

May 10, 2024

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: File No. S7-12-23; Conflicts of Interest Associated with the Use of Predictive Analytics by Broker-Dealers and Investment Advisors, Release No. 34-97990 (the “Proposal”)

Dear Ms. Countryman,

We are officers of the International Institute of Law and Finance (“IILF”),¹ a non-profit, non-partisan institution dedicated to promoting independent research, academic papers, teaching, discussion, and public policy initiatives in law and finance. We have drafted and submitted numerous comment letters on various of the Commission’s proposed rules, with the objective of putting academic views and research in front of the Commission.² Our comment letters have been cited extensively in the Commission’s adoption of final rules.³ We thank the Commission for the opportunity to comment on this Proposal.

We write now to summarize what we believe are appropriate paths forward. We commend the Commission and Staff for providing valuable insights and asking important questions about the Proposal. We have carefully considered issues related to the Proposal, both as professors who teach data science and as researchers who examine practices covered by the Proposal. As described below, we also organized a panel of experts to address the Proposal and provide constructive advice to the Commission on April 30, 2024, and we encourage the Commission and Staff to view this discussion, which is available publicly.⁴

We believe **there are two reasonable paths forward: (1) abandon the Proposal, or (2) offer guidance** based on certain aspects of the Proposal, with several clarifications. To the extent the Commission nevertheless decides to proceed with a rule, we believe a reproposal is necessary. In addition, we believe the Commission already has achieved many of the objectives of the Proposal,⁵ and could further those objectives by providing guidance with respect to certain

¹ See <https://iillawfin.org> for a description of our mission and our role.

² As described more fully on the IILF website, we receive compensation for our IILF activities, including drafting this comment letter and the comment letters described herein.

³ See, e.g., Final Rule: Modernization of Beneficial Ownership Reporting, Oct. 10, 2023 (citing IILF comment letters dozens of times), <https://www.sec.gov/files/rules/final/2023/33-11253.pdf>.

⁴ See Predictive Data Analytics and the Law, Berkeley Boost, Apr. 30, 2024, <https://executive.law.berkeley.edu/boosts/predictive-data-analytics-and-the-law>.

⁵ We note that Chair Gensler has given speeches that have constructively furthered certain objectives related to the use of technology, including artificial intelligence. See, e.g., Chair Gary Gensler, Prepared

aspects of the Proposal, articulating in particular how the Commission’s current rules and approach already cover conduct related to the Proposal. The Proposal and related commentary already have been influential, and we believe the Commission could accomplish important policy objectives without expansive final rules.

For the benefit of the Commission, and the public, IILF has provided links on our website to what we believe are all comment letters submitted by academics on recent rule proposals.⁶ Comment letters from law and finance professors have been an important part of the Commission’s comment process in the past, and research by academics is often cited in final rules. Our website is intended to make these comment letters more accessible for regulators, commentators, and the public. In our opinion, the academic comment letters submitted in response to the above Release are broadly consistent with the views we express here in this letter. Consistent with our mission, one of our goals is to help present all academic research to the Commission.

We recognize that, if the Commission elects to abandon the Proposal, no further comment is necessary. However, if the Commission decides to repropose certain aspects of the proposal, or to the extent Commissioners or Staff seek to provide guidance to advise and inform investors and other market participants, or through speeches or otherwise, we seek to be constructive here by describing areas of the Proposal that we believe could be improved. These areas are: terminology, purpose, guidance, legal authority, data and economic analysis, and enforcement. We address each in turn.

Terminology

First, we note that the Proposal uses terminology in broad and imprecise ways that have raised significant questions from a wide variety of commentators from diverse perspectives.⁷ We believe the Commission, in any reproposal or guidance, should be more precise about the meaning of several terms, as described below. At the outset, we emphasize that, although we sympathize with many of the Commission’s concerns about the potential abuse of technology, we believe it is important to avoid categorical assumptions about terminology related to the

Remarks before the Yale Law School, Feb. 13, 2024 (addressing various conflicts and risks), <https://www.sec.gov/news/speech/gensler-ai-021324>.

⁶ See <https://iilawfin.org/sec-comments>. The comments that we have been involved in drafting received overwhelming support from law and finance academics, and the signatories included many of the leading researchers in the relevant fields. See, e.g., 85 Law and Finance Professors, Comment Letter on the Swaps Proposal (Mar. 21, 2022), <https://www.sec.gov/comments/s7-32-10/s73210-20120780-272960.pdf> (signed by 85 academics, including authors of many of the leading articles in the relevant fields); 65 Law and Finance Professors, Comment Letter on the Beneficial Ownership Proposal (Apr. 11, 2022), <https://www.sec.gov/comments/s7-06-22/s70622-20123313-279608.pdf> (signed by 65 academics, including authors of many of the leading articles in the relevant fields).

⁷ See, e.g., Predictive Data Analytics and the Law, <https://executive.law.berkeley.edu/boosts/predictive-data-analytics-and-the-law> (addressing questions about the meaning of terms from a diverse group of experts, including Professor Christina Sautter, an academic who writes about a range of corporate governance and investor education issues; Hardy Calcott, a lawyer who advises a range of individuals and institutions and was in a senior Staff position at the Commission; and Mitra Surrell, who has held a variety of private sector positions).

design and educational features of technology, much of which we and other academics in various disciplines use in teaching and research, and which we and many others believe increasingly will be important to the education of investors and in efforts to help investors make better decisions.⁸

Specifically, we caution the Commission about generalizations regarding “game-like” features of technology and “gamification.”⁹ As with other definitions, terms such as “game-like” and “gamification” can encompass a wide range of practices, some potentially problematic but others beneficial. Unfortunately, the Proposal does not define these terms, but instead asserts that they include, for example, “behavioral prompts, differential marketing, [and] game-like features (commonly referred to as ‘gamification’).”¹⁰ The Proposal includes assertions about gamification being associated with potential conflicts of interest, such as “business practices that could place the firm’s or an associated person’s interest ahead of investors’ interests,” but it does not substantiate these assertions with evidence or demarcate which types of “gamification” are likely to be associated with conflicts of interest in a problematic way.¹¹ One recent study,¹² cited in the Proposal for the proposition that firms may use technology to exploit investor biases to place the firm’s interest ahead of investors’ interests,¹³ concluded with three recommendations, the first two of which called for collecting more data, and the third of which recommended “exploring positive impacts of gamification and other behavioural [sic] techniques to increase investing knowledge and level of expertise.”¹⁴ We encourage the Commission to take greater care with respect to the use of “gamification” and similar terms, as well as related conclusions, in any reproposal or future work related to the Proposal.

Another term, “covered technologies,” is defined broadly in the Proposal to include any analytical, technological, or computational function, algorithm, model, correlation matrix, or similar method or process that optimizes for, predicts, guides, forecasts, or directs investment behaviors or outcomes. We believe the Commission should abandon this language, and instead

⁸ See Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Educated Retail Investor: A Response to “Regulating Democratized Investing,”* 83 *Ohio State Law Journal Online* 205 (2022); see also Comment Letter of Sergio Alberto Gramitto Ricci & Christina M. Sautter, Oct. 9, 2023, <https://www.sec.gov/comments/s7-12-23/s71223-269659-651462.pdf>.

⁹ See Proposal, at 16, 144. For example, the Proposal cites a study by Newall & Weiss-Cohen for the proposition that “some stock trading apps appear to follow strategies employed by some firms in the gambling industry to encourage frequent repeat betting.” See *id.* at 147-48. But that study emphasized the definition of a “gamblified investment product” as one “that leads most investors to lose, that attracts people at risk of experiencing gambling-related harm, and that utilizes product design principles from gambling (either by encouraging a high frequency of use or by providing the allure of big lottery-like wins).” Philip W. S. Newall & Leonardo Weiss-Cohen, *The Gamblification of Investing: How a New Generation of Investors Is Being Born to Lose*, 19 *International Journal of Environmental Research and Public Health*, Abstract (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9105963/>. That definition is only a subset of business practices addressed by the Proposal.

¹⁰ See Proposal, at 16.

¹¹ See Proposal, at 144.

¹² See Ontario Securities Commission, Staff Notice 11-796, *Digital Engagement Practices in Retail Investing: Gamification and Other Behavioural Techniques* (2022), https://www.osc.ca/sites/default/files/2022-11/sn_20221117_11-796_gamification-report.pdf.

¹³ Proposal, at 147-48.

¹⁴ See Ontario Securities Commission, Staff Notice 11-796, at 4.

explain more precisely the types of technology that are of concern. We do not believe the Commission should be concerned about the use of calculators and spreadsheets, for example, nor do we think that a factual presentation of stock prices not selected for any specific user—such as any person may view already on Yahoo! Finance—constitutes “artificial intelligence” within any reasonable understanding of that term. Accordingly, it would be helpful to understand more precisely which technologies the Commission finds most problematic. As noted below in our discussion of enforcement, the Commission’s enforcement actions suggest that the practices regarded as problematic are more narrowly circumscribed than the Proposal’s definition, and already are being addressed by the excellent Division of Enforcement staff.

Likewise, “investor interactions” is defined broadly to include engagements and communications that encompass activity well beyond what we believe is, or should be, the primary source of concern in the Proposal. We believe the Commission should abandon the term “investor interactions,” and instead explain more precisely what types of interactions are of concern. As with other broad terms in the Proposal, it would be helpful for the Commission to articulate examples of the types of technologies and interactions that are viewed as potentially problematic, and conversely which types are not.¹⁵

What constitutes a “recommendation” in the Proposal also is unclear. The meaning of “recommendation” has proven difficult to clearly delineate, in part because questions about whether a communication with an investor reasonably could be viewed as a call to action and reasonably would influence an investor to trade a particular security or group of securities are more amenable to a common law-style facts-and-circumstances analysis than a precise definition. The Proposal does not contain any reliable economic analysis or study that would support classifying digital engagement practices as recommendations in some circumstances, but not others, particularly based on whether a practice “encourages” or “affects” investors in ways that might not be in their best interests.¹⁶ Nor does the Proposal cite any academic literature or body of evidence supporting such a delineation or re-definition.

Finally, although the Proposal is focused on “conflicts of interest,” there is a lack of clarity about what is meant by that term as well. Although the Introduction to the Proposal is framed in terms of conflicts of interest that result from new data analytics technology, it is unclear in the remainder of the Proposal which aspects of new rules are meant to address which types of potential conflicts of interest, as opposed to other potential harm to investors. Most fundamentally, the Proposal’s new approach to conflicts of interest contrasts sharply with the

¹⁵ Likewise, the use of terms such as “eliminate,” “neutralize,” and “mitigate” creates ambiguity and uncertainty for market participants, including investors. We recognize the potential for ambiguity and vagueness to play a positive policy role in some regulatory contexts, particularly when ambiguity and vagueness serve to deter problematic activity, but we believe the areas of conduct covered in the Proposal are areas where the Commission could more precisely articulate the boundaries of such terms, or follow an approach that does not rely on these terms and instead continues along the “common law”-oriented, principles-based approach of prior regulation, including Regulation Best Interest.

¹⁶ See Recommendation of the SEC Investor Advisory Committee’s Disclosure Subcommittee Regarding Digital Engagement Practices, Feb. 2024 draft, at 14-16 <https://www.sec.gov/files/20240214-draft-recommendation-use-dep.pdf>. (“IAC 2024 Draft”) (suggesting that the Commission clarify the definition of “recommendation” in this way).

decades-long disclosure-focused approach the Commission has followed, and the notion of “conflicts of interest” articulated as that term is defined in the Proposal is broader than the notion in historical approaches, as are the proposed requirements related to conflicts of interest.

Purpose

Second, and relatedly, similar problems arise from the imprecision in the Proposal’s articulated purpose. We believe it would be helpful for the Commission, in any reproposal or other work related to the Proposal, to articulate a specific purpose relevant to each aspect of any reproposal or other work, and then explain how the proposed rules are tailored to that purpose.

For example, the Commission could clarify in any reproposal the extent to which new rules would be directed at investor relations. Likewise, any reproposal or other efforts could clarify which specific categories of “covered technologies” are being targeted. As noted above, any reproposal would benefit from clarity about which portions of the rules have the purpose of addressing conflicts of interest. In sum, we believe any future efforts would benefit from a clearer statement of the Commission’s purpose or purposes. Simply put, we believe the Commission should state, precisely, what its objective is in adopting particular aspects of the Proposal.

With respect to purpose, we agree in general terms with the recent recommendation by the SEC Investor Advisory Committee’s Disclosure Subcommittee¹⁷ that the Proposal would benefit from clarification, particularly given the path the Commission has followed in arriving at the Proposal. As the IAC 2024 Draft describes, the Commission began its efforts related to this aspect of technology and investing with a focus on “digital engagement practices,” then addressed various issues related to “artificial intelligence,” (“AI”) and finally turned to “predictive data analytics” in the Proposal.¹⁸ The evolution and breadth of the various Commission regulatory approaches related to technology over time have led to confusion about the purpose(s) of the Proposal. Additional guidance would be helpful in stripping apart the various purposes of any reproposal or other action, so that it is clearer than it was in the Proposal which purposes are being addressed.

As noted above, the Proposal articulates “conflicts of interest” concerns upfront as a principal purpose. However, many of the specific aspects of the proposal are arguably unrelated to conflicts of interest. Moreover, the Proposal does not address the extent to which the disclosure of conflicts of interest, as opposed to substantive restrictions related to conflicts, could satisfy this purpose.¹⁹ Any reproposal could more specifically tailor proposed rules to an articulated “conflicts of interest” purpose, and then set forth the rationale for particular aspects of the reproposal.

Likewise, any reproposal could benefit from a sharper demarcation between purposes related to broker-dealers versus investment advisers, rather than grouping them with respect to

¹⁷ See IAC 2024 Draft.

¹⁸ See *id.* at 1-3.

¹⁹ The topic of disclosure was discussed during the Berkeley Boost webinar. See Predictive Analytics and the Law, Apr. 30, 2024, <https://executive.law.berkeley.edu/boosts/predictive-data-analytics-and-the-law/>.

various aspects of the proposed rules. We believe some of the confusion and questions in the Proposal have arisen from the application of the rules to both categories of market participants.

Guidance

Third, the Commission could eschew the substantive restrictions of specific rules of conduct in favor of broader, principles-based guidance related to specific categories of market behavior. We have recommended such guidance with respect to other proposed rules, and we applaud the Commission for following these recommendations.²⁰ We believe guidance has the potential to achieve the Commission's objectives in many complex areas of practice and regulation, where it can be difficult or impossible to describe specifically the line between prohibited and acceptable conduct.²¹

Specifically, we believe any guidance from the Commission should emphasize how the Commission's prior releases, including the Investment Adviser fiduciary duty interpretation²² and Regulation Best Interest,²³ already address many of the conflicts of interest that the Proposal discusses, and have created a robust and flexible regulatory framework. In particular, we note that the IAC 2024 Draft discusses these existing requirements and urges the Commission not to abandon them.²⁴ We believe that market participants overall will take note of any guidance, and will not dismiss it as unenforceable, particularly when the guidance is backed by an existing regulatory framework, as it is here. Our experience with prior guidance from the Commission is that, although some market participants raised arguments about guidance in these other areas as well, in fact the guidance has influenced conduct, and clarified the extent to which the Commission would apply and enforce existing rules.²⁵

A guidance approach also would permit the Commission to address certain potential consequences of the rules set forth in the Proposal. For example, the Proposal arguably would negatively impact the education of investors, and could deter practices that would inform investors about new approaches or strategies that could be of significant benefit. The Commission could include in any guidance an explanation of the importance of investor education, and indicate that it favors practices designed to educate investors, even if such

²⁰ See, e.g., Final Rule: Modernization of Beneficial Ownership Reporting, Oct. 10, 2023, at 113-15, 128-39 (providing guidance as to aspects of the beneficial ownership proposal, without adopting final rules), <https://www.sec.gov/files/rules/final/2023/33-11253.pdf>.

²¹ As noted above, the Proposal does not cite academic literature or empirical evidence supporting a re-definition of "recommendation" to include communications to investors that "encourage" or "affect" investors. See IAC 2024 Draft, at 14-16. Before adopting such a re-definition, or even providing any guidance regarding such a re-definition, we believe the Commission would need to undertake additional economic and data analysis, including the topics we describe in our data discussion section.

²² See Securities and Exchange Commission Interpretation of the Standard of Conduct for Investment Advisers, Advisers Act Release No. 5248 (Jun. 5, 2019).

²³ See Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Release No. 86031 (Jun. 5, 2019).

²⁴ See IAC 2024 Draft, at 7-8.

²⁵ See, e.g., Final Rule: Modernization of Beneficial Ownership Reporting, Oct. 10, 2023 (providing guidance under an existing regulatory framework), <https://www.sec.gov/files/rules/final/2023/33-11253.pdf>.

practices might potentially be covered by some interpretation of practices covered by the language in the Proposal. Likewise, Commission guidance could make clearer how its regulatory approach in the future could vary depending on new information and data, as well as the path of technological development, and the Commission could indicate specific areas it intends to study (or that it encourages outside academics to study) related to topics described in the Proposal. We believe any regulatory approach covering the areas targeted by the Proposal would benefit from the flexibility and openness of an approach that provided guidance based on research, including empirical analyses by the Commission and the sophisticated economists and staff at the Division of Economic and Risk Analysis.²⁶

Legal Authority

Fourth, questions have been raised about the sources of legal authority for specific rules advocated in the Proposal, such as Proposed Rule 15l-2 under the Securities Exchange Act of 1934 and proposed Rule 211(h)(2)-4 under the Investment Advisers Act of 1940. We believe any reproposal or other future work should address and explain the bases for any action by the Commission. A number of commentators have questioned whether Section 211(h) of the Investor Advisers Act of 1940, which relates to sales practices, provides adequate authority for the Proposal.²⁷ Any explanations of statutory authority would be especially important in any reproposal, given the context of legal challenges to other Commission rules, the bases of which could be included in any challenges to the legal authority of such a reproposal.

Some commentators, including during the recent webinar program, also have raised First Amendment concerns about certain aspects of the Proposal, including the “eliminate” and “neutralize” requirements.²⁸ We do not express a view about potential free speech challenges to the Proposal, or other regulation. Instead, our point here is that any reproposal should address these concerns about legal authority directly. One important consideration for the Commission is that a successful challenge to a reproposal based on free speech grounds could negatively impact a wide swath of Commission rules, including rules that go far beyond the regulation of predictive data analytics.

Accordingly, our view is that the Commission should be precise and direct in any reproposal or other future work about the legal authority underlying its efforts. To the extent there is not strong legal authority for any portion of a repropose predictive data analytics rule,

²⁶ Many of the line-drawing questions about predictive data analytics are challenging, and require precise and reliable economic analysis and study. We encourage the Commission to communicate to market participants its seriousness about such analysis and study, particularly with respect to potential distinctions among categories of recommendations, and the extent to which recommendations result from conflicts of interest. We believe investors, academics, and market participants would be particularly focused on any press releases or speeches related to such distinctions as part of any reproposal or other future work, including the extent to which the Commission’s future approach to such distinctions will be based on economic analysis and study. See, e.g., Chair Gary Gensler, Statement on Conflicts of Interest Related to Uses of Predictive Data Analytics, Jul. 26, 2023 (describing such distinctions, including those based on color), <https://www.sec.gov/news/statement/gensler-statement-predictive-data-analytics-072623>.

²⁷ See Predictive Data Analytics and the Law, <https://executive.law.berkeley.edu/boosts/predictive-data-analytics-and-the-law/> (comments by Hardy Calcott at minutes 53-54).

²⁸ See *id.*

and the Commission elects not to abandon this portion, the guidance approach suggested above could be preferable to any reproposal as a way to achieve the Commission’s objectives without incurring broad legal risk.

Data and Economic Analysis

To the extent the Commission decides not to abandon the Proposal, and instead attempts to repropose rules or formulate guidance, we have several suggestions of important areas of economic analysis and data gathering that the Commission should undertake. We believe any reproposal or other future action should address the following three areas of analysis in particular.

First, the Commission should assess how broker-dealers and investment advisers currently use technology, particularly AI, to interact with retail customers. Relevant topics and questions include: How many registered broker-dealers and investment advisers currently use AI in their interactions with retail customers, and how do they use such technologies? Conversely, how do retail investors use AI technology and information transmitted using AI technology? What evidence or data support a conclusion that the disclosures envisioned by any reproposal or guidance would help retail investors understand the purpose and function of various technologies, including AI technology, compared to their current level of understanding? To what extent is technology, including AI technology, used to educate retail investors, improve returns, lower costs, mitigate risk, enhance market efficiency, or enhance customer service?

Second, the Commission should assess the trading behavior of retail investors, including basic information required to draw conclusions about the costs and benefits of any reproposal. Relevant topics and questions include: How often do retail investors trade, and what is the distribution of retail investor purchases and sells, both in terms of number of trades and dollar value periodically (e.g., monthly and annually)? How much have trading commissions paid by retail investors changed, both over time and as a result of the technologies any reproposal would seek to regulate?

Third, the Commission should assess the “covered technologies” it seeks to regulate in greater detail. Relevant topics and questions include: Which “covered technologies” would a reproposal apply to? How frequently does the Commission estimate that “covered technologies” would require updates, changes, and/or new registrations? How much time and cost would be involved in assessing, eliminating, or neutralizing any potential conflicts of interest posed by a “covered technology”? How many “covered technologies” are likely to be implicated by a typical retail trade order? Which “covered technologies” employ AI, and how do they do so?

Enforcement

Since the Proposal was published, the Commission has engaged in significant enforcement activities related to certain aspects of the Proposal. For example, on March 18, 2024, the Commission announced settled charges against two investment advisers for making

false and misleading statements about their purported use of AI.²⁹ We applaud the Division of Enforcement, and Director Gurbir Grewal, both for bringing enforcement actions in areas related to the Proposal, and for articulating the importance and relevance of these actions.³⁰ We also note that recent enforcement actions follow the more traditional disclosure-focused approach the Commission has followed for decades, in contrast to the new substance-focused approach advocated in the Proposal.

There is a robust and wide-ranging policy and academic debate about the role of enforcement in regulation,³¹ and we believe recent enforcement actions are an example of how the Commission's approach to enforcement can obviate the need for substantive rulemaking. The IAC 2024 Draft also is consistent with our recommendation regarding enforcement, and we agree with the IAC 2024 Draft that abusive, misleading, and manipulative behavior that the Proposal addresses as problematic already is prohibited and violates established anti-fraud provisions of the securities laws as well as related rules.³² Indeed, the Commission's enforcement actions demonstrate that existing law already prohibits such behavior.

Finally, we point to an important, and in our view especially effective, speech given by Division of Enforcement Director Grewal on April 15, 2024.³³ Director Grewal not only noted with respect to recent enforcement actions that "I hope these actions put the investment industry on notice," he also articulated several principles of "proactive compliance" by counsel that relate to the Proposal: (1) education regarding risks presented by AI, including conflicts of interests; (2) engagement with personnel regarding the intersection of AI with factors including risks and financial incentives; and (3) execution of policies, procedures, and internal controls related to AI.³⁴ In our view, this excellent, forceful speech accomplished many of the objectives implicit in the Proposal, without proposing new and controversial substantive rules. We hope the Commission will continue to follow this approach, and either abandon the Proposal or repropose rules or provide guidance with a more precise and limited ambit regarding the above topics.

In sum, we believe the Commission either should abandon the Proposal or repropose rules and/or guidance related to certain aspects of the proposal. We have articulated above our major areas of concern that we believe any future action should address. We thank the Commission for its consideration of our comments.

²⁹ See SEC Charges Two Investment Advisers with Making False and Misleading Statements About Their Use of Artificial Intelligence, Mar. 18, 2024, <https://www.sec.gov/news/press-release/2024-36>.

³⁰ See *id.* (statement from Enforcement Director Grewal that "if you claim to use AI in your investment processes, you need to ensure that your representations are not false or misleading").

³¹ See, e.g., Chris Brummer, Yesha Yadav & David Zaring, Regulation by Enforcement, 96 Southern California Law Review 1297 (2024) (assessing recent scholarship and setting forth a framework for when agencies should regulate by rule versus enforcement).

³² See IAC 2024 Draft, at 16.

³³ See Gurbir S. Grewal, Remarks at Program on Corporate Compliance and Enforcement Spring Conference 2024, Apr. 15, 2024, <https://www.sec.gov/news/speech/gurbir-remarks-pcce-041524>.

³⁴ See *id.*

Respectfully,

/s/ Robert E. Bishop

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