

CHALLENGES AND SOLUTIONS FOR THE NEXT PRESIDENT AND CONGRESS

COMPETING TO WIN

REGULATORY AND LEGAL REFORM *IN FOCUS*

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Introduction

Manufacturers in the United States face government-imposed challenges that are not faced equally by many of our global competitors. While foreign governments are aggressively developing and implementing policies to strengthen their manufacturing economies, excessive U.S. government regulations hinder our full capacity for job creation, innovation and investment. Moreover, the U.S. tort system imposes additional costs that not only harm our competitiveness, but also discourage foreign investment. Unnecessary cost burdens make it more difficult to do business.

Manufacturers believe regulation is critical to the protection of worker safety, public health and our environment. We believe some critical objectives of government can only be achieved through regulation, but our regulatory system is in need of considerable improvement and reform. New regulations are often poorly designed and analyzed and ineffectively achieve their benefits. They are often unnecessarily complex and duplicative of other mandates. Their critical inputs—scientific and other technical data—are often unreliable and fail to account for significant uncertainties. Regulations are allowed to accumulate with no real incentives to evaluate existing requirements and improve effectiveness. In addition, many one-size-fits-all regulations do not consider the special needs of small businesses. We can do better.

Trends Shaping the Regulatory and Legal Landscape for Manufacturers

Trend 1: An Expanding Regulatory State

▶ *Historical Backdrop*

When President Grover Cleveland signed into law the Interstate Commerce Act of 1887, a new era of federal governance was born. The act created the Interstate Commerce Commission and authorized the new agency to issue “general rules or orders as may be requisite for the order and regulation of proceedings before it” and to establish record-keeping and reporting requirements for regulated entities. The New Deal and the challenges posed by the Great Depression ushered in an unprecedented level of legislation and executive actions to delegate authority to federal regulatory agencies. Technology had greatly changed the everyday lives of Americans at the start of the 20th century, and government intervention in private-sector activities extended beyond economics.

▶ *The Growth of Modern Regulations*

As lawmakers recognized the growing power of regulators, the Administrative Procedure Act (APA) became law in 1946 and established the framework with which all federal agencies must comply when issuing regulations. Substantive regulations have the force and effect of law, and the APA provides the foundation for a regulatory process centered on the principles of public participation and fairness to stakeholders. Although the APA dictates the process for promulgating rules, the law provides agencies vast discretion. A notice-and-comment period is not required for interpretive rules and agency guidance, and this provides regulators considerable authority over how and when to regulate. The complexity of rulemaking and its reliance on highly technical scientific information has only increased since the passage of the APA. Our administrative process has not kept up with those changes, and the lack of a meaningful judicial review process limits control over agency accountability.

▶ *A Regulatory System Entangled*

The regulatory state has grown to be vastly complex and immensely inefficient—a fact on which Democrats and Republicans can agree. Successful efforts to reform the regulatory system in the past have been bipartisan endeavors, and that same spirit is vital today if we are to implement reforms that protect our health and safety while promoting economic growth.

Despite efforts over the past four decades to reduce the unnecessary burdens imposed by federal agencies, our regulatory state continues to expand at an astronomical rate.

Between 1980 and 2015, a story of increasing regulatory burdens imposed on the public becomes clear.

- Excluding the Transportation Security Administration (TSA), federal outlays, or spending, for regulatory agencies tripled from \$16.46 billion in fiscal 1980 to \$50.09 billion in fiscal 2015 (values in constant 2009 dollars).¹ See Table 1.
- The number of staff at these same federal agencies rose 50 percent from 146,408 to 219,198.²
- The pages in the Code of Federal Regulations increased 74 percent from 102,295 to 178,277.³ See Figure 2.

¹ Dudley, Susan and Melinda Warren, “Regulators’ Budget from Eisenhower to Obama: An Analysis of the U.S. Budget for Fiscal Years 1960 through 2017,” 2016. Accessed at <https://regulatorystudies.columbian.gwu.edu/regulators%E2%80%99-budget-eisenhower-obama>.

² *Ibid.*

³ <https://www.federalregister.gov/uploads/2016/05/cfrPageBreakdown.pdf>.

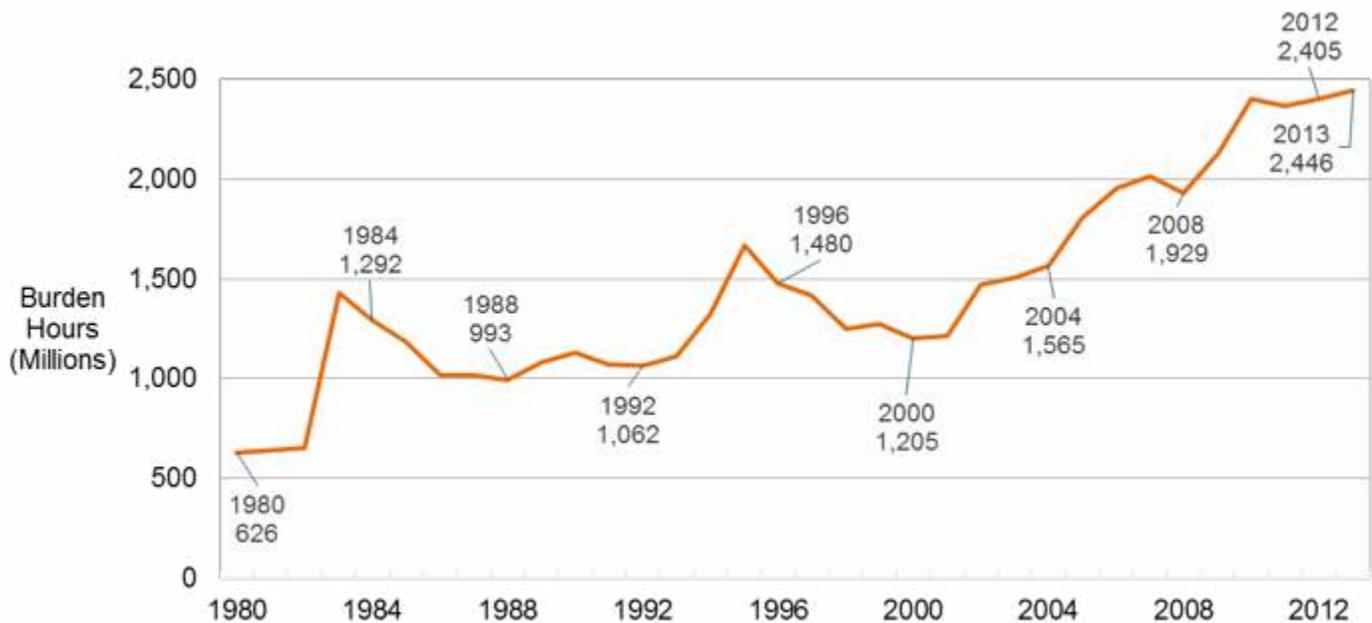
Since 1981, the federal government has issued an average of just under 1.5 manufacturing-related regulations per week for more than 30 years.

Table 1: Federal Outlays for Regulatory Agencies, Excluding TSA (in Real 2009 Dollars)

Fiscal Year	Federal Outlays	U.S. Population	Outlays per Capita
1980	\$16.46 billion	227,224,681	\$72.44
2015	\$50.09 billion	321,418,820	\$155.84

There is a bipartisan recognition of the problems associated with our broken, unnecessarily complex and inefficient regulatory system. However, this recognition has not translated into a reduction in the institutional challenges confronting manufacturers and other businesses as a result of poorly designed regulations. Presidents of both parties have issued executive orders and implemented policies with the goal of reducing regulatory burdens, but these efforts have failed to materialize into improvements in the way we regulate. Since fiscal 2003, the paperwork burden imposed by federal agencies, excluding the Department of Treasury,⁴ increased from 1.509 billion hours to 2.446 billion hours in fiscal 2013, an increase of 62 percent (see Figure 1). In fiscal 2013 alone, federal agencies—excluding the Department of Treasury—imposed the equivalent of more than 279,000 years’ worth of paperwork burden on the American public.⁵

Figure 1: Government-Wide Paperwork Burden, Excluding the Department of Treasury



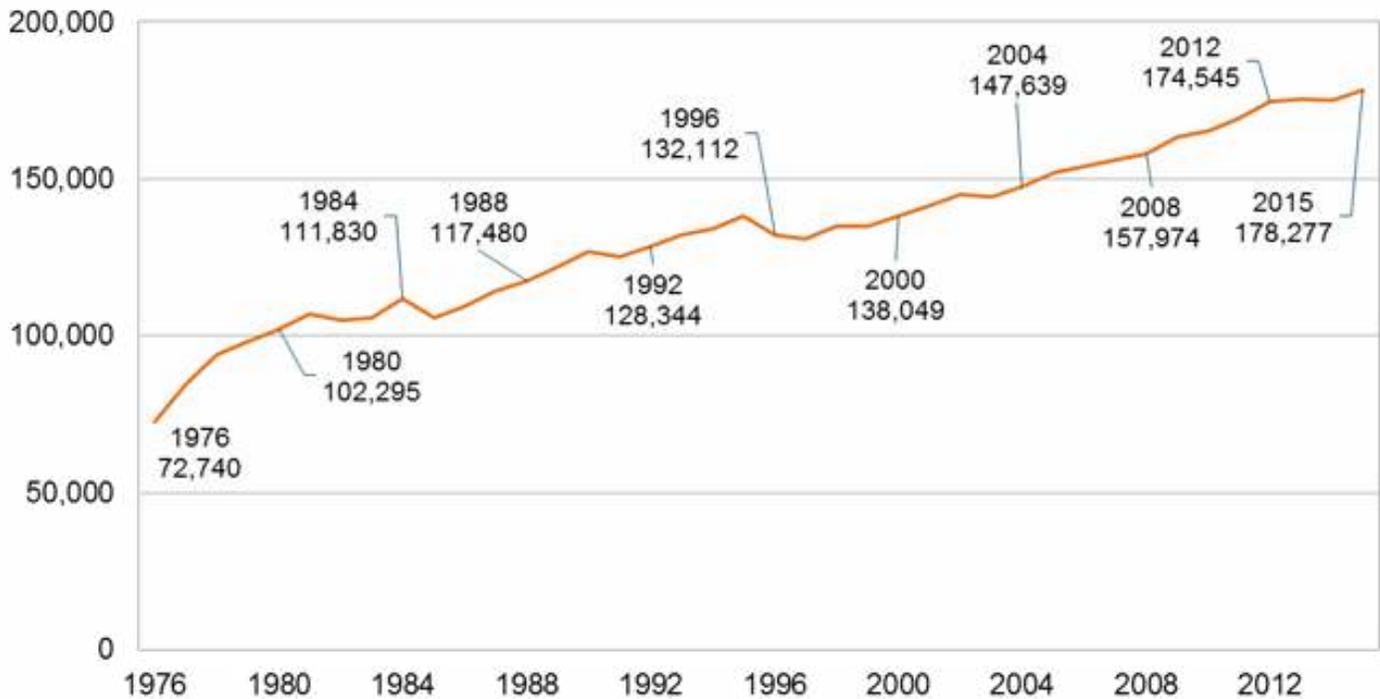
Our inefficient and unnecessarily burdensome regulatory system poses real challenges to prosperity, job growth and competitiveness that our own government is placing on us. Single-mission agencies are intensely focused on accomplishing their narrow policy objectives and often fail to consider the cumulative effects that new regulations impose. For the 10 years ending in fiscal 2013, federal agencies (excluding the Department of Treasury), through their own discretion, added almost 82 million hours in paperwork burden. This is on top of the 1.121 billion hours that these agencies estimate was added because of new statutory requirements mandated by Congress.

The number and impact of rules are also increasing. Since 2009, 637 major new regulations—defined as having an annual effect on the economy of at least \$100 million—have been issued through October 2016 by the current administration. This translates to a new major regulation once every 4.46 days. Manufacturing has been the frequent target of new regulatory requirements. Since 1981, the federal government has issued an average of just under 1.5 manufacturing-related regulations per week for more than 30 years.

⁴ The Department of Treasury’s burden estimates include the burden imposed by the IRS and account for about 75 percent of the total federal burden imposed on the public. Treasury’s burden has increased from 6.590 billion hours in fiscal 2003 to 7.007 billion hours (or 6.3 percent) in fiscal 2013. See Office of Information and Regulatory Affairs (OIRA), “Information Collection Budget of the United States Government,” 2014. Accessed at https://www.whitehouse.gov/sites/default/files/omb/inforg/icb/icb_2014.pdf.

⁵ In fiscal 2013, federal agencies excluding the Department of Treasury imposed the equivalent of 7.7 hours of regulatory burden for every person in the United States. In fiscal 2003, per-person regulatory burden was 5.2 hours annually. This demonstrates that the increase in regulatory burden is far outpacing population growth. Population estimates available from the U.S. Census Bureau. Accessed at <https://www.census.gov/popest/data/historical/2000s/index.html>.

Figure 2: Pages in the Code of Federal Regulations



Trend 2: A Legal System That Rewards Opportunism

Much like the cost of regulatory compliance, the cost of litigation rose steadily through the second half of the 20th century, often outpacing increases in GDP⁶ and costing the economy an estimated \$865 billion a year.⁷ While civil litigation is a necessary form of nongovernmental regulation and serves a great purpose in our society, the impact of its inefficiencies on our economy and the opportunism by unscrupulous plaintiffs demand that leaders in Washington take action to curb the exorbitant costs.

The legal system in the United States is in need of reform. Manufacturers and other businesses must direct scarce resources to fight or settle baseless claims. As a result, opportunities to invest in jobs, employee benefits, expanding markets or resources to improve productivity are lost. Basic fairness in our legal system must be restored.

America's Challenge: Creating a Regulatory and Legal Environment That Protects and Promotes Economic Growth

Regulatory Reform in Focus

The Challenge

Manufacturing in America is gaining momentum, but it could be much stronger if federal policies did not impede growth. If we are to succeed in creating a more competitive economy, we must reform our regulatory system so that manufacturers can innovate and make better products instead of spending hours and resources complying with inefficient, duplicative and unnecessary regulations. Manufacturers are committed to commonsense regulatory reforms that protect the environment and public health and safety as well as prioritize economic growth and job creation.

Federal regulators establish the rules without considering the cumulative effects of existing regulations, hampering our ability to effectively meet desired regulatory outcomes. The effectiveness (or ineffectiveness) of existing regulations is not analyzed, and the continued onslaught of new regulations simply adds to the ever-growing burden imposed by our inefficient and complex regulatory system.

⁶ Towers Watson, "U.S. Tort Costs Up Slightly in 2007; Significant Increases Anticipated for 2008," 2008. Accessed on April 2, 2012, at http://www.towersperrin.com/tp/showdctmdoc.jsp?country=usa&url=Master_Brand_2/USA/News/Spotlights/2008/Nov/2008_11_19_spotlight_tort_costs.htm.

⁷ L. McQuillan and H. Abramyan, "The Tort Tax," *The Wall Street Journal Online*, 2007. Accessed on April 2, 2012, at <http://online.wsj.com/article/SB117496524456750056.html>.

Based on data from the Government Accountability Office, 637 major new regulations—defined as having an annual effect on the economy of at least \$100 million—have been issued through October 2016 by the current administration. This translates to a new major regulation once every 4.46 days.

The Stakes

The scope and complexity of federal rules have made it harder to do business in the United States and harmed the ability of manufacturers to compete in an ever-changing global economy. The burdens of a continued onslaught of duplicative and inefficient regulations will be too much to bear, and the business climate will deteriorate.

The burden of regulation falls disproportionately on manufacturers, and it is heaviest on small firms because many of their compliance costs are not affected by economies of scale. A 2014 NAM study⁸ showed that manufacturers in 2012 spent on average \$19,564 per employee to comply with regulations, nearly double the amount per employee for all U.S. businesses. Small manufacturers—those with fewer than 50 employees—incur regulatory costs of \$34,671 per employee per year. This figure is more than triple that of the average U.S. business.

The Solutions

Leaders should take the following actions to ensure that regulatory decisions focus on outcomes to improve the quality of regulations:

- **Mandate that agencies engage in a thoughtful examination of existing regulations so that we can improve the effectiveness of both existing and future regulations.** Retrospective reviews provide agencies an opportunity to analyze, revise and improve techniques and models used for predicting more accurate benefit-and-cost estimates for future regulations. Retrospective review plans should be written into each major rule an agency promulgates.
- **Sunset outdated and ineffective regulations.** One of the best incentives for high-quality retrospective reviews of existing regulations is to automatically sunset rules that an agency does not affirm necessary to meet policy objectives.
- **Statutorily require that agencies consider the cumulative costs of regulatory requirements.** Agency adherence to this important regulatory principle is vital if we are to implement fundamental change to our regulatory system that improves the effectiveness of rules in protecting health, safety and the environment while minimizing the unnecessary burdens imposed on regulated entities.

The Challenge

Policymakers of the primary political parties agree on the importance of thoughtful and objective oversight in ensuring our regulatory system is smart and fair. Institutional third parties facilitate public participation in the regulatory process, provide an objective review of an agency's decisions and assist in minimizing inefficiencies that can arise through duplicative and poorly designed rules.

The decision on how and whether to regulate is made well before the public is provided notice that an agency intends to act. Institutions within government that ensure that agencies employ sound regulatory principles face diminishing resources. Moreover, Congress has failed to provide adequate oversight of the regulators to which it has granted significant authority to govern commerce and the citizenry.

The Stakes

The policies and institutions within the federal government designed to improve the quality of regulations are at risk of becoming obsolete or ineffective. Congress lacks the institutional capacity to challenge agency determinations about regulatory costs and benefits. Independent regulatory agencies are often free from cost-benefit analysis requirements and are not subjected to third-party review of their analyses by the Office of Management and Budget (OMB) or Congress. The OIRA in the OMB reviews significant rules issued by executive branch agencies and the analyses used to support those rules at both their draft and final stages. The office applies a critical screen to the contents of regulation, agencies' analytical rigor, legal requirements affecting the proposal and the president's priorities and philosophy. Nowhere else in the government does this take place. Despite its critical function, the OIRA has shrunk even as the size and scope of the government have increased. In 1980, the office had 90 full-time equivalent employees; in 2015, there were only 47.⁹

⁸ NAM, "The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business," September 2014. Accessed at <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf>.

⁹ Dudley and Warren, 2016.

The Solutions

Leaders should take the following actions to improve the oversight of regulatory agencies and the quality of the regulations they issue:

- **Conduct rigorous oversight and hold independent regulatory agencies accountable to improve transparency and the quality of the rules they issue.**

Independent agencies are not required to comply with the same regulatory principles as executive branch agencies and often fail to conduct any analysis to determine expected benefits and costs. Lawmakers should require these agencies to conduct cost-benefit analyses of their significant rules and subject their analyses to third-party review through the OIRA or some other office.

- **Establish a regulatory review function in Congress.**

This institutional change to the regulatory system could encourage more thoughtful analysis of the regulatory

authority Congress grants in statutes, provide Congress with better tools for analyzing agency regulations and allow Congress to engage in more holistic reviews of the overlapping and duplicative statutory mandates that have accumulated over the years.

- **Support centralized review of agencies' regulatory activities.**

Expand the OIRA's and other institutions' abilities to provide objective analysis, to conduct thoughtful regulatory review and to work with regulating agencies so that regulations will meet health, safety and environmental objectives more effectively at a much lower cost to businesses.

The Challenge

The challenges associated with protecting public health, worker safety and the environment command that regulatory determinations be based on the best available science. Meeting regulatory objectives while promoting economic growth are not mutually exclusive principles. Without quality analysis, it is difficult to ensure that regulations are meeting health, safety and environmental objectives while promoting economic growth, innovation, competitiveness and job creation.

Federal agencies fail to use the best available science when making regulatory decisions. They too often manipulate the calculation of benefits and costs to support predetermined regulatory actions, while ignoring thoughtful, useful and relevant feedback from the public. Agency failures to employ sound regulatory principles harm our ability to effectively and efficiently regulate.

The Stakes

Poorly designed regulations and the inefficient application of limited resources greatly harm society's ability to protect the public and the environment. Federal agencies fail to comply with statutory and executive-level directives that require thoughtful analysis to ensure that they are minimizing the unnecessary burdens that regulations pose. As more layers of complexity are added to an already broken system, it becomes increasingly more difficult to fix the problem. It is vital that our leaders act now.

The Solutions

Leaders should take the following actions to improve regulatory analysis and improve the effectiveness of how we regulate:

- **Strengthen and codify sound regulatory analysis.** The process by which the government relies on complex scientific information as the basis for rules should be improved and subject to judicial review. Efforts to encourage peer review of significant data and to create consistent standards for agency risk assessment should be part of that process. Agencies should, among other things, use the best available science, better calculate the benefits and costs of their rules, use the least burdensome tools for achieving regulatory ends and specify performance objectives rather than a particular method of compliance to improve the effectiveness of regulatory measures.

- **Increase sensitivity to small business.** Current law requires agencies to be sensitive to the needs of small businesses when drafting regulations. Procedural requirements that greatly improve the quality of new regulations direct agencies to consider less costly alternatives for small businesses and prepare a regulatory flexibility analysis when proposed and final rules are issued. Lawmakers have universally

supported the provisions of the Regulatory Flexibility Act, but Congress needs to strengthen the law and close loopholes that agencies use to avoid its requirements.

- **Strengthen the interagency review process and enhance the abilities of third-party institutions to improve the quality of regulations.**

As agencies expand their regulatory reach, it is vital that interagency cooperation be improved to reduce duplication and minimize inefficiencies.

- **Improve public participation and transparency.**

Agencies should fully and thoughtfully consider public inputs to ensure that regulatory actions will be effective and appropriate. For major rules, agencies should provide the public an advance notice that it may regulate to ensure the public can provide valuable input and can engage throughout the rulemaking process instead of crafting complex regulatory proposals behind closed doors and without stakeholder input.

Legal Reform in Focus

The Challenge

Many issues important to the common good are handled through our civil justice system. Much like our regulatory system, our legal system should be reformed to ensure consistency and fairness throughout our nation's courts. To ensure the competitiveness of American manufacturing, common sense and fairness must be restored to the legal system. Manufacturers support the principle that balanced tort reforms should be implemented to address the present inequities that exist in the law.

Manufacturers are consistently targets of lawsuits that seek to unfairly enrich opportunistic individuals at the expense of innocent companies and citizens truly harmed by wrongful action.

The Stakes

The expenses incurred by manufacturers to fight frivolous lawsuits can result in lost jobs and drive an individual or small business toward bankruptcy. Among other things, current civil rules include no disincentives to file a frivolous lawsuit, enable plaintiffs to forum-shop or use loopholes in the rules to identify plaintiff-friendly venues and encourage plaintiffs' attorneys to sue on behalf of individuals who were never harmed by a product or action. Unless changes are made, legal costs will continue to place an increasing burden on this country's job providers.

The Solutions

Leaders should take the following actions to restore fairness to our legal system:

- **Support clear standards for liability, including specific statutes of limitations and limits on punitive damages.** Product liability impacts manufacturers disproportionately to any other industry or sector. Manufacturers should be protected from lawsuits targeting products that are not defective and in fact comply with federal standards.
- **Enact legislation that removes incentives for frivolous litigation.** The "safe harbor" that allows lawyers who file frivolous claims to walk away should be eliminated. Mandatory sanctions when a lawsuit is obviously frivolous should be reinstated, and we should restore the ability of judges to use sanctions to compensate an injured party for his or her reasonable attorneys' fees and costs resulting from a frivolous claim.
- **Implement policies that minimize unnecessary direct costs of litigation.** Whether it's discovery, damages or fees, the costs incurred by manufacturers and other businesses should be reasonable and fair in the circumstances.
- **Enact legislation to discourage forum-shopping and eliminate bias against out-of-state defendants.** Unfortunately, some attorneys game the system by unfairly joining innocent defendants or bringing cases in biased jurisdictions rather than in the most appropriate venue. Our system was designed to protect against such biases and must be restored.

COMPETING TO WIN THE UNITED STATES WINS WHEN WE LEAD

Conclusion

Manufacturers are committed to working toward policies that will restore fairness to our courts and common sense to our broken and inflexible regulatory system. The best way to meet regulatory objectives while ensuring continued economic growth and employment is by enacting comprehensive and consistent policies that improve regulatory analysis, enhance the quality and transparency of scientific and technical inputs, eliminate waste and duplication and support the institutions and existing policies that work.

Without immediate action by our leaders in Washington, the ability of manufacturers to cope with the inefficiencies of government will weaken, along with our ability to compete globally and provide jobs.

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