In proposing its amendments to the delivery procedure for the notice-only option, the SEC cited its concern that shareholders have been less responsive to proxy solicitations using the notice-only option. The SEC also reported anecdotal instances where shareholders have misunderstood the purpose of the issuers' notice regarding the electronic availability of proxy materials.

The SEC proposes, among other items, amending the notice and access provisions in Rule 14a-16 of the Exchange Act to provide additional flexibility by eliminating the current requirement to include a specific legend regarding the purpose of the notice, the online availability of proxy materials and the process for obtaining paper copies. The amended rule would require notices to address these topics without specifying the exact language to be used. The SEC also proposes to permit issuers and soliciting shareholders to include along with the notice an explanation of the process of receiving or reviewing proxy materials and voting. Presently, issuers are prohibited from including additional materials with the notice. These proposed changes are aimed at preventing shareholders from disregarding boilerplate language in the notice, as well as increasing issuers' flexibility to explain the voting process to shareholders.

In addition, the SEC proposes to amend the deadlines under Rule 14a-16 to encourage broader use of the notice-only option by soliciting shareholders. The proposed rules would require a soliciting shareholder electing the notice-only option to file a preliminary proxy statement within 10 days after the issuer files its definitive proxy statement, and to send its notice to shareholders on the date the soliciting shareholder files its definitive proxy statement.

Public comments on the proposed rule amendments must be received by the SEC within 60 days after their publication in the Federal Register.

Click here for the SEC's release regarding these proposed rules.

LITIGATION

Investment Advisor Certified as Lead Plaintiff in Securities Class Action

Lead Plaintiff Galleon Management LP (Galleon) is an investment advisor for two funds that claimed pecuniary loss from their purchase of Herley Industries, Inc. (Herley) securities at a fraudulently inflated price. Galleon and plaintiff Norfolk County Retirement System, on behalf of themselves and other members of the proposed class, asserted claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, alleging that the defendants knowingly misled members of the proposed class to defraud them into purchasing shares of Herley stock at inflated prices.

Galleon moved for an order certifying a class under Fed. R. Civ. P. 23. In opposition, defendants first argued that Galleon, as investment advisor to the funds, lacked standing to bring the suit because investment advisors do not have standing to pursue the claims of their clients' funds. Applying the Second Circuit's decision in *W.R. HufAsset Management Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100 (2d Cir. 2008), the Third Circuit agreed that Galleon did not have standing to pursue claims on behalf of its clients because the advisor had not personally suffered an injury-in-fact. However, the court found that, though Galleon did not have standing at the time of its appointment, it had cured its standing infirmity through a valid assignment of claims from the funds to Galleon.

Once the court determined that Galleon had standing to bring the suit and that Galleon was the proper lead plaintiff, the court found that the class had satisfied the requisite elements of Fed. R. Civ. P. 23: numerosity, commonality, typicality and adequacy of representation. Moreover, Galleon had demonstrated that common issues predominated over any individual concerns, and that the class mechanism was superior to individual actions. Thus, the Third Circuit granted Galleon's Motion for Class Certification. (*In re Herley Industries Inc. Securities Litigation*, 2009 WL 3169888 (E.D. Pa. September 30, 2009))

Claims of Violation of Federal and State Securities Acts Against Investment Advisor Dismissed

Plaintiff invested in defendants' real estate fund, "based on the advice of the defendants and defendants' representation that she would have a direct security interest in real estate or equity interest in real estate that would secure her investment." Defendants later failed to make the payments due and owing under the notes they issued to plaintiff, and failed to deliver the promised direct security and/or equity interests in the real estate referenced in communications with plaintiff. Plaintiff alleged claims for breach of contract, fraud in the inducement, breach of fiduciary duty and violations of federal and state securities laws. Defendants moved to dismiss plaintiff's complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

Plaintiff alleged securities fraud claims under Section 10(b) of the Securities Exchange Act and Rule 10(b)-5, as well as the Pennsylvania Securities Act of 1972 (PSA). In a typical Section 10(b) private action, a plaintiff must prove: (i) a material misrepresentation or omission by the defendant; (ii) scienter; (iii) a connection between the misrepresentation or omission and the purchase or sale of a security; (iv) reliance upon the misrepresentation or omission; (v) economic loss; and (vi) loss causation. Pennsylvania trial courts have treated PSA claims as requiring the same elements of proof as required under the federal statutes.

The District Court for the Eastern District of Pennsylvania held that plaintiff failed to plead the federal and state securities fraud claims with the degree of particularity required to support claims under either Section 10(b) or the PSA. First, plaintiff alleged that scienter was proven because the accounting defendants made their misrepresentations while in the role of her personal accountants, and that they therefore acted with the intent or knowledge of their wrongdoing. The court rejected this contention, finding that the defendants' role as plaintiff's personal accountant was not sufficient to establish that they acted with the requisite scienter necessary to state a valid claim for securities fraud. Moreover, plaintiff failed to specifically allege how her investment into the defendants' fund constituted the "sale of a security" within the meaning of either the federal or state acts. Accordingly, the court dismissed plaintiff's state and federal securities fraud claims, with leave to re-plead. (*Beck v. Arcardia Capital Group, Inc.*, 2009 WL 3152184 (E.D. Pa. Sept. 30, 2009))

BROKER DEALER

FINRA Releases Notice Regarding Amendments to Interpositioning Standards

The Financial Industry Regulatory Authority has issued Regulatory Notice 09-58 summarizing its recent amendments to firms' best execution and interpositioning obligations under National Association of Securities Dealers Rule 2320. The amendments, effective as of September 8, apply NASD Rule 2320(a)'s best execution standards to the execution of all customer orders, including those involving interposed third parties. Accordingly, firms interposing a third party between the firm and the best available market for a security must use reasonable diligence to ascertain the best market for the subject security so the resulting price to the customer is as favorable as possible under prevailing market conditions.

Click here to read FINRA Regulatory Notice 09-58.

See also the September 18 edition of *Corporate and Financial Weekly Digest* discussing the Securities and Exchange Commission release approving these amendments.

CBOE to Issue Options Regulatory Fee Credit for Linkage Trades

On October 8, the Chicago Board Options Exchange (CBOE) issued Regulatory Circular RG09-110 announcing that CBOE will begin issuing an Options Regulatory Fee credit for Linkage trades. The Regulatory Circular explains that CBOE has been unable to identify trades resulting from Linkage orders following the implementation of the New Linkage Plan. Linkage orders are excluded from the Options Regulatory Fee, which otherwise applies to all options transactions executed or cleared by a CBOE member that are cleared by the Options Clearing Corporation (OCC) in the customer range. For CBOE to issue a credit, the Linkage routing firms must submit a monthly report containing various data for each trade that was routed via standard "front-door" routing mechanisms and marked to clear by the OCC in the customer range.

Click here to read CBOE Regulatory Circular RG09-110.

PRIVATE INVESTMENT FUNDS

CFTC and SEC Recommend Harmonization of Oversight of Private Funds and Advisors

On October 16, the Commodity Futures Trading Commission and the Securities and Exchange Commission issued a joint report on harmonization of regulation, including recommendations of particular interest to managers of private investment funds. The report indicated that the two agencies would work to harmonize the length of time records must be retained by persons under their respective jurisdictions and inconsistencies in requirements applicable to private funds and commodity pools and their advisors, such as use of performance track records, investor reports and recordkeeping requirements. The report also called for a joint agency enforcement task force to coordinate and develop a process for conducting joint investigations, offer training programs for staff, develop enforcement and examination protocols and eliminate inefficiencies. In furtherance of these goals, the report recommends establishing joint cross-agency training programs for CFTC and SEC staffs, having staff rotate for periods of time between the two agencies and creating a Joint Information Technology Task Force to link information available to the public about persons and issues under each agency, similar to the National Futures Association's Background Affiliation Status Information Center database and the Investment Advisor Registration Depository.

The full report can be found here.

Please see "CFTC and SEC Issue Joint Report on Regulatory Harmonization" in **Financial Services** below.

Please see "SEC's Draft of Five-Year Strategic Plan Includes Plan for Oversight of Asset Management Industry" in **Investment Companies and Investment Advisors** below.

FINANCIAL SERVICES

CFTC and SEC Issue Joint Report on Regulatory Harmonization

The Commodity Futures Trading Commission and the Securities and Exchange Commission issued a joint report on October 16 identifying areas where the agencies' regulatory schemes differ and recommending actions to address those differences, where appropriate. The report includes 20 recommendations to strengthen market and intermediary oversight, enhance enforcement powers and improve operational coordination between the agencies.

The report recommends, among other things:

- legislative changes to facilitate the holding of futures products in securities portfolio margining accounts and the holding of securities options, securities futures products and other securities derivatives in futures portfolio margin accounts;
- legislative changes to provide a process for expedited judicial review of jurisdictional questions regarding new products;
- legislation to enforce uniform fiduciary duty standards on intermediaries (i.e., futures commission merchants, broker-dealers, introducing brokers, investment advisors and commodity trading advisors) providing similar investment advisory services regarding futures or securities;
- efforts to align private fund reporting requirements; and
- review of the SEC approach to cross-border access with the aim of increasing the efficiency of cross-border transactions while maintaining customer protections.

The full report can be found here.

Please see "CFTC and SEC Recommend Harmonization of Oversight of Private Funds and Advisors" in **Private Investment Funds** above.

OTC DERIVATIVES

House Financial Services Committee Approves the OTC Derivatives Markets Act of 2009

On October 15, the House Financial Services Committee approved the Over-the-Counter Derivatives Markets Act of 2009 (Bill) for consideration by the full House of Representatives. In general, the Bill reflects the proposals set forth in a concept paper that was jointly released by Congressmen Barney Frank and Congressman Collin Peterson, Chairman of the House Committee on Agriculture, a few months ago and is similar, but not identical, to the proposal set forth by the Obama administration in August. (See the August 13 Katten *Client Advisory*.)

The Bill differs from the Obama administration proposal in that it attempts to provide more flexibility to end users of derivatives. For example, the Bill makes it clear that end users can use non-cash collateral to meet margin requirements, and would make it less likely that end users would fall within the definition of the term "major swap participant" by excluding persons who hold substantial net positions primarily for hedging, reducing or otherwise mitigating commercial risk.

In addition, the Bill would prohibit swap dealers and major swap participants, collectively, from owning more than 20% of a clearing organization, swap execution facility or exchange, and would require that a majority of the directors of such organizations not be associated with a swap dealer or major swap participant. The Bill would also require the Securities and Exchange Commission, Commodity Futures Trading Commission and prudential bank regulators to issue recommendations on establishing solvency laws for clearinghouses. Further information on the Bill can be found here.

The House Agriculture Committee is also considering draft legislation on OTC derivatives, and a mark-up of this proposed legislation is scheduled for October 21.

CFTC

Senate Confirms Three Nominees as CFTC Commissioners

On October 8, the United States Senate confirmed by unanimous consent Bart Chilton, Jill Sommers and Scott O'Malia as Commissioners of the Commodity Futures Trading Commission. Mr. Chilton and Ms. Sommers had been nominated to serve another term at the CFTC, while Mr. O'Malia had been nominated in September to fill a vacant position. Both Mr. Chilton and Ms. Sommers have served as Commissioners since August 2007. Mr. O'Malia was previously the Minority Clerk of the Senate Subcommittee on Energy and Water Development and served as Professional Staff on the Senate Energy and Natural Resources Committee, where he focused on energy trading and markets.

Each of the newly confirmed Commissioners has expressed support for the Obama Administration's plan to require centralized clearing of over-the-counter derivatives.

A link to the Senate record noting the confirmations can be found here.

INVESTMENT COMPANIES AND INVESTMENT ADVISORS

SEC's Draft of Five-Year Strategic Plan Includes Plan for Oversight of Asset Management Industry

The Securities and Exchange Commission has released a draft five-year strategic plan that outlines its strategic goals for fiscal years 2010 through 2015. Among its proposed initiatives, the SEC aims to (a) foster and enforce compliance with the federal securities laws, (b) establish an effective regulatory environment, (c) facilitate access to the information investors need to make informed investment decisions, and (d) enhance the SEC's performance through effective alignment and management of human, information and financial capital.

In implementing its proposed initiatives, the SEC will continue reviewing how the different regulatory systems that apply to broker-dealers and investment advisors may be harmonized for the protection of investors. To further safeguard investors, the SEC has proposed rules related to custody of assets held by investment advisors (comment period closed July 28) and rules designed to prevent political contributions from influencing the selection of investment advisors to the detriment of public pension plan clients (comment period closed October 6). The SEC also intends to consider amending investment advisor registration forms to elicit information that will be useful to investors in comparing and selecting investment professionals.

In preparation for expected legislation that will require substantially all advisors to hedge funds and private pools of capital to register with the SEC, the SEC intends to use a risk-based program of investment advisor examinations by identifying a target of 33% of investment advisors as high risk at the beginning of every fiscal year, inspecting such advisors on a cyclical basis at least once every three years, and inspecting a target of 9% of all investment advisors each year. The SEC will also aim to eliminate the need for investment advisors and investment companies to submit applications for exemptive relief that are substantially similar to certain previously granted applications by adopting rules codifying the relief. The SEC also intends to survey market participants, such as investment advisors, to determine whether they believe the SEC's regulatory requirements are clear.

The draft strategic plan is available here.

Please see "SEC Announces Five-Year Plan Will Include Revised Rules and Forms for Asset-Backed Securities" in **Structured Finance And Securitization** below.

BANKING

OTS Revises Commercial Lending Guidance and HMDA Guidance

On October 14, the Office of Thrift Supervision (OTS), which regulates the nation's savings banks, revised its Examination Handbook relating to Other Commercial Lending pursuant to RB 37-45.

The OTS, on October 15, pursuant to RB 37-46, also revised its Examination Handbook in connection with the Home Mortgage Disclosure Act and its implementing rule, Regulation C.

Click here to read more on the revisions to Other Commercial Lending.
Click here to read more on the revisions to the Home Mortgage Disclosure Act.

STRUCTURED FINANCE AND SECURITIZATION

House Committee Marks up Legislation, Will Hold Hearings on Securitization and Systemic Risk

On October 14, the House Financial Services Committee (HFSC) held a session to mark up the Over-the-Counter Derivatives Markets Act of 2009, the Consumer Financial Protection Agency Act of 2009, H.R. 3763 (which amends the Fair Credit Reporting Act to provide certain businesses with an exclusion from "red flag" guidelines), and H.R. 3639 (to expedite the Credit Card Accountability, Responsibility and Disclosure Act Reform for Consumer Act of 2009). Information on the mark-up session is available on the HFSC website.

On October 20, the HFSC will hold a full committee hearing entitled "Systemic Regulation, Prudential Matters, Resolution Authority and Securitization." Additional information about the hearing, such as a list of witnesses and prepared testimony, will be posted when it becomes available on the HFSC website.

SEC Announces Five-Year Plan Will Include Revised Rules and Forms for Asset-Backed Securities

The Securities and Exchange Commission issued a comment draft on October 8 titled "Strategic Plan for Fiscal Years 2010-2015," which includes the SEC's mission, vision, values, strategic goals, planned initiatives and performance metrics. The SEC's initiatives for the next five years include revising its rules and forms to improve registration and disclosure requirements for asset-backed securities. The SEC requests comments on its Strategic Plan by November 16. A copy of the Strategic Plan and the notice on the plan are available on the SEC's website.

Please also see "SEC's Draft of Five-Year Strategic Plan Includes Plan for Oversight of Asset Management Industry" in **Investment Companies and Investment Advisors** above.

ANTITRUST

DOJ Begins Investigating Possible Sherman Act Violations by IBM

According to published news reports, the Department of Justice (DOJ) has launched its first large investigation into possible violations of Section 2 of the Sherman Act since the Obama administration entered office. Following last spring's announcement by Christine Varney, head of the Antitrust Division of the DOJ, that the administration would take a closer look at monopoly cases, the DOJ has opened a preliminary investigation into whether IBM has violated Section 2 of the Sherman Act in the market for mainframe computers. The investigation stems from a complaint by the Computer and Communications Industry Association (CCIA), a trade group started over 30 years ago to counter IBM's dominance in the general computer marketplace. CCIA members include Microsoft, Google, Oracle Corporation, Yahoo! and Sun Microsystems.

According to one market researcher, IBM had 85% of the $6.5 billion mainframe computer market last year. The CCIA has complained that IBM has used this monopoly position to keep competitors out of the marketplace by refusing to license its operating system software to rival manufacturers of mainframe hardware. The CCIA asserts that IBM effectively blocked actual and potential competition by tying its operating system software to its mainframe computer hardware. IBM has said that it intends to cooperate with any inquiries from the DOJ.

Read more.

EXECUTIVE COMPENSATION AND ERISA

Section 162(m) Deadline May Be Approaching

In Revenue Ruling 2008-13, the Internal Revenue Service clarified that compensation which would otherwise be deductible under Section 162(m) of the Internal Revenue Code using the "performance-based compensation" exception would not qualify for such exception if the compensation would became payable, regardless of whether the applicable performance goals were satisfied, in the event of the covered employee's involuntary termination (either without "cause" or for "good reason") or retirement.

Prior to this ruling, such involuntary termination and retirement payment provisions were generally thought to satisfy the requirements of the "performance-based compensation" exception. Accordingly, the ruling provides transitional relief (i.e., a grace period) so that it does not apply to plans and arrangements that otherwise satisfy the requirements of the "performance-based compensation" exception and either (i) contain a performance period which begins on or before January 1, 2009, or (ii) were in effect on February 21, 2008.

While most public companies' arrangements would likely have satisfied one of the transitional relief requirements for 2009, it is time to take a look at such arrangements to determine if changes need to made before next year's performance programs are put in place. If amendments are necessary, they should be addressed in a timely fashion to ensure that they are appropriately negotiated with the relevant executives and approved by the compensation committee and/or the board of directors before any deadline passes.

Click here for further information on Revenue Ruling 2008-13.

UK DEVELOPMENTS

FSA Writes to CEOs to Clarify Issues Regarding Significant Influence Functions

On October 12, the UK Financial Services Authority (FSA) sent a letter (the CEO Letter) to the CEOs of its 5,000 relationship managed firms to clarify its approach to approval and supervision of persons performing significant influence functions (SIFs).

In July 2009, the FSA extended its approved persons registration regime to include a wider range of persons performing functions considered to be SIFs at any FSA authorized firm. It also announced that it would place greater emphasis on the role of senior management, including non-executive directors (as reported in the July 31 edition of *Corporate and Financial Weekly Digest*).

The CEO Letter sets out the FSA's competence expectations of SIF holders. It states that the FSA expects senior management to be able to demonstrate their understanding of the inherent risks in the business/markets in which the firm is active and to articulate what plans are in place to mitigate the risk of failure. The letter also emphasizes that "as a critical component of our credible deterrence philosophy" the FSA "will take tough enforcement action" against approved persons where it finds evidence of culpable misconduct or a breach of principles due to competence failures—as well as cases of dishonesty and lack of integrity.

The CEO Letter also explains the approval process for firms' candidates applying to perform SIFs and gives details on the way in which interviews, a newly introduced element of the approval process designed to help the FSA assess the candidate's fitness and propriety, will be used. Interviews will typically take place at the FSA's offices and will last about 90 minutes. They will explore a range of issues including the knowledge, skills and experience that the individual will bring to the SIF role, the individual's view of the main risks facing the firm and the FSA's expectations of the individual in performing the role.

To read the letter in full, click here.

Overseas Banks Commit to FSA Rule on Remuneration Practices

On October 14, the UK Treasury announced that UK subsidiaries and branches of the following eight leading overseas banks—Bank of America Merrill Lynch, Citigroup, Credit Suisse, Goldman Sachs International, JP Morgan Securities Ltd, Morgan Stanley, Nomura and UBS—have confirmed their commitment to the UK Financial Services Authority (FSA) Rule on remuneration practices and the supporting Code, which was published in August and is due to come into force on January 1, 2010 (as reported in the August 14 edition of *Corporate and Financial Weekly Digest*). The eight have also confirmed their full support for the Group of Twenty (G20) agreement, which sets global standards for the implementation of the Financial Stability Board's remuneration principles.

Three EU banks with major London branches, BNP Paribas, Deutsche Bank and Société Générale, have confirmed that they will implement the G20 agreement in accordance with their home regulator and would seek to voluntarily comply with the FSA Rule on Remuneration for their UK-based employees.

To read the full press release, click here.

FSA Fines Firm for Failure to Prevent Employee Fraud

On October 8, the UK Financial Services Authority (FSA) announced that it had fined Seymour Pierce Limited, a stockbroker, £154,000 ($250,000) for a breach of FSA Principle 3 by failing to take reasonable care to organize and control its affairs responsibly and effectively with adequate risk management systems, by failing to establish effective measures to prevent employee fraud in its settlement department.

A former Seymour Pierce employee was able to steal approximately £150,000 ($244,000) in 36 separate transactions over a three-year period. The theft was undetected until, after the employee's dismissal, his replacement pointed out serious accounting discrepancies.

Margaret Cole, the FSA's Director of Enforcement and Financial Crime, commented: "This is a serious failure on Seymour Pierce's part. The frauds were not sophisticated and could have been detected at a much earlier stage if the proper procedures had been in place."

Seymour Pierce agreed to settle at an early stage of the investigation, meaning it qualified for a 30% discount. Without the discount, the fine would have been £220,000 ($358,000). The FSA took into account a number of mitigating factors: Seymour Pierce cooperated fully with the authorities once the frauds had been discovered, instigated internal reviews into the failings and implemented new systems to protect against future failings. The firm also took steps to ensure that its affected clients were fully reimbursed.

Read more.

FSA Impact Assessment Criticizes Proposed AIFM Directive

On October 15, the UK Financial Services Authority (FSA) published an independent impact assessment report on the proposed Alternative Investment Fund Manager Directive which had been carried out on the FSA's behalf by a firm of consultants. The assessment was based on the Directive as originally drafted in April 2009. (For more information on the Directive see the May 1 edition of *Corporate and Financial Weekly Digest* and the May 6 Katten *Client Advisory*.) Its key conclusions were that the Directive would have significant impacts in terms of reduced investor choice and substantial compliance costs for the alternative investment fund industry. Costs would be passed on to investors and would ultimately result in lower returns.

To read the report, click here.

EU DEVELOPMENTS

CESR Chairman Criticizes Draft AIFM Directive

On October 9, it was reported that Eddy Wymeersch, Chairman of the Committee of European Securities Regulators (CESR), had said in an interview that the draft EU Alternative Fund Managers Directive was unworkable and needed to be rethought. Mr. Wymeersch went on to say that he hoped that the European institutions involved in the process "will come forward with something more balanced. It really doesn't work. They have pooled everything together, the scope is absolutely too wide, everything is caught."

Read more.

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