

Key Considerations as FTC, DOJ Significantly Change HSR Premerger Notification Requirements

October 21, 2024

On October 10, 2024, the Federal Trade Commission (FTC) [announced a unanimous 5-0 vote to finalize changes to the Hart-Scott-Rodino \(HSR\) premerger notification program](#), including changes to the HSR form and associated instructions, with the Department of Justice (DOJ) [concurring with the final rule](#). Under the HSR Act, parties to transactions are required to notify the FTC and DOJ of most transactions valued above the size-of-transaction thresholds – currently \$119.5 million – and observe a waiting period before closing. The new HSR rules do not alter the filing thresholds, nor do they change the substantive merger review process – rather, the new rules focus on the premerger notification process and what information must be produced with an HSR filing.

According to the DOJ and FTC, the current HSR form “has not kept pace with the realities of how businesses compete today,” and the changes are meant to address “significant gaps in the information” generated under the current rules. The new HSR rules should go into effect in mid-to-late January 2025, after which any transactions notifiable under HSR must use the new HSR form.¹ The FTC also has announced that it will resume granting “early terminations” of HSR filings once the new rules go into effect, and that it will introduce an “online portal” for third parties to submit comments or complaints about proposed transactions.

The new HSR rules contain dramatic differences from what was [initially proposed by the FTC in June 2023](#), alleviating many of the more onerous requirements. But the new rules retain many other additional reporting requirements not in the current HSR form – many of which are significant and will increase the time required to prepare the HSR filing. Some of the most notable changes include:

- Narrative descriptions of competitive overlaps, supply relationships, deal rationale and ownership structure of the acquiring firm.
- Broader production of “business documents,” including deal-related documents that analyze competition from the “supervisory deal team lead” in addition to officers and directors as well as regularly prepared reports provided to the CEO or the board that analyze competition in any overlap.
- Translation of foreign language documents.
- New disclosure requirements targeting private equity (PE), such as required disclosure of information about minority shareholders, limited partners and other entities apart from the ultimate parent entity.
- New minimum requirements for filing based on a letter of intent or term sheet.

Resources to help navigate the changes

To help companies navigate the changes to the HSR rules, this client alert includes the following additional resources:

- Our FAQ addressing possible queries related to the final rule.
- An [appendix with a table](#) summarizing the changes to the rules, along with implications for filing parties.

FAQ regarding the new HSR rules

When will the new requirements go into effect?

Any reportable transaction filed on or after a soon-to-be announced date that's likely to be in mid-to-late January 2025 must be filed under the new HSR rules.

I'm currently working on a transaction that is likely to be HSR reportable – are there things I need to consider as I negotiate my deal?

Parties currently considering transactions that they may sign after (or shortly before) the new HSR rules go into effect should carefully consider how the new HSR rules may impact certain deal terms. In particular, parties should consider the following:

Timing between signing and filing

Today, parties often require that the HSR filing be made within five or 10 days of deal signing. For simple transactions with no overlaps, the additional time to draft the HSR filing under the new HSR rules should be minimal (i.e., a day or two). However, for more complex transactions or those with competitive overlaps (or supply relationships) it may be prudent to allow for additional time between signing and filing the HSR. In such circumstances, parties may consider allowing for the HSR to be filed "as soon as reasonably practical" after signing – as is often done for foreign filings – or, if including a requirement to file within some number of days, allowing for the HSR filing date to be extended upon mutual agreement by outside counsel.

Filing on a letter of intent

If parties intend to complete a transaction, but the deal signing and the filing of the HSR could slip past the HSR implementation date, parties may consider filing on a letter of intent or term sheet prior to the implementation of the new HSR rules. Doing so could allow the merging parties to file under the less onerous HSR requirements while they finalize the transaction documents.

Document creation

As with all transactions, the merging parties should be cognizant of the documents they are creating in the context of considering a deal, so as not to create documents that could be misinterpreted. In addition, if there is an overlap, the merging parties should identify ordinary course documents or documents that went to the board that may need to be produced as part of the HSR filing – and factor such documents into the substantive antitrust analysis.

Deal lead

Because parties now will be required to produce documents from the "supervisory deal team lead," parties should consider identifying that person early in the process, then letting that person know that they have been identified as the deal team lead and that their documents will need to be produced with the HSR filing under the new HSR rules.

I've heard the new HSR form requires a description of competitive overlaps and supply relationships – what will that entail?

One of the more significant changes to the new HSR rules is that parties must now provide a brief description of the product or

services that both parties currently or plan to offer (the “overlap description”), as well as a description of any vertical supply relationships (the “supply relationship”).

For the **overlap description**, parties must describe current product or service overlaps “based on documents created in the ordinary course of business.” For example, if a merging party’s ordinary course documents list the other party as a competitor for a particular product, then that overlap will need to be described. Filers also must provide sales figures for these products or services from the most recent year and identify customer categories (e.g., retailer, distributor) and the top 10 customers by dollar value.

For the **supply relationship**, filers must describe products, services, or assets (including data) supplied to the other party or to businesses that use such products to compete with the other merging party. Filers must provide sales or purchase figures for the most recent year for any such products, services or assets, as well as the top 10 customers by dollar value.

In addition to the requirement that the merging parties describe the competitive relationship between them, the new HSR rules now will require the parties to describe each strategic rationale for pursuing the transaction. The **strategic rationale** should be based on the rationale(s) “discussed or contemplated” by the filing party’s officers, directors, or employees, and should identify documents produced with the filing that reference such rationales.

Are the HSR requirements the same for buyers and sellers?

No. Under the new HSR rules, the information required from buyers and sellers differs much more than before. Unlike buyers, sellers are not required to describe their ownership structure, identify certain officers and directors, identify foreign jurisdictions where notification is required, or describe other agreements that may exist between the buyer and seller not related to the transaction.

Will certain industries – such as tech, life sciences or defense – be more impacted than others?

The changes are not targeted at any specific industries and should not result in significant differences in how the HSR filing is made based on the filing parties’ industry. However, for certain industries, such as certain **technology segments**, the determination of whether products may be competitive – and will thus require a description of the overlaps and products – can sometimes be more difficult to determine than in traditional manufacturing segments. In these instances, it will be important for clients and outside counsel to work together closely to draft a response regarding any potential substantive overlaps or supply relationships. Additionally, companies in technology markets should take particular care in drafting documents so as not to suggest a potential overlap where one does not otherwise exist, as doing so could require further explanation in the narrative overlap section of the new HSR form.

For transactions in the **defense industry**, if the merging parties have an overlap or supply relationship, each party must identify nonclassified details regarding any contracts or pending requests for proposals (RFPs) with the Defense Department or other US intelligence agencies and produce such information with the HSR filing.

Will I need to produce additional documents under the new HSR rules?

Yes. The new HSR rules will require most parties to produce additional documents as the rules call for the collection of a wider range of documents from an expanded set of people.

First, certain types of competition related documents, so-called Item 4 documents, that currently only need to be collected from officers and directors of the filing parties will now also need to be collected from each party’s “supervisory deal team lead,” defined as an individual who has primary responsibility for supervising the strategic assessment of the deal, and who is not an officer or

director. Expanding the document collection to include Item 4 documents prepared by or for the supervisory deal team lead could significantly expand the volume of documents collected, reviewed and produced with the filing.

Second, the HSR rules will now require parties to produce “all regularly prepared [business] plans or reports [...] that analyze market shares, competition, competitors, or markets pertaining to any product or service of the acquiring person also produced, sold, or known to be under development by the target” that were provided to the CEO within one year of the date of filing. Additionally, all similar plans or reports prepared or modified within the last year that were provided to the board of directors also must be produced.

The new requirements expanding scope documents:

1. Increase the need for parties to be careful in creating internal documents so as not to create documents that could be misleading or misconstrued.
2. Raise the potential for parties to unintentionally miss or fail to produce such documents, thus increasing a filing party’s need to conduct a careful review and search for required documents prior to filing.

Can I still pull and refile? How do the new rules impact that process?

Yes, the acquiring party (buyer) may still pull and refile. It remains the case that the seller does not have an obligation to supplement its initial filing. In addition, the updated HSR rules no longer require updated financials.

As with the previous rules for a pull and refile, the buyer is required to supplement its Item 4 documents. Under the new HSR rules, the types of documents that may count (and people that may need to be collected from) have expanded and will require additional care to ensure all required information is produced when refiling. In addition, a pull and refile will now require the buyer to provide updated transaction agreements, as well as any updated foreign subsidy information.

How much longer will it take to prepare the HSR filing under the new rules?

The time required to complete the HSR filing will vary more significantly by deal than it did under the prior HSR requirements. For deals without a competitive overlap or supply relationship, the new HSR rules will not greatly extend the amount of time required to complete the form. However, the changes could significantly impact larger transactions with multiple overlaps or supply relationships that require substantive descriptions and additional documents. According to the agencies the new HSR rules will increase the time required for a filer to prepare an HSR by 68 hours on average – with an average low of 10 hours for the simplest filings and an average high of 121 hours in transactions involving competitive overlaps or supply relationships.

Do I now need to produce information on certain foreign subsidies?

Yes. As part of the Merger Filing Fee Antitrust Modernization Act, Congress required that merging parties disclose foreign subsidies (or a commitment to provide a subsidy in the future) from any “foreign entity or government of concern.” Parties also must provide a brief description of any such subsidy. The exact definition of “foreign entity or government of concern” refers to other statutes, which may shift as the underlying statutes are amended, but the current definition identifies China, Iran, North Korea and Russia.

What were some of the most onerous requirements from the proposed rule that were not adopted in new HSR rules?

The new HSR rules appear to be a compromise between those who wanted more onerous requirements and those who did not believe significant updates to the HSR process were required. As a result, certain proposals from the original notice of proposed rulemaking were not adopted, including:

- A timeline of key dates for closing the proposed transaction.
- Creating organization charts for the purpose of filing a notification.
- Information about other interest holders.
- Drafts of submitted documents.
- Information about employees and board observers.
- Geolocation information.
- Information on prior acquisitions involving entities with less than \$10 million in sales or revenues or consummated more than five years prior to filing.
- Information about steps taken to preserve documents or use of messaging systems.

Is early termination back?

Yes. The agencies announced that with the new filing requirements, they now will have information to better determine whether a transaction may require a closer look to assess the potential competitive effects. Thus, they are re-implementing early termination, which allows the agencies to clear transactions that do not present any potential concern prior to the expiration of the 30-day waiting period.

I heard about a new portal that will allow the public to file concerns about transactions – what is it and what impact will it have on deals?

In addition to rolling out new HSR filing requirements, the agencies announced a new online portal that allows customers, competitors and the general public to submit comments about a proposed transaction. For transactions that do not present any potential competitive harm, the portal is unlikely to have any impact. Similarly, for those transactions likely to receive a second request, complaints through the portal are unlikely to significantly alter the agencies' investigations. However, it is possible that if customers, trade groups, or even employees complain about a transaction with minimal overlaps or supply relationships, the agencies may request additional information that they may otherwise not have asked for.

Additionally, because the portal appears to allow for anonymous complaints, it is possible that competitors or other market participants may use it to cause delays or raise other issues for merging parties, even if such concerns are not well-founded.

Are HSR filings still confidential?

Yes. HSR filings will remain confidential, and the agencies will not be allowed to disclose filings unless the parties request early termination, and the agencies grant the request. The FTC publishes on its website all transactions that receive early termination.

I don't have a deal currently under consideration, but are there things I should be doing now to prepare for the new HSR rules?

As noted above, the new HSR rules will require the production of additional documents, including certain ordinary course documents and other information on competitive overlaps. Thus, the new HSR rules should serve as a reminder that companies

should maintain good document hygiene and be cautious about creating documents that could be misconstrued or misinterpreted.

Appendix

Key filing requirements: Changes and impacts

This chart highlights some of the key changes from the new HSR rules at a high level, but it does not address every specific change. If you have questions, please reach out to your Cooley's antitrust contact or one of the lawyers listed at the end of this alert.

HSR form request	New requirement/change	Impact for filing parties
Additional merging party details		
Competitive overlap(s)	<p>The new HSR rules require an “overlap description” of current or known products or services (including pre-revenue) that compete with those of the other party.² For known planned products or services, the description can be limited to those documents noted in the business documents submitted with the filing. The overlap description considers sales on a global basis (i.e., is not limited to US sales). For products or services identified in the overlap description, each party is required to provide its most recent year’s sales data (by value) for those products or services.</p> <p>Additionally, each party must describe the categories of customers that purchase or use the overlapping product or services and provide the top 10 customers in the most recent year (based on sales or, for pre-revenue products, projections) and the top 10 customers by customer category (based on sales) in overlapping products or services.</p>	<p>The information requested in the new HSR rules is data that previously was only provided in response to a “voluntary request” by a reviewing agency, should the agency open a preliminary investigation following receipt of the HSR filing. In such cases, the filing parties could voluntarily provide the information to assist the agency with its preliminary review.</p> <p>For those transactions with a competitive overlap, collection of this information will have a material impact on the time needed to prepare the HSR filing.</p>

<p>Supply relationship</p>	<p>The new HSR rules require a description of those products, services or assets representing at least \$10 million in revenue that are (i) sold to or purchased from the other party or (ii) sold to or purchased from a business that competes with the other party or a business that uses such products as an input to compete with the other party.³ If such a “supply relationship” exists, for each such product, the filing party is required to provide sales or purchase data for its most recent year (by value) and a list of the top 10 customers or suppliers.</p>	<p>The information requested in the new HSR rules is data that was only provided in response to a voluntary request by a reviewing agency, should the agency open an investigation following receipt of the HSR filing.</p> <p>For those transactions with a supply relationship, collection of this information will have a material impact on the time needed to prepare the HSR filing.</p>
<p>Officers and directors</p>	<p>If an identified overlap or supply relationship is indicated in the overlap description or supply relationships description, the new HSR rules require that for all entities within the acquiring person that develop, market, or sell products or services that overlap with the target, the acquiring person must list the officers and directors for that entity that also serve as an officer or director of another entity that derives revenues in the same North American Industry Classification System (NAICS) codes as the target.⁴</p> <p>In addition, the acquiring entity must provide similar information for any entities it directly or indirectly controls or is controlled by, and any entity within the acquiring person that has been or will be created for the transaction.</p>	<p>The information requested is intended to alert the agencies to potential interlocking directorate concerns – scenarios where the same person serves as an officer or board director of two competing entities – as well as potential information-sharing concerns.</p> <p>This new request could raise issues in certain transactions that may not have been highlighted in past HSR filings. Thus, the analysis of potential interlocking directorates and other information sharing issues may become more relevant under the new HSR rules, even for transactions that do not pose a substantive antitrust risk.</p>
<p>Existing agreements</p>	<p>The acquiring person must identify whether it currently has, or had within one year of filing, certain contractual agreements with the target and identify (via a checkbox) the type of agreement</p>	<p>For acquisitions in which the parties have existing agreements, this will have a limited impact on the time needed to prepare the HSR filing. Depending on the type of agreement(s) and the</p>

	(via a checkbox) the type of agreement, such as a noncompetes, master service agreements, leases, license agreements, operating agreements, supply agreements, or “other” types of agreements in place.	the type of agreement(s) and the proposed transaction, however, this requirement may raise questions about the deal efficiencies or other substantive deal concerns.
Business of the acquiring person	The acquiring person must provide a brief description of its business operations.	The addition of this requirement is purportedly to allow the agencies to better determine if the acquiring person may have other lines of business that may be related to the operations of the target.
Minority interest holders (previous HSR form Item 6(b))	The new HSR rules expand the requirement, particularly for the acquiring person, for disclosing minority shareholders, investment funds, including increased disclosures for limited partnerships, and entities that hold indirect stakes in either the acquiring or acquired parties. ⁵	As with the new officer and director requirement, this expansion around minority interests reflects the FTC’s increased focus on private equity transactions. While the collection of this information is unlikely to materially impact the time needed to prepare the HSR Filing, the information could result in greater scrutiny of transactions where potential interlocking directorate or information sharing concerns could arise post-transaction.
Geographic overlaps (previous HSR form Item 7)	The new HSR rules require filing parties to identify the entity or entities with US operations in the overlapping NAICS codes. Additionally, filing parties must disclose any “doing business as” names used by these entities with US operations in the overlapping NAICS codes within the past three years.	The current HSR form requires certain geographic information related to overlapping products and services, and the new HSR rules expand on this to require the parties to identify the specific entities generating revenue in connection with those products and services.
Prior acquisitions (previous HSR form Item 8)	Both parties must report relevant acquisitions made within the previous five years if the acquired entity had net sales or total assets of \$10 million in the year prior to its acquisition. The reporting obligation is limited to transactions where a filing party generated revenue in	The update is similar to the existing rule, but previously only the acquiring person needed to identify certain prior acquisitions. Additionally, the new rule expands the description beyond just NAICS overlaps and eliminates certain exemptions from the prior rules.

	where a filing party generates revenue in a specified six-digit NAICS industry code overlap or offered a product or service as described in the overlap description.	Exemptions from the prior rules:
Certain foreign subsidies	Each filing party must now disclose whether it has received in the past two years prior to the HSR filing any subsidy (or a commitment to provide a subsidy in the future) from any “foreign entity or government of concern” and must also provide a brief description of any such subsidy. Current foreign entities of concern are China, Iran, North Korea and Russia.	<p>This change implements provisions of the Merger Filing Fee Modernization Act adopted by Congress in December 2022.</p> <p>For those transactions where such subsidies may be at issue, the collection of this information could have a moderate impact on the time needed to prepare the HSR filing. The exact impact such subsidies may have on the antitrust review will be highly transaction-specific.</p>
Defense or intelligence contracts	In any area where the parties have a described overlap, NAICS code overlap(s) or supply relationship, each party must identify nonclassified details regarding pending requests for proposals from the Defense Department or certain US intelligence agencies for which it has submitted a proposal, or any awarded procurement contracts it has received from the Defense Department or certain US intelligence agencies, if the value of the proposal or contract exceeds \$100 million.	<p>This provision is intended to expedite outreach to those agencies related to the reported transaction. For parties engaged in providing products or services to the defense or intelligence industries, collection of these documents will have a moderate impact on the time needed to prepare the HSR filing, but the disclosures could increase the agency’s scrutiny of the transaction. Select 801.30 transactions are exempt from this requirement.</p>
Additional acquisition details		
Strategic rationale	Both parties are required to identify and explain the strategic rationale for the transaction discussed or contemplated by the filing person or any of its officers, directors, or employees. Each party must also identify each document produced in the filing that confirms or discusses the stated rationale.	<p>For certain transactions, the requested information will require a moderate amount of time to draft to ensure the description accurately reflects the party’s rationale for entering the transaction. It is likely that in most transactions, the seller’s rationale will be more straightforward than the buyer’s</p>

		<p>rationale.</p> <p>The strategic rationale may be an important consideration for the agencies as they assess potential competitive effects from transactions with overlap descriptions or supply relationships. Thus, parties should take particular care with documents that may discuss deal rationale.</p>
Related transactions	<p>The new HSR rules require that if the transaction has related HSR filings, the parties must identify the basis of the related filing (via checkbox), such as backside transaction, joint venture, consolidation or other circumstances mandating the filing. Additionally, parties must provide the filer names, transaction numbers, or other information necessary to identify and connect the related filings.</p>	<p>Previously parties only needed to indicate whether there were any related transactions, but did not need to identify the basis for the related filing or the party names.</p> <p>The collection of this information will have limited impact on the time needed to prepare the HSR filing.</p>
Transactions subject to international antitrust notification	<p>The acquiring person will now need to indicate whether a non-US antitrust or competition authority has been or will be notified of the transaction, and identify any such authorities as well as the timing of such notifications.</p>	<p>Previously, parties only needed to provide this information on a voluntary basis. The collection of this information will have limited impact on the time needed to prepare the HSR filing. However, it may result in additional scrutiny of the transaction.</p>
Additional document requirements		
Transaction-specific agreements (current HSR form Item 3(b))	<p>In addition to the primary transaction agreement and any noncompete agreements, all exhibits, schedules, side letters or other agreements negotiated in conjunction with the transaction must now be provided.</p>	<p>Certain qualifying transactions described in Section 801.30 of the HSR rules (“select 801.30 transactions”), such as the acquisition of shares on a public exchange by a minority shareholder, are exempt from this requirement.</p>

<p>Filing on a letter of intent</p>	<p>If parties intend to file on a “barebones” letter of intent (LOI), they will need to provide a supplemental document, such as a draft of the proposed agreement or term sheet, that provides more detail regarding the deal terms. The HSR form instructions indicate that the supplemental document should provide some combination of various material terms, such as the identity of the parties, the transaction structure, the voting securities, noncorporate interests or assets being acquired, and the purchase price.</p>	<p>Currently LOIs are sufficient if they are executed by both parties and simply indicate that the parties have the good faith intention to consummate a transaction. The new HSR rules require that parties provide a separate document if the LOI does not provide sufficient information. This may have a material impact on transactions in which parties, for timing reasons, plan to file on an LOI.</p>
<p>Transaction-related documents (current HSR form Items 4(c) and 4(d))</p>	<p>The new HSR rules expand the scope and type of transaction-related documents that must be produced under Item 4 of the current HSR form, including:</p> <ul style="list-style-type: none"> ■ Expansion of Item 4 documents to include materials prepared by or for the “supervisory deal team lead,” defined to be “the individual who has primary responsibility for supervising the strategic assessment of the deal” (and who is not an officer or director). ■ Production of drafts of transaction-related documents if the draft was shared with any member of the board of directors (or similar body). 	<p>The expanded collection of Item 4 documents will increase the time needed to prepare the HSR filing – and will almost certainly increase the number of documents produced with the HSR filing.</p> <p>In addition, with the expanded scope of required documents, the potential for parties to miss or fail to produce such documents increases. Thus, under the new HSR rules, parties will need to be particularly careful to ensure they collect all required information.</p>
<p>Plans and reports</p>	<p>The new HSR rules require parties to produce all regularly prepared plans and reports that were provided to the CEO of the filing party or its controlled entities, prepared or modified within one year the filing, that analyze competitive factors pertaining to any product or service that the other party also produced, sold, or is known to be under development by the other party, as identified in the overlap description.</p>	<p>While it can take significant time to prepare and provide translations of non-English documents, parties already often provide such translations voluntarily to expedite review of the HSR filing. This change may affect the time needed to prepare the HSR filing for those transactions involving foreign language documents, particularly given the wider scope of documents that must be provided with the HSR filing.</p>

	<p>Additionally, parties will need to produce all plans and reports that were provided to the board of directors (or similar body) of the filing party or its controlled entities that meet the above criteria.</p>	<p>This requirement does not apply to select 801.30 transactions or if there is no identified overlap in the overlap description.</p>
Translations	<p>Each party will need to provide English translations of any foreign language documents accompanying the filing.</p>	<p>While it can take significant time to prepare and provide translations of non-English documents, parties already often provide such translations voluntarily to expedite review of the HSR filing. This change may affect the time needed to prepare the HSR filing for those transactions involving foreign language documents, particularly given the wider scope of documents that must be provided with the HSR filing.</p>
Transaction diagram	<p>The new HSR rules require the acquiring person to provide a diagram of the transaction, if one exists.</p>	<p>While this was not previously required, this will have a limited impact on the time needed to prepare an HSR filing. The acquiring party is not required to create such a diagram if one does not already exist. However, the production of the diagram could result in questions regarding related or intermediary transactions. Select 801.30 transactions are exempt from this requirement.</p>
Ownership structure	<p>If the acquiring person is a fund or master limited partnership, it must provide any existing organizational chart showing the relationship of entities that are affiliates or associates to the acquiring party.</p>	<p>While this was not previously required, this should have limited impact on the time needed to prepare an HSR filing, since the acquiring person is not required to create a diagram if one does not already exist.</p> <p>Production of organizational structure could, however, result in additional questions from the reviewing agency if it wants to explore the holdings of or relationships with affiliates and associates.</p>

Notes

1. The effective date in mid-to-late January 2025 assumes that there are no legal challenges to the new HSR rules that delay implementation.
2. Select 801.30 transactions, such as the acquisition of shares on a public exchange by a minority shareholder, are exempt from this requirement.
3. As with the overlap description, select 801.30 transactions are exempt from this requirement for supply relationships.
4. The acquired person and acquired entity are not subject to these reporting requirements.
5. For limited partnerships that are minority investors, previously the entity only needed to disclose the identity of the general partner; however, the new HSR rules require the acquirer to disclose the identity and percentage holding of limited partners for the acquiring party and certain described related entities (the “covered” entities) that have or will have “the right to serve as, nominate, appoint, veto, or approve board members, or individuals with similar responsibilities, of any covered entity, or of the general partner or management company of a covered entity.” Such disclosure also is required by the acquired entity, but only if the limited partner will continue to hold an interest in the acquired entity or any entity within the acquired entity as a result of the transaction.

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